1944 *Present:* **Soertsz J.**

WRIGHT, Appellant, *and* RAMANATHAN, Respondent.

165—M. C. Kandy, 10,566.

Labourer—Employment of labour on terms of employment less favourable than the recognized terms—Defence of accused—Offer of material benefits to labour to make good difference in terms—Payment of daily average wage essential—Emergency Powers Defence Acts, 1939 and 1940.

Where the accused was charged under paragraph 11 (1) of the Essential Services (Avoidance of Strikes and Lockouts) Order in that he employed labourers on terms of employment less favourable than the recognized terms and conditions of employment for the district concerned.

Held, that it was no defence to the charge that the labourer received other material benefits in virtue of which the difference was made good to him and that in the result the terms and conditions were not less favourable.

Held, further, that regardless of the number of hours work a day contracted for between the employer and the labourer the minimum daily wage fixed for the working day should be paid to the labourer.

Attorney-General v. Urquhart (*34 N. L. R. 393*) followed.

APPEAL from a conviction by the Magistrate of Kandy.

H. V. Perera, K.C. (with him *E. F. N. Gratiaen* and *D. W. Fernando*), for the accused, appellant.

Mervyn Fonseka, S.-G., K.C. (with him *H. W. R. Weerasooriya, C.C.*), for the complainant, respondent.

Cur. adv. vult.

May 15, 1944. SOERTSZ J.—

It is undisputed and, indeed, indisputable that the appellant has been a considerate and even generous employer, and that his labourers have been more than satisfied with the wages he paid them, and with all he did for them. But, the case for the Crown is that an employer must be just according to the requirements of the law, before he is generous in accordance with his own views and, it is contended that in that respect, the appellant has been found wanting.

There were three charges brought against him, and the substance of each charge is that in respect of the labourer named in it, he had contravened paragraph 11 (1) of the Essential Services (Avoidance of Strikes and Lockouts) Order, in that he employed that labourer on terms and conditions of employment less favourable than the recognized terms and conditions of employment for the district concerned. These charges relate to the terms and conditions of employment in the month of March, 1943. Paragraph 11 (1) of the Order under which the charges were laid in a defence regulation made under The Emergency Powers Defence Acts, 1939, 1940 is in these terms:—

> "No employer shall, in any district, employ any workman in any essential services in that district on terms and conditions of employment less favourable than the recognized terms and conditions of employment for that district."

An Order made by the Governor in the exercise of powers duly vested in him defines " essential services " and the part of that definition relevant to this case is the part that declares that those " services are of public utility, essential for the prosecution of the war and essential to the life of the community " which consist " of work or labour of any description whatsoever rendered or performed by persons engaged or employed in or in connection with . . . . all business, or undertakings concerned in the production, manufacture, sale or exportation of tea, rubber, or plumbago."

The appellant's estate is a rubber estate, and in the case of the labourers Suppen and Weerappen, it is admitted that their work or labour was connected with the production of rubber. They were tappers. The case of Palaniandy, however, is disputed. It is asserted that he was engaged, at least in the month of March, 1943, that is to say the month to which the charge relates, in food production and not as a tapper and that he was not in an essential service in the relevant period. But the evidence is clear that he was, primarily and essentially, a rubber tapper, although from time to time he appears to have done such other work as he was directed to do. He had been on this estate all his life, and long before food production became one of the enterprises on the estate. Having regard to the evidence, as a whole, there can, I think, be no doubt that the Crown has established that part of its case which rested on the allegation that these three labourers were employed in essential services.

The next question is whether they were employed " on terms and conditions less favourable " than those " recognized for that district ". Now, sub-paragraph (2) of paragraph 11 of the Order that applies in this case says what the phrase " recognized terms and conditions of employment " means. It means—

(*a*) the terms and conditions of employment set out in an award made by a District Judge where there has been an award;

(*b*) the terms and conditions set out in an agreement, reached on a dispute settled in that district;

(*c*) where there has been no award, or agreement, or settlement, " the terms and conditions on which a workman in that district is *ordinarily* employed in the same capacity or in some similar capacity."

So far as this case is concerned, it is the last clause (*c*) that matters, and the real issue between the Crown on the one side, and the appellant, on the other, is whether the terms and conditions on which the appellant employed these three men, in the month of March, 1943, were less favourable than those on which rubber tappers in that district were ordinarily employed.

The case for the Crown is that the terms on which they were ordinarily employed in that district were that they received as wages, fifty-five cents a day, for each and every wroking day of eight hours excluding a mid-day meal adjournment of one hour, together with a " dearness allowance " of thirty-eight cents a day, and were also entitled to the benefits and amenities provided for them in virtue of certain Legislative

Enactments relating to the supply of rice, the rendering of maternity and medical aid, education and things like that. In regard to those benefits and amenities, it is beyond question that the appellant has more than done his part. The point in issue is thus reduced to this—were the other terms and conditions of employment, that is to say the terms of remuneraction in the circumstances of this case, less favourable than those recognized in the district as applicable to labourers engaged in the capacity in which these three men were employed?

