Present : Mr. Justice Middleton.

1908.
September 11.

HUTCHINSON *v.* SINNEWELLASAMY KANGANY.

P. C., Matale, 28,878.

Wadsworth, for the accused, appellant.

A. St. V. Jayewardene, for the complainant, respondent.

Cur. adv. vult.

September 11, 1908. MIDDLETON J.—

In this case the accused, a kangany, has been convicted under section 11 of Ordinance No. 11 of 1865 for quitting service without leave or reasonable cause. This section has been re-enacted, with a slight and important addition as to forfeiture of wages, by section 2 of Ordinance No. 16 of 1905. The point now raised before me is similar to that raised in 395, P. C., Kandy, 10,369 (*Ogilvy v. Caruppen* [1]), where I have discussed the question at some length.

The facts here are that the accused was a head kangany, said to owe the estate Rs. 1,400, who had lost most of his coolies on the estate, and watchers were appointed by the superintendent to watch him and his coolies and prevent their running away.

The accused quitted service on June 22, and wages for April were paid on June 12. His wages for March were not paid to him, but were, after deducting the watchers' wages, taken into advance account. The superintendent stated that about ten of accused's coolies left the estate without notice, and with accused's consent he put on watchers to watch the remaining coolies, and that accused

[1] *(1908) 11 N. L. R. 300.*

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objected later. That in March accused earned Rs. 10.03 as wages, which was set off against advances with the consent of the accused. The accused also was apparently not allowed to leave the estate.

I have carefully perused the evidence taken by the Magistrate, and I can nowhere find that the superintendent says that the accused consented to the cost of the watchers being deducted from his wages. It is true he says that he put a watcher with accused's consent, but not that accused consented to have the watcher's wages set off against his own. This appropriation is not one which the superintendent is entitled to make under sub-section (6) of section 3 of Ordinance No. 13 of 1889 without the cooly's consent. Even if the statement of the superintendent may be held to imply that the accused consented, there is no evidence of the time and place, when and where, and under what circumstances his consent was obtained; and if this were a civil action in which the superintendent had set up an agreement to allow a set-off he was desirous of enforcing, I do not think that there would be sufficient *prima facie* evidence of it to warrant the Court in calling on the defence to rebut it. Beyond the superintendent's statement there is no other evidence.

The defendant was not, I think, therefore called upon to rebut what was stated by the superintendent. It is not in evidence that during the period of service for which wages are alleged to be due he had received any further advances which might be deducted under sub-section (6) of section 3. I must therefore hold, following my judgment in 395, P. C., Kandy, 10,369 (*Ogilvy v. Caruppen*[1]), that, inasmuch as it is not proved that the deduction for the watchers' wages was made from the defendant's wages with his consent, the defendant had sufficient reason to believe that his wages for March had not been paid so as to entitle him to quit service without leave on the ground of reasonable cause.

The conviction must therefore be set aside.

Appeal allowed.

[1] (*1908*) *11 N. L. R. 300.*