NATU MEYA *v.* KADERSA KANGANY.

August 7, 1902. WENDT J.—

The appellant has been convicted of a breach of section 11 of Ordinance No. 11 of 1865, in that, being a servant of F. G. Souter, superintendent of Nayabedde estate, he neglected and refused, between May 12 and June 12, to attend for work during the time and hours and at the place where he contracted to attend. The prosecution was commenced by Natu Meya, described as head kangany of the estate, presenting to the Court a written complaint, upon which the Court ordered summons to issue. At the trial the complainant was the first witness examined, and after him Mr. Souter himself. It has been objected in appeal that Natu Meya was not entitled to initiate a prosecution for breach of a contract existing between the accused and Mr. Souter, and the case of *Kandasamy v. Muttamma* (*2 N. L. R. 71*) was relied upon, in which appears an *obiter dictum* of Bonser C.J. to the effect that the employer is the only person who can properly prosecute for offences under the Labour Ordinance, because he is the only person injured. Even if that opinion had been the ground of the decision in that case, I consider that the facts of the two cases are not similar, inasmuch as in the present case it was expressly stated at the foot of the plaint, which was prepared and signed by Mr. H. B. Potger, as proctor, that it had been drawn under instructions received by him from Mr. Souter, and this proctor afterwads conducted the case for the prosecution and called and examined Mr. Souter. This circumstance, coupled with the absence of objection, either in the Court below or in the petition of appeal, to the head kangany's authority to prosecute, is in my opinion sufficient to establish that he had that authority.

It was next contended for the appellant that it had not been proved that the appellant was a servant of Mr. Souter within the meaning of the Ordinance dealing with the subject. There is no direct evidence of an express contract of service between these parties, and it was said that although the appellant's name appeared on the check roll, it had not been shown that Nayabedde was an "estate" as defined by the Ordinance, that is to say, that 10 acres or more of it were actually cultivated, or that the appellant had received an advance of rice or money from his employer. It is, of course, not sufficient (as the Magistrate appears to have assumed), in order to raise the presumption created by section 5 of Ordinance No. 13 of 1889 as to the existence of a contract of service, that the name of the accused appears in the check roll, he must also have received an advance; but I do not think it necessary to go into this question, although there is evidence of some advance having been made to the appellant and of his wages having been stopped to pay it off, because I think the appellant admitted in the Court below that he was a sub-kangany in the service of Mr. Souter, and on that footing he gave Mr. Souter a notice of his intention to quit his service. I proceed to deal with the real defence relied upon, viz., that as a sub-kangany the accused was not bound to do the work which he was ordered to do. The accused, as I have said, was a sub-kangany, and had at least three coolies in his gang. He had been

1912.

Appavu v. Ponniah

on the estate for some three and a half years. He says that it is optional for a sub-kangany to work as a cooly (in which case he received a cooly's wages) or to supervise the labour of his gang, receiving only his pence money. He swears that he never worked as a cooly, but it is established for the prosecution that he had so worked, and last did so in February, 1899, when he worked for nine days. Since then he has not done manual labour, and has merely drawn pence money in respect of his coolies. There is no evidence to show that an agricultural labourer, merely because he is a sub-kangany, is entitled to choose whether he shall himself work or not. It is not suggested that it is a generally recognized custom in such employment that a sub-kangany shall not be obliged to work with his own hands. All the evidence there is points the other way. Every other sub-kangany on the estate works as a cooly, and the accused himself, who is proved to have worked three years ago, does not say that he then worked because he himself choose to do so, but denies the fact altogether. I am of opinion that the appellant was legally bound to obey the order of his master to go out into the field and pick coffee.

It was, however, argued on his behalf that his wages had been unpaid, and that he was, therefore, not punishable for a breach of his contract of service. But it was proved that the wages for February had been paid into his own hands, and although there was a question as to the appropriation of March and April's wages towards the reduction of advances, it is clear that March's wages were not sixty days overdue at the date of the alleged offence. Section 7 of the Ordinance of 1889 therefore does not apply. While I think the conviction was right, I do not think the appellant ought to have been sentenced to so severe a punishment as six weeks' rigorous imprisonment. Really he had for over three years not performed any labour, and although he is said to have been warned in the interval about his liability to work, this was never insisted upon, and as Mr. Souter puts it, he was always away from the estate. It was only when the appellant gave notice of his intention to quit his employer's service, that the latter insisted upon his performing what I have held to be his legal obligation. The order did not come as one given in the ordinary course of work on the estate, but as an act of retaliation upon the accused for the intimation of his intention to quit the estate.

The conviction will be affirmed, but the sentence altered to forfeiture of all wages due to the appellant not exceeding one month's wages.