1968 *Present:* Wijayatilake, J.

THE CEYLON UNIVERSITY CLERICAL AND TECHNICAL ASSOCIATION, PERADENIYA, Appellant, *and* THE UNIVERSITY OF CEYLON, PERADENIYA, Respondent

S. C. 43/67—Labour Tribunal No. K 991

Labour Tribunal—Inquiry about a criminal act involving moral turpitude—Standard of proof required—Industrial Disputes Act (Cap. 131), ss. 31C, 36 (4).

Where, in an industrial dispute between an employer and an employee, a Labour Tribunal is called upon to decide whether the employee was guilty of a criminal act involving moral turpitude—such as making fraudulent entries with a view to misappropriation of funds—the standard of proof should be as in a criminal case. Accordingly, if there is a reasonable doubt, the benefit of such doubt should be given to the person accused. This requirement is not in conflict either with section 31C (1) of the Industrial Disputes Act, which empowers a labour tribunal to make a "just and equitable" order, or with section 36 (4), according to which the Tribunal is not bound by any of the provisions of the Evidence Ordinance.

APPEAL from an order of a Labour Tribunal.

K. Thevarajah, for the applicant-appellant.

M. M. Kumarakulasingham, for the employer-respondent.

K. M. M. B. Kulatunga, Crown Counsel, as *amicus curiae*.

Cur. adv. vult.

December 20, 1968. WIJAYATILAKE, J.—

This is an appeal from the order of the learned President of the Labour Tribunal dismissing the Application made by the Applicant union on behalf of Mrs. Padma Perera, a nurse employed at the Dental School of the University of Ceylon, Peradeniya from 16th January 1956. The services of Mrs. Perera were terminated by the University on the ground that she had made certain false entries (seven) and misappropriated certain funds amounting to Rs. 80 odd belonging to the University during a period of 15 days in February 1962 when she acted for the cashier-clerk of the Dental school. A domestic Inquiry had been held by the University and the University Council had decided to dismiss her from service with effect from 14th November 1962.

After a lengthy Inquiry the learned President has come to the conclusion that this nurse has been responsible for several incorrect entries in the cash register all of which are of the kind one intending to misappropriate would make and it is difficult to resist the inference that they were made with a dishonest intention. He proceeds to hold that in a case like this the University does not have to prove beyond all reasonable doubt that there has been misappropriation; and that while the inferences from certain facts are clear, *it may be that they are not sufficient for conviction in a criminal case, but that he has to be satisfied on a balance of evidence* that the University was justified in acting on the basis that there had been dishonest conduct. He accordingly holds that the University had sufficient reason for her dismissal.

The evidence was concluded on 20th September 1965, and the Order was delivered on 14th November 1966; the delay being due to the question which had arisen with regard to the regularity of the appointment of the President by the Public Service Commission.

Learned Counsel for the appellant has submitted that the Order of the President is bad in law, as it is not just and equitable as contemplated under Section 31 C of the Industrial Disputes Act as on the evidence led the University has failed to establish the charge of misappropriation of funds or even an attempt to misappropriate the funds of the University beyond reasonable doubt. He further submits that the President has misdirected himself on the Law in the matter of the burden of proof in a case such as the instant one where the charge whether of misappropriation or the making of false entries, with a view to misappropriation clearly involves moral turpitude on the part of the person so accused, by proceeding to adjudicate on the balance of evidence. He submits that in our Criminal Law it is well recognised that a charge laid against an accused has to be proved beyond reasonable doubt. Vide *A. G. v. Rawther*[1]. It is a Rule of practice which we have adopted from the English and now it has ripened into a Rule of Law. This Rule has been extended to our Civil Courts when the issue pertains to an allegation

[1] *(1924) 25 N. L. R. 385.*

of moral turpitude ; for instance an allegation of adultery in a matrimonial action or allegation of Fraud in a civil dispute. This Rule has also been adopted in the Election Court. Vide *Jayasinghe v. Jayasinghe* [1] ; *Selliah v. Sinnammah* [2] ; *Coomaraswamy v. Vinayamoorthy* [3] ; *Muttiah Chettiar v. Mohamed Hadjiar* [4] ; *Aluvihare v. Nanayakkara* [5] ; *Subasinghe v. Jayalath* [6] ; *Premasinghe v. Bandara* [7] ; *Narayana Chetty v. Official Assignee* [8].

