

1956

*Present: Gunasekara, J.*

P. W. WAAS, Appellant, and E. GANEGODA (Inspector of Labour),  
Respondent

*S. C. 507—M. C. Negombo, 77,497*

*Wages Boards Ordinance, No. 27 of 1941—Prosecution thereunder—Burden of proof—Sections 21, 39 (1), 42.*

Where an employer is charged with failing to pay a worker wages at not less than the minimum rate, in contravention of section 21 of the Wages Boards Ordinance, but the evidence properly admitted at the trial is insufficient to prove that the worker was entitled to payment of wages in respect of the period mentioned in the charge, there is no burden on the accused to prove, in terms of section 42, that payment was duly made by him.

**A**PPEAL from a judgment of the Magistrate's Court, Negombo.

*G. E. Chitty*, with *J. A. L. Cooray* and *Daya Perera*, for the accused-appellant.

*V. T. Thamotheram*, Crown Counsel, for the Attorney-General.

*Cur. adv. vult.*

February 22, 1956. GUNASEKARA, J.—

The appellant was convicted of three offences punishable under section 39 (1) of the Wages Boards Ordinance, No. 27 of 1941, alleged to have been committed by him on or about the 1st December, 1953. The allegation in each count of the charge was that being the employer of a worker in the coconut manufacturing trade he had, in contravention of section 21 of the Ordinance, failed to pay that worker for work done in the period 22nd to 28th November wages at not less than the minimum rate. The workers were three women named Jane Silva, Winifreda Fernando and Julihamy.

Part II of the Ordinance, in which sections 21 and 39 occur, was applied to the coconut manufacturing trade on the 1st April, 1949, by an order made under section 6 (1), and a wages board for that trade was established on the same day by an order made under section 8 (1). At the time material to the charge there were in force decisions of the wages board determining, among other things, minimum rates of wages for piece work "applicable to certain processes in the activities of the Coconut Manufacturing Trade" and minimum rates for time work applicable to all other processes in the activities of that trade. Section 21 of the Ordinance provides that

where any decision of a Wages Board, whereby a minimum rate of wages for any trade is determined, has come into force, every employer shall pay to every worker to whom such minimum rate is applicable, wages at not less than such minimum rate ;

and section 39 (1) provides that

every employer who fails to pay wages to any worker in accordance with the provisions of section 21, shall be guilty of an offence.

The appellant was at the material time the owner of a mill for the manufacture of coconut fibre, an activity of the coconut manufacturing trade as defined in the order by which Part II of the Ordinance was applied to that trade. The prosecution put in as part of its case a document, marked P13 and headed "Pay list of Workers employed at Kapuwatto Mills from 23rd November 1953 to 28.11.53", which was alleged to be an extract from the wages records kept at the appellant's mill. One of the grounds on which the appeal was pressed was that this document was improperly admitted in evidence.

The admission of the document was objected to at the trial by Mr. Cooray, who appeared for the appellant, and the learned magistrate made the following order overruling the objection :

"The accused has been noticed to produce these records but according to Mr. Adv. Cooray these records are with the Assistant Commissioner of Labour. The prosecution states that the records had been returned to the accused. The application of the prosecution to lead secondary evidence, with regard to the contents of these records is therefore allowed."

According to the case for the prosecution, P13 is an extract from a book that was in the mill on the 20th August, 1954, and was made by an inspector of labour at the mill itself on the occasion of an inspection held by him on that day. Evidence to this effect was given by the inspector, Mr. Ganegoda, after the learned magistrate had made the order quoted above. The witness denied a suggestion made to him in cross-examination that he was keeping the books with him. It was also suggested to him that the appellant had come to the Labour Department's office on the 8th August, 1954, and he said that he could not remember whether the appellant had done so. He admitted that the appellant was not present at the mill on the 20th August, 1954, and there is no evidence that the appellant had notice of the inspection.

The appellant gave evidence to the effect that he had taken to the Labour Department's office on the 8th August, 1954, "all the books" (meaning apparently all the wage records) and had left with Mr. Ganegoda all except those relating to the year 1954. "All the books were forwarded to the Labour Department", he said. "Mr. Ganegoda wanted the books. I left the books in the office of the Department of Labour. I have the 1954 books." Cross-examined on this point he said "I took the records to the Labour Office, Negombo. That was on 8th August 1954. The books were kept by the Inspector, Mr. Ganegoda."

