21/89

SUPREME COURT OF VICTORIA — FULL COURT

CHUGG v PACIFIC DUNLOP LIMITED

Kaye, Beach and Ormiston JJ

31 January, 1-3 February, 5 May 1989

OCCUPATIONAL HEALTH AND SAFETY – SAFE SYSTEM OF WORK – EMPLOYEE CARRYING OUT MODIFICATIONS TO PART OF A MACHINE – EMPLOYEE KILLED – PRACTICABILITY OF MAKING WORKPLACE SAFE – WHETHER ONUS OF PROVING ELEMENT OF PRACTICABILITY RESTS ON EMPLOYER OR INFORMANT – DANGEROUS MACHINERY – FORESEEABILITY – WHETHER MACHINERY ADEQUATELY GUARDED – COSTS – INFORMANT SUCCESSFUL IN REGULATORY OFFENCE NOT SUCCESSFUL IN STATUTORY OFFENCE – WHETHER OPEN TO AWARD INFORMANT HALF OF THE COSTS OF PROCEEDINGS: *OCCUPATIONAL HEALTH AND SAFETY ACT* 1985, SS4, 21, 39, 40, 47, 48; *OCCUPATIONAL HEALTH AND SAFETY (MACHINERY) REGULATIONS* 1985, R10; *MAGISTRATES (SUMMARY PROCEEDINGS) ACT* 1975, SS97, 168.

Section 21(1) of the *Occupational Health and Safety Act* 1985 ('Act') provides:

"An employer shall provide and maintain so far as is practicable for employees a working environment that is safe and without risks to health."

HELD: Per Kaye and Beach JJ (Ormiston, J agreeing).
(1) As a matter of construction of s21 of the Act, the practicability of providing and maintaining a safe place of work is not a qualification to the duty of an employer but an essential element of the offence. Accordingly, the provisions of s168 of the *Magistrates (Summary Proceedings) Act* 1975 do not operate so as to relieve an informant from proving the practicability element, that is, that it was practicable for an employer to make the workplace safe.

***Nimmo v Alexander Cowan and Sons Ltd* (1968) AC 107; and**

***Kingshott v Goodyear Tyre and Rubber Co Australia Ltd (No.2)* (1987) 8 NSWLR 707; [1987] Aust Torts Reports 80-105, distinguished.**

(2) If it is foreseeable that a machine or part of a machine might cause injury to a person if it is operated whilst not guarded, there is a duty upon the employer to ensure that the machine or part thereof is guarded. Per Kaye and Beach JJ (Ormiston J dissenting): Where a conveyor had been moved to one side to enable work to be carried out on the machine, and an employee was killed whilst carrying out modifications to rectify a problem which had arisen, it was open to a Magistrate to conclude that the machine or part thereof was dangerous and that the employer had failed to provide an adequate guard for it.

(3) Where informations are heard together, generally speaking it is more appropriate when determining the question of costs to look at the quantum of costs generally rather than to apportion them between each information. Where a magistrate dismissed six informations alleging a breach of the Act but found one information proved in respect of a breach of the Regulations, it was open to the Magistrate to allow the informant one half of his total costs of the proceedings.

KAYE and BEACH JJ: *[After setting out the nature of the charges, the results of the proceedings, the circumstances leading up to the commission of the alleged offences, relevant statutory and regulatory provisions, the grounds of the orders nisi, and three decisions said to be relevant to the matter, their Honours continued]* ... **[14]** In our opinion, there are significant differences between the Victorian statute and both the English *Factories Act* 1961 with which the House of Lords was concerned in *Nimmo's case* (1968) AC 107 and the New South *Wales Shops and Factories Act* 1962, which was the subject of the Court of Appeal's decision in *Kingshott's case* (1987) 8 NSWLR 707; [1987] Aust Torts Reports 80-105. The differences render inapplicable some of the considerations upon which the majority judgments in both cases were based.

When considering these differences, and for the purposes of interpreting s21 of the Victorian statute, it is necessary to take into account other provisions of the statute. Of these the first and perhaps the most important is s47, by the operation of which a contravention of

or a failure to comply with s21 constitutes an indictable offence, punishable by a fine. It follows that not only does s21 impose a duty upon an **[15]** employer but also breach of its provisions renders an employer liable to be indicted for an offence under the section. The criminality of such a breach is emphasized by s28 which provides that any contravention of any provision of Part III of the Act does not confer a right of action in any civil proceedings. Secondly, provisions similar to s47 creating an indictable offence for breach of duty in relation to the safety of the workplace imposed on the employer are not to be found in either the English *Factories Act* 1961 (cf. s155 and 164 *ibid*) or the New South Wales *Factories Shops and Industries Act* 1962 (cf. s72 *ibid*).

