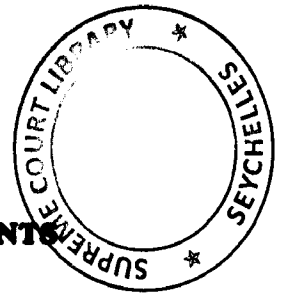


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**IN THE SEYCHELLES COURT OF APPEAL**

**P & J SUPPLIES (PTY) LTD  
JEAN DINGWALL**

**APPELLANTS**



**versus**

**THE REPUBLIC**

**RESPONDENT**

Criminal Appeal No: 12 of 2002

*[Before: Ayoola, P, De Silva & Matadeen JJ.A]*

.....  
Mr. F. Chang-Sam for the Appellants

Mrs. L. Valabhji for the Respondent

**JUDGMENT OF THE COURT**

*(Delivered by Ayoola, P)*

The first appellant P&J Supplies (Proprietary) Ltd was tried at the Supreme Court and convicted, in four counts, of selling various items of goods in excess of the controlled price determined by or under Section 7 of the Trades Tax Act 1992 (as amended) contrary to and punishable under regulation 80(1) of the Trades Tax Regulations 1997 (as amended by the Trades Tax (Amendment) Regulations, 2001) and, in one count of contravention of a condition of a licence contrary to section 19(4) of the Licences Act (Cap 113) and punishable under section 20 of that Act as amended by Acts number 9 of 1998 and 7 of 2001. Fines of SR150,000 were imposed on the 1<sup>st</sup> appellant on each of the five counts, or in default six months' imprisonment in respect of each of the counts. The 2<sup>nd</sup> appellant, Jean Eddy Dingwall, was tried and convicted in one count of sale above controlled price contrary to and punishable under regulation 80(1) of the Trades Tax Regulations 1997 as amended and sentenced to a fine R50,000 or 2 months imprisonment in default. Both of them have now appealed.

The facts as found by the Learned Chief Justice were that upon a complaint by a member of the public to the Price Control Division of the Ministry of Finance for overpricing of a sandwich toaster, officers of that division of the Ministry paid a surprise visit to the Homemakers Store of the 1<sup>st</sup> appellant at Palm Street where the officers noted several instances of overpricing of goods displayed for sale on the shelves of the said store. The 1<sup>st</sup> appellant was as a result charged with the offences for which it was convicted.

The main evidence relied on by the Chief Justice for the conviction of the appellants was that of Louise Belle a price control officer (pw4). She gave evidence that upon suspicion that the store was selling goods above controlled retail price she filled in a notice to produce records pertaining to such goods and handed it to Flavie Solin. The bills of entries pertaining to the items were produced. She gave evidence of the price on the goods displayed and the controlled price of the goods to which counts 1, 2, 3 and 4 of the charge related. The Chief Justice believed her evidence that Flavie Solin who was in charge of the store came to the shelves and verified for herself the price of the goods.

Flavie Solin a shop assistant in the store who took charge of the store in the absence of the supervisor on the material day gave evidence that all the goods for sale were displayed on the shelves and the prices tagged on them. As a matter of practice, in respect of defective goods there is a price tag on such goods and it is only when the customer goes to the paying desk that the cashier will tell him that the goods are defective and reduce the price accordingly. Sometimes *"people remove the correct price from an item and put a different tag on it. Then the cashier will tell them that this is not the correct price"*. The supervisor supplies the price of each and every item. The Chief Justice did not believe the evidence of Flavie Solin.

The Chief Justice found overwhelming evidence in respect of the counts on which the appellants were convicted. On this appeal from conviction and sentence, the 1<sup>st</sup> appellant's counsel puts the 1<sup>st</sup> appellant's case thus: (i) the offence under each count of sale in excess of controlled price is not known to the law, (ii) regulation 80(1) is ultra vires the Act, (iii) the Chief Justice failed to consider fully the submission on the elements of the offence, (iv) he failed to fully consider and weigh the evidence adduced at the trial, and, (v) in respect of conviction for contravention of the Licences Act, it offends against section 52 of the Interpretation and General Provisions Act (Cap 123) and is bad for the same reasons as the conviction on the counts of sale in excess of controlled price is bad. The gist of the 2<sup>nd</sup> appellant's case, in addition to the reasons given for challenging the conviction of the 1<sup>st</sup> appellant on the sale in excess of controlled price counts, is that there was no or insufficient evidence to support his conviction. In respect of both appellants it was argued that the sentences were manifestly harsh and excessive.