It appears from the learned magistrate's judgment that he has accepted the appellant's evidence that the books were taken to the Labour Department's office on the 8th August, 1954. He holds, however, that they were taken away again by the appellant and were in the latter's custody at the time of the trial. Having dealt with certain evidence to the effect that Mr. Ganegoda had removed wage records from the mill on 7th December, 1953, and returned them on the 17th December, the learned magistrate says :

"Thereafter the books were taken to the Labour office by the accused on 8.8.54. The accused says these books were retained at the office from that date, but Inspector Ganegoda's evidence, which I have no reason to doubt is that they were removed by the accused and that he took extracts from them at the Mills on 20.8.54. P13 is one such extract. I am satisfied that the wage records for the relevant periods are in the custody of the accused and that he has not produced them in Court in spite of the notices served on him. The prosecution was therefore entitled to lead secondary evidence of the contents of the wage records for the relevant period."

The finding that the wage records were in the appellant's custody is based on a misdirection as to the evidence given by Mr. Ganegoda; for it appears from the record of the evidence that he has not said anything to the effect that the books that were brought to his office on the 8th August, 1954, (or any books) were removed by the appellant. At the time when the learned magistrate made his order allowing the prosecution to adduce secondary evidence of the contents of the wage record in question there was no material before the court to support a finding that the original was shown or appeared to be in the possession or power of the appellant; there was only a denial by the officer conducting the prosecution of an allegation made by counsel for the defence that the wage records had been "left at the Department of the Commissioner of Labour for inspection". For these reasons the contention that the document P13 was improperly admitted in evidence must be upheld, and that document cannot be relied upon by the respondent in support of the conviction.

It appears that in November, 1953, the minimum rate of wages applicable to each of the three workers mentioned in the charge was a time-rate of Rs. 1.79 for a normal working day of 9 hours and 28 cents an hour for overtime work. The prosecution relied mainly on the document P13 to

prove the quantity of time-work done by each of the three women during the period 23rd to 28th November, 1953, and the rate at which they were paid. The three women themselves were called as witnesses for the prosecution, and it is contended by the learned crown counsel that even if P13 is left out of consideration their evidence, which was given on the 30th March, 1955, is sufficient to support the conviction.

Jano Silva, who is the worker to whom the first count relates, stated that she had been working as a labourer at the appellant's mill from the 3rd November, 1953, and was still employed there, that she had always been paid at the rate of Rs. 1.50 a day and no more, and that she had not been paid any overtime wages. She admitted, however, that she could not say on how many days she worked during the period in question, and she did not claim to have worked or to have been at the mill on even a single day that week. She said "I start work at 6.30 a.m. and work till 5.30 p.m. . . . We have one hour for our meals"; but she did not say that in the material period, too, which was sixteen months earlier, there were her hours of work or even that she was present at the mill on any day in that period.

Although this witness alleged in her evidence that right up to the 30th March, 1955, she had been paid at the rate of Rs. 1.50 a day, she admitted that when she was paid on Saturday the 12th March, 1955, her wages for the week that ended on that day she signed a receipt (D1) acknowledging that she had been paid at the rate of Rs. 1.87 a day. She explained that she signed it because the appellant said that otherwise he would refuse to give her work. In re-examination she said that she could not read the document and that her sight was "not good". In further cross-examination she admitted that she could "read and sign in Sinhalese". D1 is written and signed in that language.

The 12th March, 1955, was the day on which the trial began. The appellant had appeared before the magistrate's court on the 5th March and pleaded not guilty to the charge, and on that day the magistrate had fixed the trial for the 12th March and ordered the issue of summonses requiring the prosecution witnesses to attend at the trial. It so happened that the 12th March was also a pay-day. According to the appellant's evidence that was the first occasion on which he had obtained receipts from the workers. "I am aware", he said, "that they had gone and complained that they had received Rs. 1.50 as wages. I took receipts in order to safeguard myself".

