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Present: Lascelles C.J.

JONKLAAS *v.* MUTTUSAMY.

141—P. C. Kegalla, 16,986.

Labour Ordinance, No. 11 of 1865, ss. 11 and 3—Payment by the quantity of work done—Monthly service—Cooly working under a Public Works Department overseer—Service under the Department.

The circumstance that a labourer's pay depends on the quantity of work which he performs is not necessarily inconsistent with employment on a contract of monthly service.

The case of a labourer who is under a contract of monthly service, and is sometimes called on to perform work which, as a matter of convenience, is paid for by the piece, is clearly distinguishable from that of a labourer whose contract of service consists only of an agreement to perform defined work at a defined rate, according to the quantity of work which he does.

Where a cooly was paid monthly by the District Engineer out of funds voted for the service of Public Works Department, and he received from the same source advances of rice which were distributed by his overseer,—

Held, that the cooly must be held to have entered the service of the Department.

[1] *(1909) 13 N. L. R. 33.*

THE facts are set out in the judgment of the learned Magistrate (W. de Livera, Esq.), which was as follows:—

The accused is an Indian cooly, who was working in the Public Works Department. He is charged by the District Engineer with quitting his services on or about November 22 without leave or reasonable cause (section 11 of Ordinance No. 11 of 1865). In a prosecution under section 11 of Ordinance No. 11 of 1865 a contract of service must be proved, either verbal, implied, or written. There is no written contract in this case. The presumption raised by section 5 of Ordinance No. 13 of 1889 is not applicable to the accused, because he is not a labourer within the meaning of that Ordinance. The complainant has in this to prove a monthly contract of hire and service as would bring the accused under the Ordinance No. 11 of 1865. The District Engineer has entered into no verbal or written contract with the accused. The contract, if any, has been entered into by the overseer. It is contended that he is the agent of the District Engineer and had full authority to do so. The District Engineer in his evidence has stated how the coolies are taken on and employed. Overseers are not employed unless they can keep coolies. When one overseer leaves, his successor takes over the coolies, paying the debts of the coolies to the overseer who is leaving. The coolies, if they do not want to serve under the successor, are given a tundu, and if they bring this amount of their debts they are discharged by the District Engineer. The debts are due to overseers. The accused in question was under one Nagamuttu when he left. Tambimuttu took over this accused. The accused has been working from June or July, 1912. So far as I can see, the accused is a cooly who broke metal, spread metal on the road, and also did miscellaneous works. There is a check roll, produced, for coolies who do miscellaneous works, and accused's name is entered for eleven days in October, 1912, from 20th to 31st, at 50 cents a day. Then, there is what is called the pay sheet for October, 1912, where I find accused has worked ten days and has earned Rs. 5. This, I take it, is as watcher of steam roller. Then, for spreading ten cubes metal he has earned Rs. 11·50, and for breaking one cube metal Rs. 5·50. So he has earned in all during October on pay sheet Rs. 23·20. He has had four bushels rice advanced, Rs. 20·20, balance Re. 1·80, besides the Rs. 5 he had earned as watcher. It is proved this Re. 1·80 was paid to him by the District Engineer on November 14, 1912, and the accused has put this thumb mark on the check roll. There is said to be a separate check roll for each sort of work, but only one (A) has been produced. The coolies have to break metal, and are paid according to the amount they break; they are paid monthly. So far as I can see, they are not paid 50 cents a day. They are paid Rs. 5·50 for a cube irrespective of the number of days. If a cooly break a cube in five days he will have his Rs. 5·50. As regards spreading of metal, too, a cooly gets Re. 1·15 for each cube he spreads. As watcher a cooly gets 50 cents a day, as also for other work other than breaking and spreading metal. The District Engineer pays no advances to coolies, nor does he advance them rice. He advances rice to the overseer, who advances to the coolies. The overseer is responsible to the District Engineer. The overseer is paid Re. 1·50 a day for superintending the work. The tundus issued by the overseers for coolies have to be countersigned by the District Engineer. The coolies live in the Public Works Department lines. As I said before, the complainant has to prove a

