1951 *Present:* **Nagalingam J.**

ABEYGOONESEKERA, Appellant, *and*
SINNATHAMBY, Respondent

S. C. 1,096—M. C. Colombo, 1,990/A

Wages Boards Ordinance, No. 27 of 1941—Section 58—Meaning of "trade"—Minimum wage—Employer and worker may be engaged in two different trades.

The accused was charged that he, "being an employer in a trade, to wit, the motor transport trade", failed to pay the lorry driver employed by him the prescribed minimum wage. It was proved by the accused that he used the lorry as merely ancillary to his business of engineering and drainage contractor.

Held, that in the circumstances the accused could not be said to be engaged in the motor transport trade and, therefore, could not be convicted under the charge preferred against him.

Semble, the accused could have been convicted if the charge against him had been that he, being an employer of a worker in a trade, to wit, the motor transport trade, failed to pay such worker his minimum wage. The definition of "trade" in section 58 of the Wages Boards Ordinance includes the occupation or calling of a worker, irrespective of what the trade of the employer may be.

APPEAL from a judgment of the Magistrate's Court, Colombo.

M. M. Kumarakulasingham, for the accused appellant.

T. S. Fernando, Crown Counsel, with *E. H. C. Jayetileke*, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

February 23, 1951. NAGALINGAM J.—

The appellant in this case was charged with having failed to pay the minimum wage to a lorry driver employed by him and has been convicted and sentenced to pay a fine of Rs. 100.

In regard to the facts there is no dispute. The appellant is the manager of a firm known as "Samarakone Bros." Admittedly, the firm carries on business as engineering and drainage contractors and for the purpose of its business owns a lorry which is exclusively used for the purpose of transporting goods and material in connection with the execution of the contracts undertaken by it. There is no suggestion that the lorry is used for transporting materials for third parties or that is hired out. It is also a matter of agreement between the parties that the lorry driver has not been paid the minimum wage payable as set out in the notification framed under the Wages Boards Ordinance, No. 27 of 1941.

The main contention raised on behalf of the appellant is that he was not engaged in the motor transport trade and therefore the notification prescribing *inter alia* the rate of wages payable to lorry drivers has no application to him. I do not think it can be said that the firm of Samarakone Bros. is engaged in a transport trade, much less the motor transport trade. They do not carry on business as carriers of goods; they do not own a fleet of vehicles; they do not employ a number of lorry drivers. A private owner having a lorry to transport, say, his

produce from his estate to his agents in Colombo for sale cannot be said to carry on a transport trade. The use of the lorry in such a case is merely ancillary to the sale of the produce grown on the estate. Similarly, Samarakone Bros. use their lorry as ancillary to their business of contractors and engineers and cannot be said to be engaged in the motor transport trade.

This view is supported by the reasoning in the case of *Attorney-General v. Mayor, Aldermen and Burgesses of Portsmouth* [1] cited by Counsel for the appellant. I should like to refer to a passage in the judgment of Moulton L.J., where this identical question is discussed:

> " I put to Mr. Levatt the parallel case of a carrier—that is to say, of a man carrying on works, who has his own horses and carts and delivers the goods he produces at the house of his customer and fetches the things he buys and brings them to his works. Is he carrying on the business of a carrier ? Mr. Levatt argued himself into such a belief in his case that he said ' Yes '. All I can say is that the answer appears to me to be emphatically ' No '."

It seems to me, therefore, that it cannot be said that the appellant was engaged in the motor transport trade.

Mr. Fernando who appeared on behalf of the Crown, however, after battling strenuously to sustain the contrary of this view, took up another line of argument which I have little doubt is quite a sound one. He referred to the definition of " trade " in the Ordinance and argued that the term " trade " is defined in the Ordinance not only from the standpoint of the employer but also from that of the worker. The term " trade " is defined in section 58 of the Ordinance. Looking at the definition from the angle of the employer, it would run as follows:

> " Trade includes any industry, business, undertaking, occupation, profession or calling carried out, performed or exercised by an employer."

