

1944

*Present: Wijewardene J.*THAMPILLAI *et al.*, Appellant, and MATARA POLICE, Respondent.

623-625—M. C. Matara, 51,777.

Control of Prices Ordinance, No. 39 of 1939, s. 5 (8)—Employee convicted of offence—Liability of employer.

A charge cannot be framed against an employer under section 5 (8) of the Control of Prices Ordinance in respect of anything done by an employee in contravention of the provisions of the Ordinance until the employee has been convicted of the offence. It would then be open to the employer to plead by way of defence that the offence was committed without his knowledge and that he exercised all due diligence to prevent the commission of the offence.

A PPEAL against a conviction by the Magistrate of Matara.

H. V. Perera, K.C. (with him *H. W. Thambiah*), for the accused, appellants.

H. W. R. Weerasooriya, C.C., for the complainant, respondent.

Cur. adv. vult.

October 3, 1944. WIJEYWARDENE J.—

The charge against the three accused was that they—

“ did on or about the 4th day of November, 1943, at Kotuwegoda in breach of the Orders made under section 3 of the Control of Prices Ordinance, No. 39 of 1939, and published in the *Government Gazette* sell to one A. G. Wilson 96½ pounds of Red Onions for Rs. 41.75, a price in excess of the maximum wholesale

¹ 14 N. L. R. 417.

price which was Rs. 13.99 and thereby committed an offence punishable under Regulation 2 (2) (6) (A) of the Defence (Control of Prices) (Supplementary Provisions) Regulations."

It would have been more correct to refer to the penal provision as section 5 (6) (a) of the Control of Prices Ordinance, No. 39 of 1939, as amended by the Defence (Control of Prices) (Supplementary Provisions) Regulations.

The Magistrate convicted the accused and sentenced each of them to pay a fine of Rs. 750.

The prosecution called three witnesses Wilson, Police Constable Samarawickrema and Inspector Badurdeen. Wilson stated that he complained to the Inspector that the first accused refused to sell him red onions at the control price and the Inspector thereupon gave him Rs. 45 in five 5-rupee and two 10-rupee currency notes after noting down their numbers and asked him to purchase a bag of onions. The Inspector sent Samarawickrema in plain clothes to watch the transaction and give a signal to him when the transaction was complete. Wilson went to the boutique as arranged and found the first and second accused and some others. Wilson bought a bag of onions from the first accused for Rs. 41.75 and tendered to him the seven currency notes given by the Inspector and received from the first accused the balance Rs. 3.25. The first accused placed three of the 5-rupee notes in a drawer and handed the remaining four notes to the second accused who then left the boutique. Samarawickrema who witnessed the transaction from the road corroborated Wilson. The Inspector came to the boutique on receiving the signal and found the three 5-rupee notes in the drawer. He searched Wilson and did not find the remaining notes on him. Shortly afterwards the second accused returned to the boutique and the Inspector searched him in view of the information given to him by Wilson and Samarawickrema but found none of the missing notes on him. The first and second accused gave evidence. The first accused stated that he sold the bag for Rs. 11.75 and Wilson gave him three 5-rupee notes and received from him the balance Rs. 3.25. The second accused denied having received Rs. 30 from the first accused on that day.

The provision which makes it an offence to sell an article above the controlled price is section 5 (1) of the Control of Prices Ordinance, No. 39 of 1939, as amended by the Defence Regulations. It reads—

"Any person who acts in contravention of any Order made under this Ordinance, or of any regulation made or deemed to have been made thereunder, shall be guilty of an offence under this Ordinance."

The Magistrate has accepted the evidence of Wilson with regard to the sale and I see no reason to interfere with the conviction of the first accused. I dismiss his appeal.

So far as the second accused is concerned the evidence of Wilson and Samarawickrema shows only that the second accused was present in the boutique at the time of the transaction and that he received Rs. 30

out of the purchase price from the first accused. This does not prove that the second accused had anything to do with the sale. I allow his appeal and acquit him.

The evidence of the Inspector who was the last witness called for the prosecution shows that the third accused was charged merely because he happened to be the proprietor of the boutique. He did not take any part in the sale of the onions and he was not even present at the time of the transaction. If section 5 (1) stood by itself the prosecution might have justified the joint trial of the accused and the conviction of the third accused on the ground that the Legislature has created in that section an exception to the general principle of Criminal Law that a man is not criminally liable for an offence committed by his servants without his knowledge, and that therefore the third accused could be charged together with the other accused for a sale above the controlled price. But that section has to be read in the light of section 5 (8) of the Ordinance as amended by the Defence Regulations. The section reads:—

“ Where any person, who is employed by any other person (hereinafter referred to as “ the employer ”) to sell articles in the course of any business carried on by the employer at any premises, is, by reason of anything done or omitted to be done at those premises, convicted of the offence of contravening any provision of any Order, then the employer or where the employer is out of the Island, the person for the time being acting as manager or having control of the business, shall also be guilty of that offence unless he proves to the satisfaction of the Court that the offence was committed without his knowledge and that he exercised all due diligence to prevent the commission of the offence.”

Now that section shows clearly that where an employer is charged as such it should be proved that the employee was *convicted* of “ the offence of contravening any provision of any Order ” and that it is then open to the employer to plead by way of defence “ that the offence was committed without his knowledge and that he exercised all due diligence to prevent the commission of the offence.”

A charge could not have been framed, therefore, against the third accused until the conviction of the first accused. In this case all the accused were charged together and the Magistrate called upon all the accused including the third accused for their defence, at the close of the case for the prosecution. In other words the third accused was asked to plead his defence before the first accused was convicted and at that stage there could not have been any valid charge against the third accused. For this reason it is not possible to sustain the conviction of the third accused. I quash his conviction and leave it open to the prosecution to institute fresh proceedings against him if it is thought desirable to do so.

Conviction of 1st accused affirmed.

Conviction of 2nd accused set aside.

Conviction of 3rd accused quashed.