The clarity of the presentation of the arguments of Mr Chang Sam, counsel for the appellants, and Mrs Valabhji, counsel for the respondent on each of the issues raised in the appeal makes it easy to summarise their respective submissions. Mr Chang Sam submitted as follows: The offence of sale in excess of controlled price charged in the first four counts on which the 1<sup>st</sup> appellant was convicted and which was the gravamen of the offence for which the 2<sup>nd</sup> appellant had been convicted is unknown to the law in that regulation 80(1) is void by reason of the absence of power in the Minister to fix a minimum penalty as he had done. It was argued that by reason of the theory of incorporation the amendment made by SI 18 of 2001 to regulation 80 became one with regulation 80 and it is not legally possible to excise therefrom the ultra vires part, thereby making regulation 80 entirely ultra vires. The 1<sup>st</sup> appellant could not under Regulation 80 be convicted of selling goods by merely exposing or displaying goods on the shelves in the shop because the extended meaning

of "sell" as including "expose, display or advertise for sale" does not apply to the regulation where "sold or offered for sale" were used. It was argued that the use of those words indicated that the legislature did not intend to make display for sale an offence. On the premise that displaying controlled goods for sale with price tag in excess of control price is not an offence, the prosecution must prove that the appellants "sold" or "offered for sale" such controlled goods for them to be guilty of an offence under Regulation 80(1). It was argued that for the conviction to be justifiable the Chief Justice ought to have considered the totality of the evidence to see whether the goods "were in fact prescribed goods and the offered prices were in fact above the controlled prices." By convicting the 1<sup>st</sup> appellant with sale of controlled goods in excess of the controlled price and convicting it of contravention of the Licences Act, by reason of the same acts there had been occasioned a breach of Section 21 of the Penal Code which prohibited making a person twice criminally liable for the same act or omission.

For her part, Mrs. Valabhji submitted that the power conferred on the Minister in Section 11(2) of the Act (as amended) to provide for offences and impose penalties includes the power to fix minimum penalties and that even if the fixing of minimum penalties was ultra vires, that would not make regulation 80(1) ultra vires as what is ultra vires could be severed within the principle of severance. She submitted that the use of the words "sold" and "offered for sale" in regulation 80(1) was in the context in which the words were used and did not exclude the application of the extended meaning of the word "sell".

Mrs. Valabhji submitted that the respondent has proved that the goods in question were on display and were for sale. There was no contention that the goods were not subject to controlled price and the Chief Justice was justified in rejecting the evidence of Flavie Solin. She

argued that the offence of sale in excess of controlled price is different from that of contravention of the conditions of a licence.

Section 11 of the Trades Tax Act ("the Act") 1992 as amended by the Trades Tax (Amendment) Act 2001 provides as follows:-

- "(1) The Minister may make regulations for carrying into effect the provision of this Act and for any matter which is necessary or required to be specified by regulation;
- (2) Such regulations may provide for offences and for the imposition of penalties or forfeitures for such offences:

Provided that any such penalty shall not exceed a term of imprisonment of five years or a fine of R500,000."

Pursuant to Section 11 of the Act the Minister of Finance made the Trades Tax Regulations which was amended by the Trades Tax (Amendment) Regulations 2001, pursuant to the Act as amended.

Regulation 79(1) of the regulations provided that:-

"A trader shall mark on goods offered or displayed for sale, at the premises where goods are offered or displayed for sale, the price of the goods.

Regulation 80(1) provides that:

"Any person who sells any goods in excess of the controlled price determined by or under Section 7 of the Act is guilty of an offence and on conviction is liable to a fine not less

than R20,000 and not exceeding R250,000  
and imprisonment for 2 years and, in  
addition, to a penalty equal to double the  
difference between the controlled price of the  
goods and the price at which the goods were  
sold or offered for sale.”