The burden is, of course, on the Crown to establish, beyond reasonable doubt, the recognized terms and conditions, and to show that the terms and conditions of employment adopted by the appellant were less favourable. The defence submits that the case for the Crown fails in both these respects. It is said that, upon the evidence led, the recognized terms and conditions for the district have not been sufficiently established inasmuch as (*a*) that evidence takes into account an illegally imposed dearness allowance; (*b*) includes the inadmissible testimony of the Labour Controller; and (*c*) in regard to the testimony of the Superintendents of Wariyapola, Ambalamana, Haloya and Galaha Estates, that it is nothing more than evidence of the terms and conditions of employment in four instances out of a great multitude of estates, and that as such it cannot be said to establish the recognized terms and conditions for a whole district any more than one swallow can be said to make a summer.

The objection to the legality of the dearness allowance is based on section 10 of the Minimum Wages Ordinance (Cap. 114). Sub-section 10 (1) declares, *inter alia*, that—

> " A minimum rate of wages or a cancellation or variation thereof shall not take effect until it has been approved by the Governor or published in the *Gazette*."

Sub-section 10 (2) goes on to say—

> " A notification in the *Gazette* to the effect that any minimum rate of wages has been fixed, varied, or cancelled with the approval of the Governor under this Ordinance, shall be judicially noticed, and shall be conclusive proof of the fact and the date on which the minimum rate of wages or variation or cancellation thereof takes effect."

Now, in this instance, in regard to the dearness allowance which, after all, is an integral part of the minimum wages, P 6 shows that what the Governor did was to approve such allowance " as may be fixed by the Controller of Labour by notification in the *Gazette* ", with a direction that it was to be " based on the cost of living index number . . . . ascertained by the department of labour. " At the time of this notification, therefore, a part of the minimum wages remained to be ascertained. It had, certainly, not been fixed. The Ordinance provides that the minimum rate that shall be judicially noticed and shall be conclusive proof, is the rate fixed, varied, or cancelled and approved by the Governor. The power to approve when vested in an authority necessarily implies a power to withhold approval and the question whether to approve or not to approve calls for the exercise of independent judgment by the authority concerned, and there is no opportunity for that when approval is given in advance. I am, therefore, inclined to agree with the submission for

the defence that the procedure adopted for fixing that part of the minimum wages was irregular, and it would have been necessary to consider the effect of that irregularity if this prosecution had arisen under the Minimum Wages Ordinance. But that irregularity has very little bearing, if any at all, in a case in which the charges are laid under the Essential Services Order in which we are concerned with the *de facto* terms and conditions of employment recognized in the district.

In regard to the evidence of the Controller, for the Crown, the Solicitor-General sought to bring it within the exception to the hearsay rule relating to official certificates and letters or returns of public officers and he relied on a passage from the speech of Viscount Haldane in the case of *Local Government Board v. Arlidge*[1]. But I cannot agree that this impeached evidence comes within the exception invoked, or that the citation from the case in the House of Lords has any bearing on the point. For one thing, the evidence in question is not documentary evidence in the form of certificate, letter, return, or reward by a Public Officer relating to matters rendered provable in that way. For another, all that sub-paragraphs (3) and (4) of paragraph 11 of the Order provide is that employers of labour shall be bound to furnish the Controller with information and particulars in regard to terms and conditions of employment when requested to do so, and that the Controller himself shall be bound, in the light of the information he has so gathered, to acquaint employers who seek information, with those terms and conditions. There is no provision, express or necessarily implied, requiring an employer to seek such information or making the information furnished by the Controller conclusive, or sufficient, or *prima facie* evidence on the point. The passage from the speech of Lord Haldane deals with quite a different matter. It would have been to the point if the information gathered by the Controller and communicated to the employer seeking information had been given evidentiary value by the Ordinance, and objection had been taken to it on the ground that the information had not been gathered in the way judicial tribunals gather information.

In my opinion, therefore, the evidence of the Controller was inadmissible. It was, admittedly, hearsay and could save itself from rejection only by coming within some recognized exception. But there is no such exception.

There remains the evidence of the four Superintendents and of the Inspector of Labour. The evidence of the former is, undoubtedly, direct evidence and it establishes that on the four estates in their charge, which are large estates employing considerable labour forces, among the recognized terms and conditions of employment is the payment of the minimum wage fixed by notification at 93 cents. The question, then, is whether on that evidence, it can be said that the recognized terms and conditions *for the district* have been established. It was not contended that the Superintendents or similar officers of all the estates in the district or even that the majority of them should have been called, but it was said that officers from a considerable number of the estates in that district should have been called to speak to the terms and conditions of employment before it could have been claimed that they had been established.