Thirdly, in our view, on its proper construction, an integral part of the obligations imposed by s21 on an employer is to provide and maintain for its employees a workplace that is safe so far as is practicable. The requirement of practicability is an integral part of the employer's duty. It follows that an essential element of the offence against s21 is the practicability of providing and maintaining a safe workplace. We adopt as apposite to the construction proper to be placed on s21 the passage of McHugh JA's judgment at p728 concerning the meaning of s40 of the New South Wales Act which we have hereinbefore quoted.

Fourthly, the fact of possession by the employer of a greater knowledge of the practicability of making and maintaining the workplace safe than either the injured employee or the widow of a deceased employee might possess is not a relevant consideration for the purpose of construing s21 of the Victorian Act. A proceeding against **[16]** an employer charging an indictable offence arising out of breach of s21 is brought by a Minister of the Crown or by an inspector duly appointed under the Act; s48(1). Consequently all the power, authority, knowledge and resources of the State of Victoria are available to an informant, whether the Minister or an inspector, for the purposes of securing and advancing evidence for the prosecution of an information. In addition, the wide powers exercisable by an inspector under s39(1) and (2) and s40(4) and the duty of the employer to provide every assistance to an inspector exercising these powers by s41 enables the prosecution to acquire knowledge of the practicability of providing and maintaining a safe workplace, at least equal to the knowledge of the employer.

A further matter relevant to the element of practicability is its defined meaning. By s4 "practicable" is defined in these terms.

> "'Practicable' means practicable having regard to—
> (a) the severity of the hazard or risk in question;
>
> (b) the state of knowledge about that hazard or risk and any ways of removing or mitigating that hazard or risk; and
>
> (c) the cost of removing or mitigating that hazard or risk."

In our view, because of the nature of the several matters set out in para. (a), (b), (c) and (d), what is practicable is not to be assessed subjectively according to the knowledge and circumstances of the employer, but rather it is to be determined objectively. Accordingly, in a **[17]** prosecution the informant, for the purpose of proving practicability, may apply knowledge acquired from all sources including those of the particular trade or industry of the employer. Consequently there are sound reasons for concluding that an informant may be more familiar with what is practicable than an employer.

It was submitted on behalf of the informant that the element of practicability is a qualification of the duty of an employer to provide and maintain a safe workplace, and, being a qualification, is required to be proved by him. This submission was based on the provisions of s168 of the *Magistrates (Summary Proceedings) Act* 1975 which is in these terms:-

> "168(1) Any exception, exemption, proviso, excuse, or qualification, whether it does or does not accompany the description of the offence in the Act, order, by-law, regulation, or other document creating the offence, may be proved by the defendant but need not be specified or negatived in the information.
>
> (2) Whether an exception, exemption, proviso, excuse, or qualification is specified or negatived or not no proof in relation thereto shall be required on the part of the informant."

Thus be the provisions of sub-s(2), if practicability is a qualification to the offence then the onus of proof falls on the employer.

The application of s168 depends upon the construction of s21, and particularly whether the matter of practicability is an essential element of the offence created by the section or a qualification to the offence. In *Barritt v Baker* [1948] VicLawRp 85; [1948] VLR 491 at 495; [1949] ALR 144 Fullagar J said of the operation of s214 of the *Justices Act* 1928 (now s168) *[Their Honours set out this passage of Fullagar J's judgment and also quoted a passage from the judgment of Adam J in* Harris v Macquarie Distributors Pty Ltd *[1967] VicRp 29; (1966) 13 LGRA 264; (1967) VR 257, 260 and continued]* ... **[19]** See also *Nimmo's case* at pp129-130 per Lord Wilberforce commenting upon the words "exception, exemption, proviso, excuse or qualification" in s16(d) of the *Summary Jurisdiction (Scotland) Act* 1954 and the passage from the judgment of McHugh JA in *Kingshott's* case at p730 which we have quoted.

In our view, as a matter of construction, the practicability of providing and maintaining a safe place of work is not a qualification to the duty of an employer but an essential element of the offence created by the section and therefore s168 does not operate to relieve the informant from proving the facts of practicability.