Winifreda Fernando, to whom the second count relates, stated that she had been working as a labourer at this mill from August, 1953, but she did not say whether she did or did not do any work or attend at the mill during the week in question. She said that her wages had always been Rs. 1.50 a day, and that she had never been paid overtime wages. She too stated what her hours of work were at the time of the trial but not what they had been in the period 22nd to 28th November, 1953, if she did do any work that week. She too had signed a receipt (D2) on the 12th March, 1955, acknowledging that she had been paid at the rate of Rs. 1.87 a day. This document too has been written and signed in Sinhalese.

When this witness was cross-examined about the receipt D2 she said :  
 " This bears my signature. In this I have been paid Rs. 1.87. I was paid only Rs. 1.50 a day. I am unable to read this. I can read Sinhalese. I did not write this but I only signed it. Through fear I signed the document. The accused told us that he would not pay us if I did not sign it. "

She further said :

" I was not aware that I was signing a receipt for Rs. 1.87. I thought that I was signing for my weekly salary. Before this we did not sign such documents. When I questioned him the accused said that he suspected us. He said that he would not make payments without receipts. "

Julihamy, to whom the third count relates, said that she had been " working in the mill from the day it started ", that she had been " working from 1953 " and that " in November 1953 also " she worked there. There is nothing in those vague statements to show clearly that she worked at the mill or was present there on any of the days in the period 22nd to 28th November, 1953. Her evidence as to what she was paid referred only to the rate at which she was being paid at the time of the trial. She too signed a receipt (D3) on the 12th March, 1955, acknowledging that she had been paid at the rate of Rs. 1.87 a day and she admitted that she could read Sinhalese, the language in which the document was written and in which she had signed it. Her explanation was that she signed it because she was " in a hurry to go home ", that she " was made to understand that this was a receipt for weekly wages ", and was also told that she would not be paid her weekly wages if she did not sign it.

The prosecution also adduced, through Mr. Ganegoda, evidence to the effect that the appellant had committed other offences besides those alleged against him in the present charge. It was elicited from this witness in examination-in-chief that at an inspection of the mill held by him on the 11th November, 1953 (before the period to which the charge relates) he had questioned Jane Silva and Winifreda Fernando and they had made statements to the effect that they were being paid wages at less than the minimum time-rate, and that Winifreda's statement was confirmed by Julihamy. He also stated, in examination-in-chief, that on that occasion he " examined the wages record and found that women had been underpaid ". All these items of evidence were inadmissible, both on the ground that they were not relevant to the charge and on the ground that they constituted inadmissible hearsay.

The prosecution also put in evidence a letter dated the 14th December, 1953, (P14) from the appellant to Ganegoda in which the appellant had said that " the wages paid at the rate of Rs. 1.50 per day " were wages " paid to the boys and girls and not to men and women ". (Jane, Winifreda and Julihamy were 46, 48 and 38 years old, respectively, and were entitled to be paid at the rate applicable to adults.) Referring to this statement made by the appellant Mr. Ganegoda said in his examination-in-chief " He says that Jane and Winifreda are girls ". There is no such

statement in the letter itself, however, and there is no evidence that warrants a view that the appellant admitted that Jane and Winifreda were two of the workers paid at the rate of Rs. 1.50 a day at the material time (or, indeed, at any time).

It seems clear that the learned magistrate's findings that the three women witnesses worked, or were present at the mill for work, during the period specified in the charge and that in respect of that period they were paid wages at less than the minimum rate were based mainly upon the document P13, which was improperly admitted in evidence. It was contended by the learned crown counsel that even so the conviction should be affirmed on the ground that under section 42 of the Ordinance the burden was on the appellant to prove that he had paid those workers wages in accordance with the provisions of section 21. I am unable to accept this contention. What section 42 provides is that

on the prosecution of any employer under sub-section (1) or sub-section (2) of section 39 for the failure to make any payment to any worker, the burden of proving that the payment was made shall lie on the employer.

But an issue as to whether the employer has failed to make any particular payment to the worker can arise only when it has been proved that he had become liable to make that payment. The evidence that has been properly admitted at the trial is insufficient to prove that any of the workers mentioned in the charge had become entitled to payment of wages in respect of the period 22nd to 28th November, 1953. There was therefore no burden on the appellant to prove that he had paid them in respect of that period wages at not less than the minimum rate.

I set aside the conviction of the appellant and the sentence passed on him.

*Conviction set aside.*

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