Having regard to this definition it would be clear that where an employer carries on a particular business or undertaking, then such business or undertaking would fall within the definition of the term " trade " as used in the Ordinance and before an employer can be said to be in the motor transport trade he must be shown to be carrying on the business or undertaking of a motor transport agent, that is to say, of one who holds himself out as being prepared to transport for reward goods by means of motor vehicles. Clearly, as indicated earlier, the appellant does not carry out, perform or exercise the business of a transport agent. Mr. Fernando ultimately conceded that this view may be correct.

Mr. Fernando, however, relies for his contention upon a reading of the definition from the standpoint of the worker, which would then run as follows:—

> " Trade includes any industry, business, undertaking, occupation, profession or calling carried out, performed or exercised by a worker."

[1] *(1909) 100 L. T. 742.*

Looking at this definition it would be manifest that any occupation or calling exercised by a worker is in itself a trade and regarded as such for the purpose of the Ordinance. The trade of the worker, that is to say, the occupation or calling of the worker is in no way dependent upon and need not be related to any industry, business or undertaking in which the employer may be engaged. The employer in point of fact need have no business whatsoever, and to this extent our law departs largely from the law of England. That the occupation or calling exercised by the worker in this case is that of a lorry driver is undoubted. It would therefore be correct to describe the worker as one who is engaged in the lorry-drivers' trade, which trade is a branch of the larger trade designated the motor transport trade. The worker whom the appellant is alleged to have underpaid is therefore one in the motor transport trade and he certainly is entitled under the notification to be paid the minimum wage, though the appellant may not be in the motor trade himself.

The germ of the idea behind our definition of " trade " is to be found in the case of *Skinner v. Jack Breach*[1] where the contention was put forward that both the worker and the employer must be engaged in the same business before that business could be regarded as a trade within the meaning of the Trade Boards Act. This contention was rejected in that case and the Judges took the view that it was immaterial that the employer was engaged in a trade different from that he employs the worker to carry on. Our Legislature adopted this view and gave it legal recognition by enacting the definition of the term " trade " so as to include the occupation or calling of a worker, irrespective of what the trade of the employer may be. In other words, the definition catches up both classes of cases (1) where the employer and the worker are engaged in the same trade and (2) where the employer and the worker may be engaged in two different trades.

Mr. Fernando sought to sustain the conviction on this basis, namely, that although the appellant may not be engaged in the motor transport trade himself the worker undoubtedly was, and that, therefore, the employer having paid the worker less than the minimum wage prescribed by the notification, the appellant was guilty.

Mr. Kumarakulasingham, however, strenuously opposed the adoption of this course of action, for he contended that the case was never presented in the Magistrate's Court on that footing and that the defence never examined the case from that point of view, while all that the defence sought to establish in the Magistrate's Court was that the employer was not engaged in the motor transport trade, for that was the essence of the charge laid against him. I think there is substance in this contention. The charge which was framed against the appellant unmistakably shows that the prosecutor came into Court on the footing that the appellant was in the motor transport trade and not that the worker was. The opening words of the charge clearly establish this. The words relevant are:

> " That you . . . . being an employer in a trade, to wit, the motor transport trade . . . . failed to pay one . . . . "

[1] *(1927) 2 K. B. 220*

The proceedings in the Magistrate's Court show that the defence set up was that the appellant was not in the motor transport trade, while the prosecutor contended the contrary, and the Magistrate having upheld the contention of the prosecution entered a conviction against him. Had the charge run as follows:

> " That you . . . . being an employer of a worker in a trade, to wit, the motor transport trade, ... failed to pay one . . . . . "

the position may have been different. But the charge not being that, and as the appellant was not given an opportunity of setting up a defence to such a charge, I do not think it would be proper to sustain the conviction, substituting an entirely different charge for the one upon which the appellant was tried, as I have been invited to do by learned Crown Counsel.

For these reasons I set aside the conviction and acquit the accused.

Appeal allowed.