

1946

Present : Nagalingam A.J.

ALWIS, Appellant, and FERNANDO (Food Control Inspector),
Respondent.

1,286—*M. C. Kegalla, 11,221.*

Prosecution for refusal to sell bread—Defence that on the occasion in question accused had not sufficient quantity in his custody or control—Scope of such defence—Control of Prices Ordinance, No. 39 of 1939, s. 5 (2) (3).

Where the accused, a seller of bread, refused to sell bread to a casual buyer for the reason that the quantity of bread which he had in stock was all required to supply his regular customers—

Held, that there was no contravention of section 5 (2) (b) (i) of the Control of Prices Ordinance as the accused had not a sufficient quantity of bread in his custody or under his control within the meaning of section 5 (3).

A PPEAL against a conviction from the Magistrate's Court,
Kegalla.

F. A. Hayley, K.C. (with him *D. A. Jayasuriya*), for the accused,
appellant.

J. G. T. Weeraratne, C.C., for the Attorney-General.

Cur. adv. vult.

December 17, 1946. NAGALINGAM A.J.—

The accused in this case has been convicted of having refused to sell a pound of bread in contravention of section 5 of the Control of Prices Ordinance, No. 39 of 1939, as amended by the Defence (Control of Prices) (Supplementary Provisions) Regulations dated October 4, 1942, and published in the *Government Gazette* No. 9,019 of October 8, 1942.

The facts very briefly are these :—On the day in question a Price Control Inspector dressed as a bungalow podian went to the shop of the accused and there asked for one pound of bread of a salesman who directed him to the accused who was at the counter. The accused inquired from him where he was from and on being told that he was on his way to Kandy declined to sell him any bread. On these facts there can be little doubt that there has been a contravention of section 5 (2) (b) (i) of the Ordinance and that an offence has been committed.

The defence of the accused is based upon the exemption provided by sub-section 3 of the same section which enacts that in any prosecution for an offence under sub-section 2 it shall be a sufficient defence for the accused to prove that on the occasion in question he supplied a reasonable quantity of the article or had not a sufficient quantity in his custody or under his control to supply the quantity demanded. It is not the case of the accused that he did supply a reasonable quantity of the article ; he depends entirely on the second alternative and seeks to

establish that he had not a sufficient quantity of bread in his custody or under his control to supply the one pound of bread demanded of him.

The facts relevant to this part of the case are that immediately after the refusal by the accused to sell bread the Assistant Food Controller of the area together with other Inspectors came on the scene and not only questioned the accused as to why he had refused to sell bread but also conducted a search both of his stores and bakery. The accused promptly stated that as he had not sufficient stock of bread to supply his regular customers as a result of the reduction in the quantity of flour issued to him he was not in a position to make a sale of a pound of bread to a casual purchaser. The search conducted by the Assistant Food Controller revealed that the accused had 24 half-pound loaves in a cupboard in the stores and 114 one-pound loaves in the bakery. No attempt was made to check the accused's statement that he had regular customers to whom he had to supply the quantity of bread that was available both in his stores and at the bakery.

At the trial the accused produced a register D 2 which he affirms he kept in pursuance of an order issued to him by the Food Controller's Department and which was inspected by officers of the Department showing particulars of flour consumed, bread manufactured, bread sold to customers and bread sold to casual buyers. His evidence is fully supported by the register. At page opposite to that marked D 2A therein the quantity of flour used by him daily in making bread and the quantity of bread turned out and the total quantity sold both to regular customers and casual buyer, is entered and at page D 2C appear the names of the regular customers numbering, according to Counsel, no less than 156. These entries clearly establish that on 1st February the accused had made use of 290 pounds of flour in making 401 pounds of bread of which he had supplied to his regular customers 321 pounds and sold the balance of 80 pounds to casual buyers. On each of the 2nd, 3rd and 4th of February he has made use of 210 pounds of flour in baking 290 pounds of bread and he has supplied the total quantity of bread so made to his regular customers and none to casual buyers. On 5th February he appears to have made 311 pounds of bread by making use of 225 pounds of flour and to have supplied the total quantity of bread on that day too to his regular customers and none to casual buyers. On 6th February he has converted 210 pounds of flour into 293 pounds of bread and this quantity of bread again he has used entirely in supplying his regular customers. It is clear, therefore, that between 2nd and the 6th February he has sold no bread to casual buyers; on the 6th, it is in evidence, he wrote a letter P 6 to the Assistant Food Controller informing him that in view of the small allowance of flour he had received he was unable to supply bread to his regular customers and also sell to casual visitors calling for bread, and that he had therefore arranged to distribute the full quantity of bread made by him daily to his "long standing customers" and inquiring further whether his proposal would be approved. Curiously enough on the day that this letter reached the Kachcheri the raid was made on the stores of the accused.

