

1947

Present : Dias J.

ABDUL MAJEED, Appellant, and ATTAPATTU (Price Control Inspector), Respondent

299—M. C. Kandy, 25,929.

*Sale of mutton with not more than 25 per cent. bones, above controlled price—
Duty of prosecution to prove the bone content of the mutton sold—
Regulations made under Control of Prices Ordinance, No. 39 of 1939.*

Where the accused was charged with selling mutton with not more than 25 per cent. bones above the controlled price—

Held, that it was the duty of the prosecution to prove the actual percentage of bones in the mutton which was sold.

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

Colvin R. de Silva, for the accused, appellant.

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

Cur. adv. vult.

June 17, 1947. DIAS J.—

The appellant was charged with selling two pounds of mutton for Rs. 3 which is a price in excess of the maximum price of Rs. 2.10 for two pounds of mutton with not more than 25 per cent. bones in contravention of the regulations made under the Control of Prices Ordinance, No. 39 of 1939, and published in *Ceylon Government Gazette* No. 9,573 of July 1, 1946.

The appellant is a trader in the Kandy market. On October 5, 1946, a decoy went to his stall and demanded two pounds of mutton and tendered a five-rupee note, the number of which had been previously noted by Price Control Inspector Attapattu. The appellant gave the decoy two pounds of mutton containing "a little bone" and two rupees change. The raiding party then appeared on the scene. The mutton was duly weighed in the appellant's presence, and in his possession was found the five-rupee note. Admittedly, no attempt was made to ascertain the percentage of the bone content of the mutton.

The Magistrate convicted the appellant and imposed a fine of Rs. 500.

The point taken in appeal is that the prosecution has failed to establish an essential ingredient of the charge, and that, therefore, the appellant is entitled to be acquitted.

The regulations deal with country beef, Australian beef and mutton which is defined by Regulation (v) (c) to mean the flesh of a sheep or goat, but shall exclude all forms of offal and imported meat. It is to be observed that this definition does not exclude the bone content of mutton. The regulations, however, make it plain that in selling mutton the bone content must not exceed 25 per cent. of the total weight sold. Regulation (vi) directs "that when *any* mutton is sold, the weight of bones sold therewith shall not exceed 25 per cent. of the total weight sold". Regulation (v) (e) provides that the percentage of bones sold with any mutton shall be calculated on the total weight sold. It is,

therefore, clear that the sale of *any* mutton, whether at the controlled price or above it, with a bone content *exceeding 25 per cent.* of the total weight sold is unlawful. A trader who contravenes this prohibition would render himself liable to be punished under section 5 (6) of the Ordinance.

The Regulations also control the price of mutton which may be lawfully sold. Regulation (iv) read with the third Schedule provides the maximum price per pound for mutton with *not more than 25 per cent. bones.* That is to say Rule (iv) read with the third Schedule fixes the maximum price for which mutton can be lawfully sold. There was no need to fix the maximum price for the sale of mutton with a bone content in excess of 25 per cent. of the total weight sold, because the sale of such mutton is unlawful. In the case of Kandy the maximum price for mutton with not more than 25 per cent. bones is fixed at Re. 1.05 per pound.

The appellant's contention can be summarised as follows: There is nothing in the regulations which makes it illegal for a trader to sell for any price mutton with a bone content exceeding 25 per cent. of the total weight sold. This is fallacious because Regulation (vi) penalises such a sale altogether. It was next submitted that it is clear from the charge that the appellant was accused of committing a breach of Rule (iv) read with the third Schedule for selling two pounds of mutton with not more than 25 per cent. bones above the controlled price. That being so, it is urged that in order to secure the conviction of the appellant under Rule (iv) there were four essential ingredients which had to be established beyond reasonable doubt: (1) that the accused sold "mutton", (2) that the total weight of the mutton sold by the appellant aggregated two pounds, (3) that the two pounds of mutton sold by the appellant were with not more than 25 per cent. of bones, and (4) that the price charged exceeded the controlled price of Re. 1.05 per pound. The defence admits that the prosecution has established ingredients (1), (2) and (4); but it is contended that ingredient (3) has not been established and that, therefore, the appellant must be acquitted.

For the Crown it is urged that ingredient (3) is not one which the prosecution need prove. It is pointed out that in *Pinto v. The Price Controller*¹ a somewhat similar contention had to be considered. In that case the accused was asked for a pound of beef. The accused gave the customer a pound of beef *without bones* but charged a price which was above the controlled rate. In appeal it was argued, as is argued now, that the conviction could not stand because what was controlled was meat with not more than 25 per cent. bones, and that, therefore, the sale of meat without bones was not controlled. This contention was rejected. Howard C.J. said: "In my opinion on a strict interpretation of the Order, beef without bones is controlled; but a sale is allowed at the controlled price of beef which contains 25 per cent. by weight of bones." According to the Crown the resulting position is this: (a) The sale of mutton without bones above the controlled price is an offence—*Pinto v. The Price Controller*¹. (b) The sale of mutton with not more than 25 per cent. bones above the controlled price is also

¹ (1946) 47 N. L. R. 40.

an offence. (c) The sale of mutton with a bone content exceeding 25 per cent. of the total weight sold—whether at the controlled price or above it—is prohibited and unlawful.—Regulation (vi). It is, therefore submitted that there was no necessity for the prosecution to prove in this case what the bone content of the mutton sold was. If it was 25 per cent. or below that, the sale was above the controlled price and the offence was established. If the bone content exceeded 25 per cent. it was nevertheless an offence and the proof of that fact would help neither side. The prosecution, finally, submits that the charge against the appellant is that he sold two pounds of mutton above the controlled price and that was duly established by the prosecution.

These regulations are a penal enactment, and must, therefore, be strictly construed—*Sub-Inspector of Kandy v. Wassira*¹. I agree with appellant's counsel that it is clear that the charge was for a breach of regulation (iv) read with the third Schedule, which shows that what is controlled is the sale of mutton with not more than 25 per cent. of bones above the controlled price. Had the prosecuting officers brought their minds to bear on the matter, it would have been easy to separate the bone from the meat and ascertain whether the bones, if there were any, weighed eight ounces or more. This they failed to do. The only evidence on the point is that of Price Control Inspector Attapattu who in cross-examination said: "There were no bones separately, but a little in the mutton." This point was brought to the notice of the Magistrate who said "Although there is no proof with regard to the actual percentage of bones, this is not a fatal defect, and I am satisfied on the evidence that the article sold comes within the description of mutton." That is not the point. Regulation (iv) under which the charge was laid controls only mutton with not more than 25 per cent. of bones and this is an ingredient of the offence charged. The point may be highly technical, but I do not think a defect in the proof of this nature can be slurred over.

In my opinion the ingredient (3) was one which the prosecution should have proved. Regulation (iv) requires it, and the prosecution was in a position to prove it. This is a criminal case so that the charge must be strictly proved beyond reasonable doubt. I am, therefore, of opinion that there was in the proof of the prosecution a fatal defect which vitiates the conviction.

The appellant cannot be convicted of an attempt to commit the offence charged for two reasons. In the first place the Ordinance does not penalise attempts. In the second place, section 490 of the Penal Code is restricted to attempts to commit offences under the Penal Code—*Kachcheri Mudaliyar v. Mohomodu*².

I reach this conclusion with regret because I am satisfied that it was the intention of the appellant to commit a breach of the law. There is no point in sending the case back for a retrial because the material evidence must have long since perished.

The conviction is quashed, and the appellant acquitted.

Appeal allowed.

¹ (1945) 46 N. L. R. 93.

² (1920) 21 N. L. R. 369 Div. Ct.