

1957

*Present : K. D. de Silva, J.*

E. P. SENEVIRATNE, Appellant, and I. J. DEEN (Inspector of Labour), Respondent

*S. C. 251—M. C. Badulla-Haldumulla, 21,303*

*Charge—Error in reference to penal section—Curability—Wages Boards Ordinance, No. 27 of 1941, as amended by Ordinances Nos. 4 of 1943, 22 of 1945 and Act No. 5 of 1953, ss. 43A, 52 (g)—Criminal Procedure Code, ss. 171, 347 (b) (2).*

Failure to state in a charge the correct penal section is something more than an error referred to in section 171 of the Criminal Procedure Code.

Where a person has been charged under section 52, instead of section 43, of the Wages Boards Ordinance, a conviction under section 43 cannot be supported by resorting to the provisions of either section 171 or section 347 (b) (2) of the Criminal Procedure Code.

**A**PPPEAL from a judgment of the Magistrate's Court, Badulla-Haldumulla.

*M. M. Kumarakulasingham*, for the accused-appellant.

*P. Weerasinghe*, Crown Counsel, for the Attorney-General.

May 31, 1957. DE SILVA, J.—

In this case, the appellant, the proprietor of Mentenne Estate, Haputale, and his Superintendent, the second accused, were charged on two counts under Section 52 (g) of the Wages Boards Ordinance No. 27 of 1941, as amended by Ordinances Nos. 4 of 1943, 19 of 1945, 22 of 1945 and the

Wages Boards (Amendment) Act No. 5 of 1953, in that they failed to allow to workers V. Palaniyandy and P. Annavi workers' holidays with remuneration, in terms of certain Gazette notifications referred to in the charges.

The learned Magistrate found both accused guilty and imposed a fine of Rs. 200 on the appellant and Rs. 25 on the second accused. From this conviction, the first accused has taken this appeal.

Mr. Kumarakulasingham, his counsel, contended that the prosecution had failed to establish that the holiday cards P6B and P6C referred to V. Palaniyandy and P. Annavi. I am not prepared to agree with that submission. There is ample evidence to show that the cards in question referred to the two individuals mentioned in the charges 1 and 2. Mr. Kumarakulasingham also submitted that the appellant had been convicted under the wrong section. After the case for the defence was concluded, the Proctor who appeared for the 1st accused submitted to the Magistrate that the appropriate penal section is Section 43 and not 52. The learned Magistrate, however, appears to have disagreed with that submission and convicted both accused under Section 52 (g). However, in the reasons given by him in support of the conviction, the Magistrate has agreed that the accused were wrongly charged under Section 52 (g), but he was of the opinion that the accused were guilty of an offence under Section 43 (A). He, however, relied on Section 171 of the Criminal Procedure Code and held that as the accused were not misled by the error, the conviction should be allowed to stand. In my view, Section 171 is not applicable to the circumstances of this case. Failure to give the correct penal section is something more than an error referred to in that section.

Learned Crown Counsel concedes that the appropriate section under which the accused should have been charged is Section 43. Section 52 (g) refers to a breach of any provision of the Ordinance or any regulation. In this case, the accused were not charged with the commission of a breach of any provision of the Ordinance or of any regulation framed under it. The offence that the accused had committed was a failure to comply with the provisions of a decision of the Wages Board. The penalties provided by Section 52 are higher than those contemplated in Section 43. The learned Crown Counsel asked me to act under Section 347 (b) (2) of the Criminal Procedure Code and alter the verdict maintaining the sentence. He relies on the case of *Meera Natchiya v. Marikar*<sup>1</sup>.

In the circumstances of the case, I am not prepared to proceed under Section 347 (b) (2). I would, therefore, set aside the conviction of the appellant and acquit him.

Acting in revision, I set aside the conviction of the 2nd accused also and direct that the fine imposed on him, if already paid, be refunded to him.

*Appeal allowed.*

<sup>1</sup> (1940) 41 N. J. R. 319.