Mr. Thevarajah has cited the case of *M. K. B. v. Advocates Committee* [9] where this Rule was adopted even in a domestic Inquiry in India where the charge was against an Advocate for professional misconduct. He submitted that the learned President would not have dismissed the Application of this nurse if he adopted this Rule. He states that this nurse was during this period attending to the work of three persons with her children down with measles, and as a result in keeping the accounts she has made certain mistakes. As for the cash collected by her she had not appropriated any part of it. No shortage has been proved either. It would appear that during this period she had kept the money in the drawer of the table in the office and when she went on leave Mrs. Cramer had taken over from her and she had given the key of the drawer to Mrs. Cramer, but this lady has not been called as a witness by the University. He further submits that the Matron herself has admitted making a correction in the figures pertaining to the transactions during this period when this nurse was acting for the cashier-clerk. He questions why at least at that stage the cash was not checked precisely.

Learned Crown Counsel who appeared as *amicus curiae* at my request was of considerable assistance to me by referring to a series of cases but he has not been able to cite a single case which has dealt with the question before me precisely in regard to the standard of proof required before a Labour Tribunal in Ceylon in a dispute where the charge against the employee pertains to an act of moral turpitude—such as cheating, fraud, forgery and misappropriation. So far as I could gather his submission is that the onus on an Employer is not so heavy as in a Criminal case and the standard of proof is flexible and it varies according to the particular case. It is his submission that even in a case where the charge alleges a criminal act involving moral turpitude the employer need not prove it beyond reasonable doubt but at the same time the President should not hold against the employee on a slight preponderance of probabilities. He submits that the President has to make a just and equitable order and the procedure he adopts in making such order need not be legalistic and technical. He is not bound by the provisions of the Evidence Ordinance. At the same time although a President of a Labour Tribunal is not a 'judicial officer' as such he has to act judicially and not

[1] *(1954) 55 N. L. R. 410.*
[2] *(1947) 48 N. L. R. 261.*
[3] *(1945) 46 N. L. R. 246.*
[4] *(1923) 25 N. L. R. 185.*
[5] *(1948) 50 N. L. R. 529.*
[6] *(1966) 69 N. L. R. 121.*
[7] *(1966) 69 N. L. R. 155.*
[8] *(1941) A. I. R. (P. C). 93..*
[9] *(1956) 1 W. L. R. 1442 (P. C.).*

arbitrarily. He has to exercise his discretion with circumspection and act with caution as a prudent man would in the more important affairs of his daily life. The order contemplated under the Industrial Disputes Act has to be just and equitable and a President has necessarily to restrain himself lest the freedom he enjoys leads him astray. This submission of learned Crown Counsel that in a case such as this the President should adopt a flexible standard of proof sounds simple but in actual practice it does not appear to be so. It is better said than done ! In fact when I put him the question whether an employee charged with an offence such as this could be found guilty on suspicion not amounting to proof his reply was that in the instant case although there was a reasonable doubt the President was justified in finding this nurse guilty as the evidence was sufficiently cogent to show that she had made a series of false entries with a view to misappropriation of funds belonging to the University. When I pursued the question whether he could set out a general principle in regard to cases involving moral turpitude his submission was that the standard of proof being flexible unlike in a Criminal case a general rule as such cannot be laid down and every case has to be adjudged on its merits. He even sought to rely on the Public Service Commission Rule 54 to show that even when a Public servant is acquitted in any Criminal proceeding he cannot by reason of such acquittal claim to be re-instated or re-employed. In my opinion the answer to the question now before me should not be influenced by this Rule. Perhaps the P. S. C. Rule 54 which on the face of it appears to be a serious affront on the Courts still remains in this set of Rules in the interests of State security and I presume the Government would resort to it only in very exceptional circumstances. Now that Crown Counsel has relied on the P. S. C. Rules it would be pertinent to note that in Appendix C there are a set of notes on Disciplinary procedure and note 18 is substantially a faithful reproduction of Section 3 of the Evidence Ordinance in regard to the proof of a fact. Note 19 provides that the report of the Inquiring officer should always be based on facts and not on mere conjectures. But inferences may be drawn if they *obviously* arise from the facts. It is also important to note that Rule 53 provides that if in the course of or at the conclusion of a disciplinary inquiry a criminal offence is disclosed the Tribunal or person shall, after recording the findings in the disciplinary proceedings and awarding such punishment as the Tribunal or person is authorised to impose forward the proceedings to the Attorney-General for such action as he may deem fit. So that it will be seen that a Public officer has the benefit of any charge against him savouring of a criminal offence being checked by no less a person than the Attorney-General and I presume in a case where the Attorney-General finds that a prima facie case has been made out he would take action to see that the officer concerned is charged in the Criminal Courts. In a Criminal Court the Crown will have to prove the case beyond reasonable doubt and if there is any such doubt the benefit of it will have to be given to the accused and acquit him. Thus it would appear that a Public servant enjoys this privilege. Could it be said that an employee at the University of Ceylon should not be

entitled to this same privilege ? Counsel for the appellant does not go so far as to say that in every case where there is an element of criminality (for instance, minor assault, abuse and intimidation) the charge should be proved beyond reasonable doubt. He submits that at least in a case such as the present where the charge involves moral turpitude this salutary practice of giving the benefit of a reasonable doubt to the accused should be adopted by the Labour Tribunal.