The underlined words reflect the amendment introduced into regulation  
80(1) by the Trade Tax (Amendment) Regulation, 2001.

Section 2 of the Act defines “sell” as including:-

- “(a) sell by auction
- (b) offer or attempt to sell
- (c) expose, display or advertise for sale
- (d) barter or exchange.”

By virtue of Section 54(1) of the Interpretation and General Provisions Act  
(Cap 103, 1991 Ed) (“the Interpretation Act”):-

“Where at any time a body corporate  
commits an offence under an Act enacted  
after the commencement of this Act with the  
consent and connivance of or because of  
neglect by any individual, the individual  
commits the same offence if at that time –

- (a) he is a director, manager, secretary or  
similar officer of the body corporate;
- (b) he is purporting to act as such an  
officer; or
- (c) the body corporate is managed by its  
members of whom he is one.”

Having stated the relevant provisions of the main enactments  
material of this appeal, we turn to the determination of the merits of the

issues raised in this appeal. For the sake of brevity those issues are considered under appropriate headings.

(a) **Was the fixing of the minimum penalty by the Minister in regulation 80 ultra vires?**

The delegation of legislative power to the Minister is enacted in Section 11 of the Act. The question is whether Section 11 imposes such limit as Mr. Chang-Sam contends to the power of the Minister to make regulations to provide for offences and for the imposition of penalties or forfeitures for such offences. It is to be stated at the outset that a subordinate legislation will not be declared void on the ground that it is ultra vires unless it is in excess of the power conferred upon the subordinate authority either in that that authority had legislated on a subject on which it had not been authorised to legislate or it had not complied with the prescribed statute. In this case, the power to make regulations for the imposition of penalties is wide enough to authorise the fixing of minimum penalties. The only limit of the power is as contained in the proviso which provided that such penalty shall not exceed a term of imprisonment of five years or a fine of R500,000. Beyond the provision that the penalty fixed should not exceed the penalty stated in the proviso, the proviso cannot be used to whittle the ambit of the power generally granted to make regulations for the imposition of penalties. We find apt the quotation from **Caroll v Attorney General 1933 NZLR 1461**, cited by Mrs. Valabhji, where Ostler, J. said at p.1478:-

“...The Courts have no concern with the reasonableness of the regulation. They have no concern with its policy or that of the Government responsible for its promulgation. They merely construe the Act under which the Regulations purports to be made giving the statute ... such fair, large and liberal interpretation as will best attain

its objects. Then they look at the regulation complained of.

If it is within the objects and intention of the Act, it is valid. If not, however reasonable it may appear, or however necessary it may be considered, it is ultra vires and void."

Adopting that approach, we are of the view that fixing a minimum penalty is well within the objects of the Act which is to leave it to the Minister to exercise his judgment as to appropriate regulations to make for the imposition of penalties. The argument by counsel for the appellants that: "*the Minister as a representative of the Executive is without legal authority, purporting to interfere with the judiciary by fettering its power to adjudicate in sentence*", takes the matter beyond a mere matter of excess of power to be tested by the limit of the authority granted in the enabling Act to the Minister to legislate on the subject of penalties into realms of constitutionality of that part of regulation 80(1). We do not think that that issue properly arises from the grounds of appeal and for our consideration. It is sufficient for the purpose of this appeal to hold that there is nothing ultra vires in regulation 80(1).

Even if the imposition of a mandatory minimum penalty had been ultra vires the defect in the regulation would have been cured by deletion of the ultra vires part. The penalty for the offence created by regulation 80(1) would still have remained a maximum of Rs.250,000/- and imprisonment for 2 years.

(b) **What were the elements of the offence created by regulation 80(1)?**



The two elements of the offence created by regulation 80(1) are:

1. selling of goods
2. in excess of controlled price

Counsel for the appellants argued that the elements of the offence in regulation 80(1) are "selling", which must mean "sell" in the ordinary sense, the past tense of which is "sold" used in the latter part of the regulation, and "offering for sale" since "offered for sale" were words used also in the latter part of the regulation. He reasoned that had the legislature wanted the extended definition of "sell" contained in the Act to apply to the regulations it would have used only the word "sell" in the regulations and would not have used "offered for sale" and "displayed for sale" in a number of regulations such as regulations 79(1), (2), (3), (5) and 80(1). Mrs. Valabhji submitted that the only instances in which the definition of "sell" can be restricted is where the context so requires.