[1] *(1915) A. C. 120 at page 133.*

The proof of a fact is hardly ever made to depend on the number of witnesses called. It must depend on the quantity and the quality of the evidence in the particular circumstances of a case. In this case, we have it established that, by notification in the *Government Gazette*, all estate owners were informed that the minimum wage had been fixed at 93 cents for a working day of eight hours with a mid-day break of one hour, and it seems to me that, in the light of common sense and experience to which a Court may always resort, it may justifiably presume that the requirement in regard to minimum wages purporting to have legislative force would generally be regarded rather than disregarded. In addition to that presumption there is here the positive testimony of four competent and reliable witnesses from different parts of the district to the effect that they, and so far as they know, others have adopted these wages so fixed as part of the terms and conditions of employment. It was open to the defence conveniently to lead evidence to show that there were estates in the district that did not conform to the rates of wages notified in the *Gazette*. It led no such evidence and, once again, in the light of common sense and experience, a Court may presume that such evidence was not led as it was not forthcoming, and that it was not forthcoming because estates in the district with the exception of the appellant's estate, if nothing more. made a virtue of necessity and complied with the requirement.

There is also the evidence of the Inspector of Labour who visits the estates in the district in the course of his official duties, and he says that he is aware that the requirement in regard to minimum wages was generally obeyed, and that in the few instances in which he found it had not been complied with, the difference in the rates of wages was made good when attention was called to it.

On all this material, the Magistrate came to what appears to me to be a correct conclusion when he found that 93 cents a day for a male labourer was a recognized term and condition of employment.

The next question for consideration is whether the terms and conditions, on which the appellant employed these three labourers, in the month of March, 1943, were less favourable than those recognized in the district.

It will be convenient to take the case of each labourer separately. To deal with Palaniandy first—the question arises whether Palaniandy was an adult. The Magistrate had evidence before him to show that he was, and he also had the advantage of seeing Palaniandy. He was quite satisfied that Palaniandy was an adult. I see no reason for taking a different view. Document X read together with document D 12 shows that he worked for 26 days in March and was paid Rs. 16. At 93 cents a day he should have been paid Rs. 24.18. There is no evidence that he himself received any material benefits, other than those he was entitled to receive under other Legislative Enactments, to enable me to say that although he was not paid the minimum wages recognized in the district, there were other material benefits he received in virtue of which the difference was made good to him and that, in the result, his terms and conditions of employment were not less favourable. The fact that the appellant gave gifts to labourers on their coming of age, getting married and on occasions of that kind and also permitted such of them

as required vegetables, arecanuts, &c., to help themselves so far as the trees and plantations on the estate permitted, certainly shows that the appellant treated his community of labourers extremely well, but that cannot be held to compensate Palaniandy for the difference between the wages he received and the wages the law said his minimum wages should be.

In regard to Weerappen, the same documents show that he worked 27 days and received Rs. 16.55. He should have been paid Rs. 25.11. In regard to the difference being made good to him in other ways, the observations I made in dealing with Palaniandy apply to him too.

Then, there is the case of Suppen. According to the documents already referred to, he worked 29 days and received in all Rs. 28.00½. At the minimum daily wages rate, he would have received Rs. 26.97 so that, apparently, he was better off than if he had been paid according to the letter of the law, and it is contended for the appellant with an appearance of plausibility that the terms and conditions of Suppen's employment cannot be said to have been less favourable than those recognized in the district. But, the fallacy underlying that contention is that it involves a confusion of terms in that a daily *average* wage is treated as interchangeable with a daily minimum wage. The correct way of determining the question of favourableness is not to divide the sum Suppen received for March by the 29 days he worked in that month, but by multiplying the minimum daily wage of 93 cents which had become a recognized term of employment in the district by 29. The view taken by the majority of the Bench in the case of *Atorney-General v. Urquhart*[1] leads to the conclusion that regardless of the number of hours work a day contracted for between the employer and the labourer, the minimum daily wage fixed for the working day had to be paid. That view not only binds me but is also the view with which I find myself, respectfully, in complete agreement. In that view of the matter, it is scarcely to the point to say that these labourers could have earned wages at the daily rate of 93 cents or more if they chose to work the full working day, particularly where the evidence shows as it does in this case that the labourers were not informed of their rights and duties under the law, the appellant being content to accept and pay for such work as they chose to do. The evidence also shows that on other estates when labourers failed to do work sufficient to earn 93 cents a day, the difference was made good to them. Economically, and even morally, that may be a vicious practice, but it is a result of a law of the land. For these reasons, I find myself driven to the conclusion that the charge in respect of Suppen has also been established, for if he had been paid 93 cents on those days on which he received less than 93 cents, he would have received more than the sum of Rs. 28.00½ which was paid to him.

As I observed at the very outset, everyone concerned is agreed that the appellant was, in his own way, a very just and even generous employer, and it may well be that his methods of dealing with labourers would have served them and the state at least as well, if they had been adopted by the Legislature. But, the Legislature, unable, I suppose, to rely on the altruism of all employers, thought fit to adopt other methods and to

[1] *34 N. L. R. 393.*

give those the sanction of law. Once that was done, private opinions and personal predilections had to give way for the sake of law and order, or the result must be that every man would be his own measure.

There remains the question of sentence. The Legislature has fixed severe penalties for the breach of Defence Regulations, and that is easily understood, but in all the circumstances of this case, it seems hardly necessary to insist upon the punitive element that a sentence generally involves. It would, I think, be sufficient to pass a sentence that would serve to re-assert and vindicate the law.

I would, therefore, while affirming the covictions, vary the sentence on each charge to a nominal fine of ten rupees.

Affirmed.