For these reasons, in our opinion, the Magistrate correctly held that the onus of proving the element of practicability was borne by the informant. Having withheld from leading any evidence in relation to this essential element of the offence charged, the informant failed to discharge the onus of proof. For these reasons we would discharge the informant's order nisi, regardless of any error made by the Magistrate in his further reasons for dismissing the informations as complained of under the remaining grounds.

We would do so regardless of, and without deciding whether, any error which might appear in the Magistrate's further reasons for dismissing the informations preferred under s21. We turn now to consider the order nisi obtained by the defendant in respect of its conviction for a breach of Regulation 10 of the *Occupational Health and Safety (Machinery) Regulations*.

[20] *[After setting out the terms of the information, part of the learned Magistrate's reasons for convicting the defendant, and the relevant grounds of the order nisi, their Honours continued]* ... The case for the defendant in relation to this particular information was that it was not open to the Magistrate to find that the hopper was a dangerous part of the mill on the day in question. The mill was not being operated that day. Everest was only making modifications to it to rectify the problem which had arisen concerning the pneumatic system. The defendant could not have reasonably foreseen that Everest would test the machine, that in the **[21]** process of testing it he would place his head and the upper portion of his body in the hopper, and that whilst in that position the machine would malfunction causing the hopper door to close thereby crushing him. It is next said that if the hopper was a dangerous part of the machine, the conveyor, when in position, was an adequate guard. The fact that it was not in position at the time the accident occurred is not to the point. The machine was not to be operated that day. The conveyor had been removed to enable work to be carried out on it. In that situation it could not be said that the defendant had failed to provide guards for the hopper section of the machine.

In *Dunlop Rubber Australia Ltd v Buckley* [1952] HCA 72; (1952) 87 CLR 313; [1953] ALR 65 the High Court was concerned to consider the provisions of s33 of the *Factories and Shops Act* 1912-1950 (NSW) which provided that the occupier of a factory shall securely fence all dangerous parts of the machinery therein. In dealing with the meaning to be attributed to the word "dangerous", Dixon CJ said at p319: *[Their Honours set out this passage from the judgment and continued]* ... **[23]** In our opinion the first matter for the Magistrate to determine as in fact he did was whether or not the hopper section of the mill was a dangerous part of the machine. In arriving at a decision in relation to the matter the Magistrate was required to determine (*inter alia*) whether the hopper was such in its character, location, method of operation and the like that in the ordinary course of human affairs danger might reasonably be anticipated from its use unguarded. As Lord Cooper made clear in *Mitchell's Case* the test is objective and impersonal.

In determining the matter, one must look at the part of the machine in question and ask if the machine, when operated whilst part of the machine is unguarded, could constitute a danger

to the operator of the machine or some person who comes in proximity to the machine? It is no answer for the employer to say "The machine is switched off" or "The machine will not be operated today". That would make an absurdity of the regulation. One must look **[24]** objectively at the machine and determine the matter by answering the question postulated.

In our opinion the evidence in this case was more than sufficient to justify the Magistrate concluding that the hopper door was a dangerous part of the machine. If the machine was operated whilst the hopper door was unguarded, there was always the risk that through lack of care or inadvertence the operator of the machine or some person in proximity to the machine might place his hand or some other portion of his body in the hopper and sustain injury in the event the hopper door suddenly closed.

As to the defendant's contentions that it was not reasonably foreseeable that Everest would test the machine, that in the process of testing he would place his head and the upper portion of his body in the hopper and that whilst in that position the machine would malfunction causing the hopper door to close thereby crushing him, we simply say that the question of foreseeability of danger does not relate to the actual accident which occurred but relates to the risk to life and limb posed by the machine itself and/or the part of the machine in question. In other words, it is no answer for an employer to say, "I could not have foreseen that an accident would happen in this particular way." If it is foreseeable that a machine or part of a machine might cause injury to a person if it is operated in an unguarded state, then there is a duty upon the employer to ensure that the machine or part of the machine in question is guarded. There was no dispute concerning the fact that at the time Everest was crushed in the hopper the hopper was unguarded. The case for the defendant was that it had **[25]** complied with the provisions of Regulation 10 by installing the conveyor which, when in position, operated as a satisfactory guard for the hopper. At some time prior to the accident it had been moved to one side to enable work to be carried out on the machine. In that situation, it was said that the defendant cannot be guilty of a breach of Regulation 10.