We are of the opinion that Mrs. Valabhji is right in her submission. The objective of the draftsman of any penal enactment is to express and communicate with sufficient clarity and without ambiguity the act or omission prohibited by the enactment. Where the context does not permit the use of a word in its defined sense, he uses the word that precisely expresses what was being communicated. A penal enactment of which regulation 80(1) is an example, contains a statement of the act or omission which constitutes the actus reus and also mens rea of the offence created and the penalty. If additional or exceptional penalty should be imposed in certain circumstances, such circumstances are specified in clear language. In this case the actus reus of the offence created in regulation 80(1) consists of selling goods in excess of controlled price. The punishment to which a person convicted of the offence is liable is a fine not less than Rs.20,000/- and not exceeding Rs.250,000/- and imprisonment for two years. In the context of creation of the offence the use of "sell" in the

extended definition of section 2 of the Act is appropriate, clear and without any shadow of ambiguity. The latter part of regulation 80(1) merely prescribes the circumstances in which the offender is liable to additional penalty. The Minister by his choice of words chose to limit the circumstances in which the offender is liable to additional penalty to actual sale and offering for sale. The definition of "sell" in the Act as including several other acts which would not have been within the ordinary meaning of that word does not exclude the use of the word "sell" in its ordinary sense. It would have been different if "sell" had been defined as "meaning" only those other acts. The words used to describe the circumstances in which the offender would incur additional penalty cannot limit the definition of the word "sell" in the part of the enactment creating the offence.

We feel no hesitation in holding that the offence created by regulation 80(1) is, as the regulation stated, selling goods in excess of controlled price and that "sell" used in that part of the regulation creating the offence is "sell" in the extended definition. In that sense it includes "display for sale".

(c) **Did the Chief Justice appreciate that the gravamen of the offence charged is "display for sale" of the goods?**

Counsel for the appellants contended that the Chief Justice did not appreciate that mere display of goods did not amount to display for sale and that consequently he did not properly consider the evidence in order to see whether the goods were displayed for sale. No aspect of the judgment of the Chief Justice shows a lack of appreciation of the essentials of the offence charged. The evidence of Belle which he accepted was that *"she went round, looked at the shelves, noted prices displayed on goods and filled out from exhibit 3 in which she listed the prices at which the said articles were displayed for sale."* The appellants whose only

witness stated that : "*All the goods for sale are displayed on the shelves and the price tagged on them*", cannot be said seriously to dispute that articles displayed on the shelves with price marked on them were "displayed for sale." Where goods are marked with price and displayed on shelves in a store, the inference is clear that they were displayed for sale. It will take more than such vague statement as is contained in the evidence of the appellants' witness that goods on the shelves were not always on display for sale, to rebut an inference that specific goods marked with price and displayed on shelves were displayed for sale.

The principal prosecution witness stated the controlled price of the goods and it was not part of the defence of the appellants that the goods were not subject to controlled price. The argument that the goods were not proved to be "*prescribed goods*" lacks substance if by "*prescribed goods*" is meant "*controlled goods*". Goods subject to controlled price are controlled goods.

It is not necessary to go over and discuss the minute bits and pieces of complaints by which counsel for the appellants sought to show that the Chief Justice inadequately considered the evidence in the case. Such ranged from an alleged absence of authority of the controller of prices to delegate his powers to determine controlled prices to another person, to the view taken by the Chief Justice of the evidence of the only defence witness and the probative value of the notice to produce records (Exhibit P3). It suffices to say that they have all been adverted to by us and do not at all dent the robust conclusion arrived at by the Chief Justice that there was overwhelming evidence in proof of the offence of sale in excess of controlled price of which the 1<sup>st</sup> appellant was convicted.