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monthly contract of hire and service to bring the accused under Ordinance No. 11 of 1865. He is entitled to call to his aid the presumption created by section 3 of the Ordinance, which enacts every verbal contract of hire of any servant, except for works usually performed by the day, or by the job, or by the journey, shall (unless otherwise expressly stipulated, and notwithstanding that the wages under such contract shall be payable at a daily rate) be deemed and taken in law to be a contract for hire and services for the period of one month, to be renewable from month to month, and shall be deemed and taken in law to be so renewed, unless one month's previous notice or warning be given.

The prosecution in this case was bound to prove in full the contract of service, as the work the accused was doing was usually performed by the day or by the job. Unfortunately for the prosecution the overseer had left the service of the complainant, and he is said to have taken the accused and his other coolies to an estate. The overseer, naturally, would not have helped the prosecution. He would have done his utmost to negative any monthly contract, as he is charged with seducing the coolies. Though the accused continued to work from July to October, I am not prepared to hold he had entered into a monthly contract with the overseer. The accused says he came in quest of employment; the overseer engaged him to break metal at 33 cents a day; his pay depends according to the metal he breaks; he gave notice to the overseer and left. He is not quire accurate, for he received 50 cents a day. He gave no notice, but the overseer seems to have taken him away when the overseer left. In my opinion the prosecution has failed to discharge the onus laid on him, and there was no burden laid on the accused. Simply because his name appears in the check roll for ten days, and he continued to work from July, 1912, to October, 1912, I am not prepared to hold in this case, under section 3, a verbal contract of service from month to month can be presumed. The contract of service ought to have been more clearly proved, especially as the work upon which he was employed was not agricultural work, and he was paid only for the days he worked, and there was no obligation on the employer to provide him with work. No monthly contract could be implied under section 3 of the Ordinance. Again, unfortunately for the complainant, he cannot call to his aid the provisions of sections 5 and 6 of Ordinance No. 13 of 1889. It has been held in *2 N. L. R. 3* (*Alwis v. Carpen*) that a cooly employed by the Public Works Department to break metal, whose pay depends on the quantity of metal he broke, is liable to punishment for desertion under Ordinance No. 11 of 1865. I have not been able to get at the record in that case, but I suppose a verbal contract must have been proved. There seems to have been evidence in the case that the cooly had contracted to work on labour incident to the routine of Public Works Department. Mr. Justice Lawrie in his judgment states: "I have said enough, however, to show that this is not altogether a clear case. The cooly may be excused if he thought he was not under the Ordinance. The law is somewhat obscure." The points raised in this case is important as far as the Public Works Department is concerned, and I have no doubt the complainant will take this case to a higher court and obtain an authoritative decision on the points raised. The law, as Mr. Justice Lawrie observed, is somewhat obscure; from the meagre materials before me I cannot fully comprehend the system adopted by the Department as

to payment of wages. At first sight it seems to me to be open to grave objection, as, for instance, the case of the cooly Ramasamy. His name is down as having worked the whole of October (*vide* check roll). When the District Engineer came to check he found he had not worked, and disallowed his wages. The District Engineer seems to me to pay by result after examining the work. I acquit.

Garvin, Acting S.-G., for the Attorney-General, appellant.—The accused is clearly a monthly servant. He was paid by the month. His name was on the check roll, and he received 50 cents a day for what might be described as ordinary cooly work. Whenever he did stone breaking or metal spreading he was paid so much per cube. This was necessary to prevent idling. It was a check necessitated by the fact that the conditions under which the labour was performed did not admit of close supervision (*Alwis v. Carpen* [1]).

The District Engineer paid the wages. He made advances of rice. It must be presumed that the person who paid the wages is the employer. In this case the District Engineer was the employer.