Mr. Kumarakulasingham, learned Counsel for the respondent has made a strenuous effort to support the finding of the President and he submits that proceedings before the Labour Tribunal should not be equated with proceedings in Courts of Law. The relationship of Master and servant is governed by the terms of the contract of employment and the object of our Industrial Disputes Act is to provide for the prevention, investigation and settlement of industrial disputes and for matters connected therewith or incidental thereto. Therefore this dispute should be viewed in the proper perspective. He submits that it is not incumbent on an employer to adopt the standard of proof that is required in a Court of Law ; and that it would be open to him to arrive at a conclusion even on the balance of evidence. He submits that the learned President was quite justified in not adopting the strict standard of proof required in a Criminal Court. The fact that the charge against this Nurse is in the nature of a Criminal offence involving moral turpitude should not make any difference in regard to the standard of proof except that the person sitting in judgment should act as a prudent man. He further submits that an order could be just and equitable although there is a reasonable doubt if there is a strong suspicion, as in the instant case where the wrong entries point the finger of guilt at this nurse. In other words as for the President of a Labour Tribunal, even if he has a reasonable doubt in his mind as to the commission of the offence it would be just and equitable for him to make an order confirming the dismissal by the employer by acting on strong suspicion. He relies on the Indian case of *Jubilee Mills v. Baburao Chintaman and another* 4.2.1954. Appln. (Misc. Bom.) No. 349 of 1953-1954 1 LLJ 807 referred to in Kharo & Bhide Industrial Law Digest 1952–54 page 43, where it was held that in an inquiry held by a management on the evidence it was found by the management that the charge of theft against the workmen could not be conclusively proved, but a strong suspicion arose in the mind of the Manager that the employees must have tampered with and must have been responsible for the shortage of Company's property and therefore the Manager ordered that they be discharged, the Labour Appellate Tribunal went into the evidence and came to the conclusion (following the principles laid down in Buckingham and Carnatics Mill's Case 1952 L. A. C. 490) that a *prima facie* case had been made out and accorded permission to discharge them, observing, " employees in this department (Stores Dept.) must naturally continue to enjoy the confidence of the

management and it would not be in the interest of the industry if persons not enjoying the confidence of the management are thrust upon it to work in such a Department ".

In this context learned Crown Counsel has very fairly drawn my attention to the fact that in India all that a domestic inquiry has to ascertain is whether a prima facie case has been made out and the Labour Appellate Tribunal has to ascertain whether in fact the charge had been well founded and grant permission to discharge the employees concerned. On the other hand under our Industrial Law the Labour Tribunal under section 31C of the Act has to make all such inquiries into the application and hear all such evidence as the Tribunal may consider necessary, and thereafter make such order as may appear to the Tribunal to be just and equitable.

Mr. Kumarakulasingham has also relied strongly on Section 36 (iv) of the Act which provides that the Labour Tribunal shall not be bound by any of the provision of the Evidence Ordinance. Vide *C. T. B. v. Ceylon Transport Workers' Union*[1]. He submits that so long as the employer has not acted *mala fide* or indulged in unfair labour practice a decision made by him to dismiss an employee on strong suspicion, even in the absence of conclusive proof, could be upheld by the Labour Tribunal and such an order would be just and equitable.

I give below a list of cases cited by Crown Counsel.

On a careful consideration of these submissions I am inclined to agree with learned Counsel for the appellant that in a case such as the instant one where there is an allegation of misappropriation connected with an allegation of falsification of accounts with intent to defraud the standard of proof should be as in a Criminal case and if there is a reasonable doubt the benefit of such doubt should be given to the person accused. As Taylor in his treatise on Evidence observes " *in civil* disputes when no violation of the Law is in question, and no legal presumption operates in favour of either party the preponderance of probability, due regard being had to the burden of proof, may constitute sufficient grounds for a verdict. To affix on any person the stigma of crime requires, however, a high degree of assurance; and juries will not be justified in taking such a step, except on evidence which excludes from their minds all reasonable doubt ". This passage is quoted with acceptance by Bertram C.J. in the case of the *Attorney-General v. Rawther*[2]. In fact this standard of proof has been adopted even in the Civil Courts as shown by Mr. Thevarajah where there is an element of criminality involving moral turpitude. In the present case if this Nurse was charged of Criminal misappropriation under Section 386 of the Penal Code or falsification of accounts under Section 467 of the Penal Code she would have been entitled to the benefit of a reasonable doubt. The Ceylon University has not thought it fit to refer this matter to the