The register again proves that on 7th February he had converted 210 pounds of flour into 290 pounds of bread and that if he adopted the course followed by him on the previous five days he would not have had any excess even to the extent of one pound after supplying his regular customers. But as a result of the raid and the directions given to him by the Assistant Food Controller on that day the accused says he sold bread to anyone who called at his stores after the raid and sold no less than 221 pounds of bread to casual buyers and, according to the register, only 53 pounds to his regular customers. According to the record, it would appear that the accused stated at one stage that he had supplied 31 pounds and at a later stage that he had supplied 33 pounds of bread to his regular customers, but this is obviously incorrect in view of the entries made in the register.

The facts established by the accused are not challenged by the prosecution. If, therefore, it is the fact that the 290 pounds of bread that he had baked that day would all have been required to supply his regular customers whom he had rationed as a result of the cut in the supply of flour to him, the question is whether his defence that he had not a sufficient quantity in his custody or under his control to supply the one pound of bread demanded is entitled to succeed. That he had more than one pound of bread in the stores at the time the request for bread was made is not disputed in view of the fact that admittedly he had 24 half-pound loaves at that time. It is therefore contended on behalf of the prosecution that where a trader is shown to have in his stores loaves of bread in excess of the quantity demanded by a prospective buyer the trader must necessarily be deemed to have sufficient quantity in his custody or under his control to supply the quantity demanded. Normally, when goods are shown to be in a shop or stores of a trade, such goods would no doubt be regarded as being in the custody or under the control of the trader for purposes of sale and available to a buyer who is prepared to pay for them the prices fixed. But where it is shown that the goods though lying in his shop or stores have already been earmarked and appropriated for delivery to one or more of specified customers, can it be said after such appropriation the goods continue to remain in the custody or under the control of the trader? I think the answer to this question is provided by the words "a sufficient quantity" that precede the phrase "in his custody or under his control". These words undoubtedly do signify, as contended for by the prosecution, that the quantum or amount of the commodity with a trader is large enough to admit of the issue of the quantity applied for by an intending purchaser; but are they capable of no other meaning? Having regard to the framework and object of both the Ordinance and the Regulations I have little doubt that these words are wide enough also to denote the extent to which the commodity is available for sale, *after setting apart what is needed to supply the requirements of standing or regular customers.*

In the case of *Mohamed v. Nuwara Eliya Police*¹ where a butcher was able to show that he had orders from his regular customers for quantities

¹ (1943) 44 N. L. R. 260.

exceeding the amount of beef lying in his stall on the day in question, Wijewardene J. held that he had not a sufficient quantity in his custody or under his control to supply a customer who had called at the stall to make his purchase. That case was distinguished by the learned Magistrate. It is true that in that case there were specific orders from customers which more than covered the quantity of beef in the stall, while in this case there is no proof of specific orders given by the regular customers, but that is a variant which must necessarily result from the difference in the nature of the commodities dealt with. While one may expect a specific order for the quantity of meat that may be received by a householder on a particular day, a standing order over a long period for the delivery daily of a specified number of pounds of bread is more often the rule than the contrary so far as regular customers are concerned. The fact, however, remains that in view of the rationing the accused had to adopt with regard to his own customers as a body the full quantity of bread that was available to him for disposal would have been insufficient to supply the full needs of his regular customers and it follows therefore he would not have been in a position to spare even a pound of bread. Accused says that this was the position on that day. It has been suggested that when a trader had about 126 pounds of bread he might very well have afforded to have sold one pound, but then if he could have afforded to have sold one pound the argument could be advanced that he might equally well have afforded to sell another pound to a second casual buyer and a third pound to a third and a fourth, and so on, till it will be seen, the argument would embrace the sale by the baker of the total quantity of bread made by him for the day to casual buyers as distinguished from regular customers.

I am therefore of the view, having regard to the course of conduct of the accused on the previous five days, that he did not have a sufficient quantity in his custody or under his control to supply the pound of bread he was asked for by the Food Control Inspector. The conclusion I have reached on this question disposes of this appeal but I should say one word in regard to another argument advanced on behalf of the appellant, and that is that as the accused did not have in his custody in his stores any one-pound loaves of bread but only half-pound loaves a demand for one pound of bread could not have been met. I do not think this contention is entitled to prevail. Had the request been for the purchase of a one-pound loaf of bread, then there might be some room for urging that the accused was not in a position to execute that order, but the evidence in this case clearly shows that what was asked for was not a one-pound loaf but a pound of bread and by using these words the customer has clearly indicated that he was not fastidious as regards the manner in which the one pound was made up, whether of half-pound loaves or of a pound loaf, but he was only desirous of having a quantity of bread weighing one pound.

In the view I have reached on the main question argued in appeal I would set aside the conviction and acquit the accused.

Appeal allowed.