The case for the informant on the other hand was that as the conveyor was not in position at the relevant time there was no guard on the hopper at all: further that in any event the conveyor could not be categorized as a guard because of the ease with which it could be moved, thereby giving access to the hopper: and finally that there should have been an interlocking guard between the conveyor and the hopper door so that by moving the conveyor away from the hopper the power supply to the mill would be cut off.

In our opinion it was open to the Magistrate to find that the conveyor was not an adequate guard for the hopper. He may have made such a finding on one or more of the following bases. In the first place it was open to him to find that even when in position the conveyor did not constitute a guard by reason of the ease with which it could be removed from the front of the hopper. After Everest's accident the defendant took appropriate steps to have the conveyor bolted into position in front of the hopper, thereby preventing it from being moved unless it was unbolted. The Magistrate was entitled to find that in its unbolted state it did not constitute a guard at all.

In the second place, there was evidence before the Magistrate to the effect that it would have been quite **[26]** simple and inexpensive to provide an interlocking guard between the conveyor and the hopper door so that whenever the conveyor was moved away from the hopper the power to the mill would be cut off and the door could only be operated manually. The Magistrate was entitled to take the view that the absence of such an interlocking guard amounted to a failure to guard the hopper. It follows from what we have said that neither ground relied upon by the defendant has been made out and the order nisi in respect of the conviction should be discharged.

We turn finally to the orders nisi in respect of the order for costs. Although the Magistrate's order for costs was made in respect of the information brought pursuant to the regulations, there were in fact seven orders nisi before the Court, one in respect of each information. *[Their Honours set out the relevant grounds of the order nisi, s97(a) and (b) of the* Magistrates (Summary Proceedings) Act *1975 and Rule 157 of the* Magistrates' Courts Rules *1986, and continued]* ... **[27]** It is clear that a Magistrate has a general discretion to award such costs to the informant or defendant as he considers reasonable. The question for this Court to determine therefore, is whether or not the Magistrate erred in the exercise of that discretion in making the order he did in respect of the informant's

costs of the information brought pursuant to the regulations, and in refusing to make **[28]** any order in respect of the defendant's costs of the six informations which were dismissed.

It is clear from the material before this Court that in dealing with the question of costs the Magistrate was not concerned to make a separate assessment of the costs of each information, but he chose to deal with the costs of the proceedings as a whole and make the order he considered to be appropriate in respect of one information only, namely, the information brought pursuant to the regulations. In making the order he did, the Magistrate allowed the informant one half of his total costs of the proceedings. In our opinion no criticism can be made of the Magistrate's decision to adopt that approach to the matter. Where a number of informations are heard together, as they were in this case, generally speaking it is far more appropriate when considering what order should be made in respect of costs, to look at the costs generally rather than to apportion them between each information. Indeed, counsel for the defendant made no suggestion that the Magistrate was in error in that regard. What the defendant's argument really amounted to was that as it had been successful in respect of six informations, whilst the informant had only been successful in respect of one information, no order for costs should have been made in the informant's favour, rather an order for costs should have been made in favour of the defendant.

In our opinion, to adopt that approach would be to take a too simplistic view of the matter. The seven informations laid against the defendant arose out of the one set of circumstances, namely those surrounding the accident **[29]** which occurred on 2nd November 1985 and which caused the death of the unfortunate apprentice Everest. The hearing of any one information would have required an investigation of the facts surrounding the accident and a consideration of such matters as the nature of the machine, the method of operation of the machine, and the guards which were or should have been fitted to the machine. In addition, the hearing of any one information would have required the Magistrate to give consideration to such matters as the onus of proof and the question of foreseeability.

Based upon our perusal of the transcript of the proceedings, we venture to suggest that had the informant only laid the information alleging a breach of the regulations against the defendant, the hearing of that information alone would have taken up almost as much of the court's time as the hearing of the seven informations. In other words, almost all of the issues which were canvassed before the Magistrates' Court, would have been canvassed if the only information before the Court was the one alleging a breach of the regulations and in respect of which the informant was successful. In that situation we do not consider it can be successfully contended that the Magistrate erred in awarding the informant one half of his total costs of the proceedings, and the defendant's orders nisi ought to be discharged accordingly. For the foregoing reasons, we propose that the several orders nisi be discharged.

[Ormiston J delivered a separate judgment in which he concurred in the primary question concerning the burden of proof. In respect of the ground of the order nisi concerning the conviction, His Honour found that the Magistrate had erred, and accordingly, was of the view that the matter be referred back for further determination. However, His Honour agreed with the conclusion expressed by Kaye and Beach JJ in respect of the order for costs. Ed.]