H. J. C. Pereira, for the accused, respondent.—The work done by the cooly was not ordinary cooly work. It was akin to contract work. It was paid by the job. No inference can be drawn from the advance of rice, for that was made to the overseer, from whom the accused obtained the rice. So far as the accused is concerned, his employer is the overseer.

Cur. adv. vult.

April 26, 1913. LASCELLES C.J.—

This is an appeal by the Attorney-General from the acquittal of the accused on a charge brought against him under section 11 of Ordinance No. 11 of 1865 by the District Engineer, Kegalla, of quitting his service without notice. The acquittal is based on a finding that the accused was not under a monthly contract of service, and that he was in the service of his overseer and not in that of the District Engineer.

With regard to the first point, it is provided by section 3 of Ordinance No. 11 of 1865 that every verbal contract for the hire of a servant, except for the work usually performed by the day, or by the job, or by the journey, shall (unless otherwise expressly stipulated, and notwithstanding that the wages under such contract shall be payable at a daily rate) be deemed to be a contract for hire and service for the period of one month. In the present case the contract of service was " verbal " in the sense in which that word is used in the Ordinance; it was not reduced to writing. There was no express stipulation as to the duration of the contract. The question, therefore, is whether the present case falls within the exception; whether,

[1] *(1896) 2 N. L. R. 3.*

in, other words, the work on which the accused was employed is usually performed by the day, or by the job, or by the journey. In *Alwis v. Carpen* [1] Lawrie J. had to deal with a very similar case, and came to the conclusion that a cooly employed by the Public Works Department to break metal, whose pay depended on the quantity of the metal he broke, was a monthly servant and liable to punishment for desertion. The facts of the present case are stronger than those of the case which I have cited, for here the cooly was not employed entirely on piecework. It is clear from the evidence of Mr. Jonklaas, the District Engineer, that the accused was employed on different kinds of labour. In the month of October he appears to have been employed for eleven days as a watcher to a steam roller at a rate of 50 cents a day; during the same month he also earned Rs. 11·50 for spreading ten cubes of metal and Rs. 5 for breaking one cube of metal. The accused, in other words, was not employed exclusively on work which is paid for by the piece; he was employed on work of the miscellaneous character usually expected of a cooly employed in the Public Works Department. The fact that he was employed at times on work which was paid for by the piece does not alter the character of his general employment, for, as Lawrie J. pointed out, the circumstance that a labourer's pay depends on the quantity of work which he performs is not necessarily inconsistent with employment on a contract of monthly service. The case of a labourer who is under a contract of monthly service, and is sometimes called on to perform work which, as a matter of convenience, is paid for by the piece, is clearly distinguishable from that of a labourer whose contract of service consists only of an agreement to perform defined work at a defined rate, according to the quantity of work which he does. For these reasons, and on the authority of *Alwis v. Carpen*,[1] I hold that the accused was under a contract of monthly service.

Then comes the question whether the accused was in the employment of the District Engineer, representing the Public Works Department, or, as he contends, in the employment of the overseer, to whose gang he belongs.

I confess that I cannot see room for any doubt on this point. The accused was paid monthly by the District Engineer out of funds voted for the service of his Department, and he received from the same source advances of rice, which were distributed by his overseer. The relations between the accused and his overseer are not material; they appear to be to some extent analogous to those between a labourer on a tea estate and his kangani; but, however that may be, I cannot doubt but that the accused, so soon as he received monthly wages and advances of rice from the Public Works Department for work done under the supervision of the District Engineer, must be considered to have entered the service of that Department.

[1] *(1896) 2 N. L. R. 3.*

I set aside the acquittal and convict the accused on the charge framed against him. The Acting Solicitor-General stated that he did not press for substantial punishment; and as the charge is in the nature of a test case, I merely sentence the accused to a fine of 50 cents, and in default one day's simple imprisonment.

Acquittal set aside.