(d) Was the 1<sup>st</sup> appellant twice punished for the same act or omission?

That a person cannot be made criminally responsible and punished twice for the same act or omission is evident from the provisions of section 52 of the Interpretation Act and section 21 of the Penal Code. The act which is an offence in regulation 80(1) is selling goods in excess of the controlled price while the act which constitutes an offence in section 19(4) of the Licences Act of which the 1<sup>st</sup> appellant is convicted as charged in count 8 is contravention of a condition of its licence "*to sell goods in accordance with price control regulations in force as stipulated in the Trades Tax Regulations 1995.*"

Technically, the 1<sup>st</sup> appellant is not being made responsible and punished twice for the same act by its conviction for an offence under regulation 80(1) and another under the Licences Act. However, that view lays emphasis more on the letter of Section 52 of the Interpretation Act and Section 21 of the Penal Code than on the spirit of those sections. The realistic view is that it is the same act of selling in excess of controlled price that is punished by convicting the 1<sup>st</sup> appellant under regulation 80(1) and under Section 19 of the Licences Act.

Such conviction offends against the spirit of Section 52 of the Interpretation Act and Section 21 of the Penal Code. We think the course that would have been consistent with the spirit of those sections is that indicated in *R v Cole* [1965] 2 QB 388 and adopted in *R v Asba* 1984 SLR 48. Upon finding the 1<sup>st</sup> appellant guilty on the counts relating to selling in excess of controlled price there should not have been a conviction on the count of contravention of the conditions of licence founded on the same act. That latter count should have been left on the file. For this reason the conviction and sentence on the said count should be quashed and the count left on the file.

(e) **Conviction of the 2<sup>nd</sup> appellant**

It is undisputed that the 2<sup>nd</sup> appellant was at the material time a director of the 1<sup>st</sup> appellant. However, by virtue of Section 54(1) of the Interpretation Act, for him to be guilty of an offence for which the 1<sup>st</sup> appellant was guilty the offence must have been committed with his consent or connivance or because of his neglect. It is not sufficient to find any of these from the mere fact that he was a director of the body corporate. That he connived or consented are facts which are capable of positive proof. Neglect is an omission to act when there is duty to act. There must be evidence of the duty, the breach and its causal connection with the offence. In respect of all these, the judgment made no specific finding. It is not sufficient to infer connivance, consent and neglect from a finding merely that the 2<sup>nd</sup> appellant was in overall control of the business. For these reasons the conviction of the 2<sup>nd</sup> appellant cannot be sustained and it is quashed.

(f) **Question of Sentence**

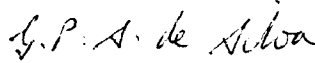
The maximum sentence to which the 1<sup>st</sup> appellant was liable on conviction for each of the counts of selling in excess of controlled price is SR250,000. It was fined SR150,000 on each of those counts. The principles on which an appellate court will interfere with sentence passed by the trial judge are now well-known. The appellate court will not interfere unless the trial judge applied wrong principles or took into consideration factors which he ought not to have taken into consideration or did not consider factors which he ought to have considered or the sentence passed is manifestly excessive. See **Simon v The Republic** [1978-1982] SCAR 557 and **R v Gumbs** 19 Cr. App. R. 74. In this case the only ground of complaint is that the sentence is harsh and excessive. The argument that the Chief Justice meted a sentence which took into consideration the minimum sentence hardly falls within the ground of appeal.

conviction and sentence of that appellant on Count 8 charging offence contrary to Section 19(4) of the Licences Act is set aside and the count is left on the file. The appeal of the 2<sup>nd</sup> appellant against his conviction of the offence of selling goods in excess of controlled price and his sentence are set aside.



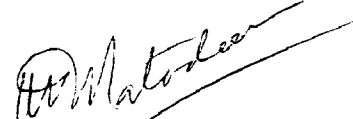
**E. O. AYoola**

**PRESIDENT**



**G. P. S. DE SILVA**

**JUSTICE OF APPEAL**



**K. P. MATADEEN**

**JUSTICE OF APPEAL**

Delivered at Victoria, Mahe this 20<sup>th</sup> day of **December** 2002.