1909.
August 31.

Present : Mr. Justice Wood Renton.

WHITTALL *v.* PERIASAMY KANGANY *et al.*

P. C., Badulla-Haldummulla, 3,099.

Contract of service—Requisites of proof—Implied contract—Entry in check-roll—Advance of rice—Ordinances No. 11 of 1865, s. 19 ; No. 13 of 1889, s. 5.

Requisites of proof in a prosecution under the Labour Ordinance (No. 11 of 1865) indicated by Wood Renton J.

APPEAL by the accused from a conviction under section 19 of Ordinance No. 11 of 1865.

Bawa, for the accused, appellants.

Blazé, for the complainant, respondent.

Cur. adv. vult.

August 31, 1909. WOOD RENTON J.—

In this case the appellants, Periasamy Kangany and a cooly named Muttusamy, were charged in the Police Court of Badulla-Haldummulla with having seduced a cooly named Kadiran, or Sevandari, from the service of Mr. Whittall, in contravention of section 19 of Ordinance No. 11 of 1865, and they have both been convicted and sentenced respectively to periods of three and one month's rigorous imprisonment. Two main points were urged by Mr. Bawa on behalf of the appellants. In the first place, he contended that there was no legal proof showing that, at the time of the alleged seduction, the cooly Kadiravi was bound by a contract of service within the meaning of section 19 of Ordinance No. 11 of 1865 ; and he argued, in the second place, that, even if that objection failed, there was no evidence which established even a *prima facie* case against the appellants. I agree with Mr. Bawa on the first point.

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But, as I think that a sufficient case in support of the charge has been made out as regards both appellants, I do not propose to give effect to the technical deficiency of proof in the evidence for the prosecution. At the same time, in view of the frequency with which this point is raised in appeals under the Labour Ordinance, and of the apparent ignorance or indifference, not only of estate superintendents, but, in some cases, of their legal advisers in regard to the requirements of the law as to proof of service, I think it may be well that I should state in a few sentences once more what the *facta probenda* on that point are.

It is essential that the prosecution, which has to discharge the onus of proving a contract of service, where, as here, the cooly alleged to have been seduced is an Indian immigrant within the meaning of Ordinance No. 13 of 1889, should prove either a verbal contract for the performance of work not usually done by the day, or by the job, or by the journey; or, in the second place, a written contract; or, in the last place, a contract to be implied by law from the facts that the name of the cooly is entered in the check-roll of the estate, and that an advance of rice or money has been received by such cooly from the employer. In the present case there is no evidence of either a verbal or a written contract; and it is clear from the record that the prosecution relied on an implied one. So far as I can see, the check-roll of the estate was not produced, and there is no evidence showing any advance of rice or money to the cooly in question. I was referred by Mr. Blazé, in his argument for the respondent on this point, to the case of P. C., Panwila, No. 14,322, reported in *Grenier (1873), Part I., p. 45*, and he argued, on the strength of that authority, that the words "bound by any contract" in section 19 of the Labour Ordinance would be satisfied by proof of an agreement to serve, even if the cooly had not in fact entered on the estate. P. C., Panwila, No. 14,322, is, in my opinion, no authority for that proposition, for in that case there was express proof of a verbal contract, and the case was, moreover, decided long prior to Ordinance No. 13 of 1889. It has been laid down again and again by the Supreme Court that it is necessary for the support of a charge of this kind, in the case of an Indian immigrant cooly, that section 5 of Ordinance No. 13 of 1889 should be satisfied, as regards an implied contract, by the evidence of the check-roll and by evidence as to the advance of rice or money. See, for example, the case of *Tringham v. Thewar*,[1] and there are many other authorities to the same effect. In regard, however, to the substantive question as to whether the charge of seduction was made out, I have come, after careful consideration, to the conclusion that this question must be answered in the affirmative. It is proved that the cooly Kadiravi was sent from Gampaha estate, to which she was properly attached, to do a day's work on Allagalla estate, in

[1] *(1907) 1 A. C. R., Sup., 16.*

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which Mr. Whittall, who is the real complainant here, although the prosecution was formally instituted by his kangany, was stated by counsel to have an interest. It was her duty, on the conclusion of her day's work, to return to Gampaha. She did not do so. On the contrary, on the very afternoon of the day in question, she was seen in the company of the two accused going in the direction of their village. Two of the witnesses asked the first accused-appellant what he was doing with the girl, and his only answer was to request his interrogator to mind his own business. In addition to all this, there is evidence showing that on two previous occasions the first accused-appellant Periasamy had endeavoured to seduce this girl from her service. Her father Muttiah speaks to those facts ; he was not cross-examined in regard to them on behalf of the first appellant, and his story as to one of the alleged previous attempts at seduction is corroborated by Mr. Whittall himself, to whom Kadiravi's father made complaint at the time. In his statutory declaration Periasamy committed himself at the statement that he did not know the woman, and thereby brought himself into direct conflict with the witnesses for the prosecution, who speak to having seen Kadiravi in his company on the very day of her disappearance. Taking all these circumstances together, I am of opinion that a *primâ facie* case was made out against both the accused, which it was incumbent upon them to answer, within the meaning of the cases cited by Mr. Bawa from *Ameer Ali on Evidence* (*page 605*) at the argument of the appeal. If I turn to the evidence of Periasamy himself, it is clear, I think, that no satisfactory explanation of the case for the prosecution was forthcoming. For, in the first place, he qualifies his statutory declaration by saying that the woman Kadiravi was not of the same caste as himself—a statement implying a certain degree of previous knowledge of her—and, in the second place, he in no way either explains or even expressly disputes the allegation of the witnesses for the prosecution that he was in Kadiravi's company on the day in question. It was impossible for the prosecution in this case to call the seduced cooly herself, for she has not returned to the estate or to her father's house since her first disappearance, and nothing is known of her whereabouts now. On the grounds stated I hold that the charge of seduction has been made out. I send the case back, however, so as to give the complainant the opportunity of complying with the formal requirement of section 5 of Ordinance No. 13 of 1889 by showing, if he is able to do so, from the check-roll itself that Kadiravi's name was entered there on the date of the seduction, and that she had received an advance of rice or money. If this proof is forthcoming, the appeal will be dismissed. On the other hand, if it is not supplied, the appeal will be allowed, and the accused-appellants will be acquitted.

Case remitted.