

1969

Present : de Kretzer, J.

V. MUNASINGHE, Appellant, and M. J. PIERIS (Food and Drugs Inspector), Respondent

S.C. 1187/68—M. C. Colombo South, 94037/A

Control of Prices Act (Cap. 173), as amended by Act No. 44 of 1957—Charge of selling article above Control price—Plea of accident—Maintainability—Penal Code, ss. 72, 73.

In a prosecution for a contravention of the Control of Prices Act, the fact that it is a statutory offence does not preclude the accused from pleading the exception of accident contemplated in section 73 of the Penal Code. In such a case the Control of Prices (Amendment) Act, No. 44 of 1957, which takes away the right of the accused to plead the exception of mistake of fact (section 72 of the Penal Code) has no application.

The accused-appellant, a salesman, sold an article for Rs. 5.98 when its Control Price was Rs. 5.89. His explanation was that when he wrote out the bill he inadvertently transposed the figure 9 for the figure 8, so that the price which he meant to convey, immediately after ascertaining it from the *Gazette*, viz. Rs. 5.89 became Rs. 5.98.

Held, that the transposition of figures was an accident within the meaning of section 73 of the Penal Code.

APPPEAL from a judgment of the Magistrate's Court, Colombo South.

S. Nadesan, Q.C., with *H. D. Tambiah*, for the accused-appellant.

T. Wickramasinghe, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

October 8, 1969. DE KRETZER, J.—

In this case the Magistrate of Colombo South (Mr. Colin Mendis) convicted the accused, a salesman in the employ of the Starline Pharmacy, Bambalapitiya, of the charge laid against him that he had sold the drug known as Brovon Liquid Inhalant, which I shall hereafter refer to as Brovon, for Rs. 5.98 when its Control Price was Rs. 5.89. The accused has appealed.

It is common ground that the accused, on 8.3.68, sold to the complainant Silva, who described himself as a Doctor in the witness box, but whom Counsel at the appeal was at pains to show was a retired apothecary, a fact unknown to Counsel at the trial, a bottle of Brovon for Rs. 5.98.

The complainant and the accused, who alone spoke to the circumstances under which the sale took place gave versions differing in detail. The Magistrate, who has made no attempt to analyse the evidence has accepted the version of the complainant for the reason that he gave his evidence "in a manner that satisfied me beyond any reasonable doubt of

the truth of the matters" to which he testified in the witness box. He says nothing as to how the accused gave evidence. Demeanour is notoriously a dangerous guide to go by, but the Magistrate goes further, for he has thereafter used the truth of the complainant's evidence as the yardstick for testing the truth of the defence. For example he says, "If by an accidental slip of the pen the figures 8 and 9 were transposed in the cash memo, the accused could have immediately rectified it when the doctor brought it to his notice." The accused's evidence is that the doctor never brought it to his notice. No reason is given why the accused's evidence is not the truth on the point.

I do not think it safe in the circumstances to accept as correct the findings of fact by the Magistrate.

The defence in this case is based on the exception of accident or misfortune—Section 73 of the Penal Code.

That is one of the exceptions still left for the accused to plead when charged with an offence of this nature, for shortly after the five judges' decision *Perera v. Munasinghe*¹ reported in 56 N.L.R. at page 433 which held that the exception of mistake of fact, Section 72 of the Code, could be taken by a person charged with a statutory offence, legislation—Act 44 of 1957—was passed taking away the right of an accused charged with an offence under the Price Control Act to plead that exception.

The five judges have said as follows :—

"Where the definition of an offence contains words of absolute and unqualified prohibition, the prosecution need only establish beyond reasonable doubt the commission of the prohibited act and is not required in addition to establish that the accused acted with any specific intention or knowledge. *But this does not mean that in such a case the accused is to be denied the right to plead any of the general exceptions set out in Chapter 4 of the Code.*"

There is thus high authority for the proposition that the exception under Section 73 is open to the accused.

The accused's explanation is that when he was asked for the Brovon he checked the price from the Gazette and got the drug from the shelf. At that stage, according to him, there was an argument as to whether the doctor was not entitled to a commission, and he wrote out the bill, inadvertently transposing the figure 9 for the figure 8, so that the price he meant to convey *viz.* Rs. 5.89 became Rs. 5.98.

The doctor has denied there was any controversy in regard to commission. While it appears to me more probable than not, that the doctor, a person who this very incident shows was the type of man careful not to be deprived of nine cents, who was accustomed to obtaining the 10% commission given to doctors would ask for it, and that there would be some argument when it was refused, it seems to me that even if there was no

¹ (1955) 56 N. L. R. 433.

such controversy, the charging of the wrong price could still be due to what accused says it was due to *viz.* a transposition of figures. The fact that the Price Control Order came in only in 2.3.68., six days before this incident and that over 1,000 drugs became price controlled, makes it more likely than not that the accused is telling the truth that he had to obtain the price of Brovon by reference to the Gazette. The complainant is not in a position to say whether the accused consulted the Gazette or not. According to the complainant the accused brought the Brovon to him with the cash memo already written out, and from the cash memo he realised that the accused had charged him Rs. 5.98. It seems to me that it is extremely unlikely that the accused who had taken the trouble to check the price would write out the bill immediately after with the figures transposed except by inadvertence. If the complainant's evidence is true that there was an argument over the correctness of the price, the conduct of the accused as spoken to by the complainant is quite consistent with the accused behaving in that way because he was confident of the correctness of the price he had set down, for had he not just checked it in the Gazette? Not unnaturally, the complainant who had a dispensary, and would therefore very likely have the Price Order there and who would have checked the control price of Brovon he wanted to buy, before he came to the pharmacy, would be annoyed at the obstinacy of the accused in insisting that the price he charged was correct and react as he did.

It appears to me, that the accused's explanation *viz.* that when he wrote out the bill 5.98 he had inadvertently transposed the figure 5.89 which he had just seen in the Gazette, is a true one. That sort of happening is a quite common occurrence. It then means that something quite fortuitous, something which he had no control over, caused the accused to transpose the figures of the correct control price which he had verified as 5.89 and which it had been his intention to charge. Such an occurrence can be attributed to accident, for the idea of something fortuitous, something that happens out of the ordinary course of things is involved in the term accident.

It appears to me that the accused has discharged the burden of proving the facts to bring him within the exception and that his appeal should be allowed. Before I part with this appeal, I think it necessary to say that the Magistrate's remark when passing sentence "that the doctor had run the risk of being blacklisted by a large combine like Mackwoods Ltd., a subsidiary of which is Starline Pharmacy, just as all reports of this case had been blacked out from the newspapers up to now", casts perfectly unwarranted aspersions on Messrs Mackwoods Ltd., and should not have been made. It would be well for him to remember that the importance of his office carries with it the expectation that he who holds it will weigh his words and will be scrupulously careful not to make remarks that affect innocent third parties, for they have no redress.

The appeal of the accused is allowed.

Appeal allowed.