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Present: De Sampayo J.

WILLS v. SHOLAY KANGANY.

1,527—P. C. Matale, 4,236.

Indian labourer charged with criminal misappropriation—Accused bailed out by surety on condition that accused should stay with surety—Accused not working on his estate when out on bail—Accused charged under s. 11 of Ordinance No. 11 of 1865 with neglecting to work—Effect of bail on contract of service—Criminal Procedure Code, s. 40—Warrant in the first instance.

The accused, an estate kangany, who was charged by his master with criminal misappropriation of a sum of Rs. 200, was arrested and bailed out on June 25 by a surety who stood bail for him on the express condition that he should stay with him. The accused did not work on the estate from June 25, and the superintendent charged him, under section 11 of Ordinance No. 11 of 1865, with having failed and neglected to work on the estate from June 25 to July 15.

Held, that the accused had a lawful excuse, under the circumstances, for not working on the estate.

The effect of granting bail is not to set the accused free, but to release him from the custody of the law and to entrust him to the custody of his sureties, who are bound to produce him at a specified time and place. The sureties may seize the principal at any time and discharge themselves by handing him over to the custody of the law again.

The effect of bail is not so much to suspend the contract of service as to furnish, according to circumstances, a lawful excuse for not attending to those obligations.

Observations on the impropriety of issuing warrant on insufficient materials.

Maclean v. Appan Kangany [1] explained.

THE facts are set out in the judgment.

Bawa, for complainant, appellant.

No appearance for respondent.

October 5, 1915. De Sampayo J.—

The complainant, Mr. Wills, who is the superintendent of Opalgalla estate, charged Sholay Kangany, formerly of that estate, under section 11 of the Ordinance No. 11 of 1865, with having failed and neglected to work from June 25 up to July 15, 1915. He appeals from an order by which the Acting Police Magistrate acquitted the accused.

[1] *(1898) 2 N. L. R. 54.*

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The circumstances of the case are unusual, and raise a question of law of a novel character. The complainant charged the accused in another case with having misappropriated a sum of Rs. 200, which had been given to him as an advance to recruit coolies. The accused was arrested on that charge and brought to Court. According to the evidence of the complainant, the accused was bailed out on June 25 and returned to the estate on June 26, but was not seen on the estate since the later date. How he could be charged with neglecting to work on the estate on June 25, I cannot conceive. He returned to the estate in the course of the day on June 26, but he does not appear then to have been asked to do any work, and he apparently came there for a temporary purpose. I cannot see that the charge, so far as those two days, especially June 25, are concerned, can in any event be sustained. From the evidence of Mr. Wills, and from the correspondence filed in this case and certain petitions given to the Police Magistrate, it is apparent that for some time there was considerable tension between the superintendent and the accused, especially in connection with the matter of the Rs. 200 advance. The accused then gave notice to quit on June 16, and the superintendent in turn charged him on June 20 with criminal misappropriation of the Rs. 200 and had him arrested. During the period, to which the present case relates, the accused appears to have been on bail in connection with the previous case of criminal misappropriation. The Magistrate held that during this period the accused must be taken to have still been in legal custody, and that the contract of service was suspended and the accused could not be charged with neglecting to work.

The Magistrate relied on the judgment of Bonser C.J. in *Maclean v. Appan Kangany.*[1] But in that case the cooly was in the actual custody of a police officer after arrest, and it was held that he could not be said to be " in the service of his employer " within the meaning of section 11 of Ordinance No. 11 of 1865. The learned Chief Justice no doubt spoke of the contract of service being suspended, but it is evident that he used the expression only for the purpose and in the sense just mentioned. In this case, though the accused was not in actual custody, the Magistrate thought that the accused had been delivered by the Court to the custody of the bailsman, and that the result, therefore, was the same as if he had been in the custody of the officers of the law. Here, I think, some qualification requires to be observed. The legal significance of " bail " is rightly stated by the Magistrate, but I cannot agree that when a servant is arrested for an offence and is released on bail he is in all cases and for all purposes freed from his obligations as a servant. The effect of granting bail undoubtedly is not to set the accused free, but to release him from the custody of the law and to entrust him to the custody of his sureties, who are bound to produce

[1] *(1896) 2 N. L. R. 54.*

him at a specified time and place. See *The Laws of England*, *vol. IX., p. 323, note (r)*. Under the English law the sureties may seize the principal at any time and discharge themselves by handing him over to the custody of the law again. The law in Ceylon is just the same in this respect, for the Criminal Procedure Code, section 400 (4), gives to sureties this power of arrest. The question, however, is, What is the effect of bail upon the accused's obligations to his employer? In my opinion, the effect is not so much to suspend the contract of service, as to furnish, according to circumstances, a lawful excuse for not attending to those obligations. If, however, the servant on being released on bail goes back to his employer and resumes his work, it cannot be said that pending his trial his contract of service is suspended, with the result that he is not liable for such offences as neglect or misconduct under the Ordinance No. 11 of 1865. But in this case the accused gave evidence to the effect that his surety had stood bail for him on the express condition that he should stay with him, which he accordingly did on his release. The Magistrate does not discredit this evidence, and the accused's statement, in view of all the circumstances, does not appear to me to be improbable. I think the order of acquittal is justified on this ground, though not on the ground stated by the Magistrate.

Before disposing of this appeal, I wish to refer to a part of the proceedings which appears to be extraordinary. The complaint was presented to Court by Mr. C. Ariya Nayagam, proctor for the complainant. It is in a printed form surmounted by the royal coat of arms. I do not know what right Mr. Ariya Nayagam has to use the royal coat of arms on his professional documents, but let that pass. A more serious matter is the evidence on which a warrant was obtained in this case to arrest the accused. On the back of the complaint is also a printed form signed by the complainant, and containing some stereotyped statements usually required to be sworn to for the purpose of obtaining a warrant. It concludes with the statement: "His (accused's) presence cannot be secured on summons." It is for the Court, and not for the complainant, to come to such a conclusion, and for that purpose the complainant must swear to the facts, of which, however, there is an entire absence. At the bottom of the form even the order to be made by the Magistrate is printed, and the Magistrate in this case has obediently signed it. The issue of a warrant is a serious matter, and the Magistrate should exercise his own independent judgment on the facts before he does this judicial act. In every case it is the duty of the Magistrate to see that the complainant or other person, when giving what purports to be oral evidence, gives it consciously and with a due sense of his own responsibility, and that he not merely adopts general statements already printed and furnished to him by the proctor. The Magistrate should himself record that evidence from the witness's own mouth, and should in no case

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recognize printed matter contained in forms which the proctor may keep in stock. I think the practice followed in this case is reprehensible, and I hope not to see another instance of it.

For the reason above given the order appealed from is affirmed.

Affirmed.