[1] *(1968) 71 N. L. R. 158; 75 C. L. W. 33.* [2] *(1924) 25 N. L. R. 385.*

Police or file private plaint. It may well be that the authorities concerned had good reasons for not doing so. In the circumstances, would it be just and equitable to deprive this nurse of a right which she would have had in our Criminal Courts by the fact that this dispute has been referred to a Labour Tribunal ? Under Section 467 she would have been entitled to a non-summary Trial. In my view it would be neither just nor equitable to indirectly rob her of this right. It used to be said in England years ago that the dispensation of Equity was measured by the length of the Chancellor's foot. Vide *Gee v. Pritchard* (1818) 2 Swan. 414. I do not think that in the highest seat of learning in our country the humblest employee should be deprived of this privilege, in a case involving criminal moral turpitude. If for instance a dental surgeon or a law lecturer of the University had to face a charge of this nature would it be right to find him guilty on suspicion, however strong it may be ? Should the Industrial and Labour Law of this country adopt a different standard of proof in the case of a minor employee ? A dismissal of this nature would amount to a condemnation for life and to do so when there is a reasonable doubt would be, in my opinion, neither just nor equitable. It would result in a serious erosion of the Criminal Law of this country and an encroachment on our Courts of Justice. Far from promoting Industrial peace it can lead to difficult situations.

On a scrutiny of the facts it would appear that the alleged seven false entries pertained to a misappropriation of a sum of Rs. 80 odd during a period of 15 days. However, as the President has observed, the shortage in the cash actually handed over has not been established. Mrs. Cramer who took over from Mrs. Perera has not been called. She was a vital witness. Why was she not called to prove the shortage ? The matron's evidence too in this regard is of an indefinite character. It is also noteworthy that during this period the relations of the matron with this nurse had been hostile in regard to a loan transaction with a Chettiar in which the matron alleges this nurse's husband had let her down. It is quite apparent from the evidence that the system of keeping accounts at the Dental School had been most unsatisfactory and everyone appears to have acted on trust ! It is surprising that the University had permitted such a system to be adopted particularly when the store-keeper cum cashier had got into trouble in connection with a similar matter sometime in 1958 or 1959. Although Mr. Kumarakulasingham submits that the charge had been sufficiently proved I find it difficult to agree with him that the onus in this case has been discharged. There is a reasonable doubt and the President who entertained this doubt has not thought it fit to give the benefit of this doubt to the employee but in my opinion she is entitled to it and this being a misdirection in law I would quash the finding of the learned President that she has been guilty of making fraudulent entries with a view to misappropriation. I might mention that although Labour Tribunals are not bound by the Evidence Ordinance it would be well for them to be conversant with the wisdom enshrined in it and treat it as a safe guide.

I have given my anxious consideration to the order I should make in this case in the interests of both parties and Industrial peace and I have come to the conclusion that this nurse should be reinstated by the University or in the alternative the University should be given the option of terminating her services on payment of all her back wages and other attendant benefits up to the date of termination and also compensation in a sum to be computed by the Labour Tribunal on the basis of her period of service at this University and the nature of her employment.

The appellant shall be entitled to the costs of the Inquiry before the Labour Tribunal which I fix at Rs. 300 and the costs of appeal which I fix at Rs. 250.

Cases cited by Crown Counsel :—1963 A. I. R. 630 (634) ; 1960 Vol. 1 Lab. Law Journal 558 ; 1957 (44) A. I. R. (S.C.) 232 (239) ; 1957 (44) A. I. R. 882 (885) ; (1967) 69 N. L. R. 289 ; (1962) 65 N. L. R. 566 ; (1963) 2 A. E. R. 114 ; S.C. 133/1967 L/T 28002 of 29.10.68 ; (1967) 71 N. L. R. 78 ; (1960) 63 N. L. R. 36 ; 1960 (47) A. I. R. (S.C.) 191 ; 1963 A. I. R. (S.C.) 1719 ; S. C. Appln. 485/64 of 3.9.68 ; Simonds Vol. 15, page 272 ; 1929 Probate 131 ; 1917 (1) K.B. 352 ; (1942) 44 N. L. R. 97 ; (1937) 39 N. L. R. 494.

Order set aside.