53/90

HIGH COURT OF AUSTRALIA

CHUGG v PACIFIC DUNLOP LIMITED

Brennan, Deane, Dawson, Toohey and Gaudron, JJ

7-9 May, 3 October 1990

[1990] HCA 41; (1990) 170 CLR 249; (1990) 64 ALJR 599; (1990) 95 ALR 481; 34 IR 412; 40 A Crim R 85

OCCUPATIONAL HEALTH AND SAFETY – EMPLOYEE KILLED – DUTY ON EMPLOYER TO PROVIDE SAFE WORKING ENVIRONMENT – "SO FAR AS IS PRACTICABLE" – WHETHER SUCH WORDS AMOUNT TO A STATUTORY EXCEPTION – ONUS OF PROOF AS TO PRACTICABILITY: *OCCUPATIONAL HEALTH AND SAFETY ACT* 1985, SS4, 21; *MAGISTRATES (SUMMARY PROCEEDINGS) ACT* 1975, S168.

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."

Per Dawson, Toohey and Gaudron JJ (Brennan and Deane JJ agreeing). The words "so far as is practicable" in s21(1) of the Act, do not constitute a statutory exception to the rule that in a criminal prosecution the onus of proof is on the prosecution. Accordingly, in a prosecution under s21(1) of the Act, the informant bears the onus of proof on the question of practicability.

***Dowling v Bowie* [1952] HCA 63; (1952) 86 CLR 136; [1952] ALR 1001, applied.**

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

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

DAWSON, TOOHEY AND GAUDRON JJ: [*After setting out the facts briefly, the charges laid and the provisions of s21(1) and (2)(a) of the Act, their Honours continued*] … **[7]**

The Informant's Appeal: Onus of Proof

The primary issue raised by the informant's appeal is whether, in a prosecution under s21 of the Act, the informant or the defendant bears the onus of proof on the question of practicability. It was unanimously held by the Full Court that the onus is on the informant. The issue upon which Ormiston J reached his dissenting decision, namely, the relevance of reasonable foreseeability to liability under s21 of the Act, will be dealt with later. The Act is silent as to the onus of proof in relation to the offence created by s21. That is not unusual for the rule as to the onus of proof in a criminal proceeding is clear, namely, that "it is the duty of the prosecution to prove [a defendant's] guilt subject … to the defence of insanity and subject also to any statutory exception": *Woolmington v DPP* [1935] UKHL 1; [1935] AC 462 at p481; [1935] All ER 1; 25 Cr App R 72; 153 LT 232. The question thus raised by the informant's appeal is whether the words "so far as is practicable", as used in s21(1) and (2) of the Act, constitute a statutory exception.

For the purpose of assigning the onus of proof, a distinction is made between a requirement which forms part of the statement of a general rule and a statement of some matter of answer, whether by way of exception, exemption, excuse, qualification, exculpation or otherwise (called an "exception"), which serves to take a person outside the operation of a general rule. See *Vines v Djordjevitch* [1955] HCA 19; (1955) 91 CLR 512 at pp519-520; [1955] ALR 431. The distinction does not depend on the rules of formal logic: *Dowling v Bowie* [1952] HCA 63; (1952) 86 CLR 136 at p147; [1952] ALR 1001. Rather, the categorization of a provision as part of the statement of a general rule or as a statement of exception reflects its meaning as ascertained by the process of statutory construction. Where some matter is said to be an exception to an offence, the question is whether there is to be discerned a legislative intention "to impose upon the accused the ultimate burden of bringing himself within it": *DPP v United Telecasters Sydney Ltd* [1990] HCA 5; (1990) 168 CLR 594; 91 ALR 1 at p6; (1990) 64 ALJR 181 at p183; 45 A Crim R 238. The intention may be discerned from express words or by implication. See *R v Edwards* [1975] QB 27; [1974] 2 All

ER 1085; (1974) 3 WLR 285 and *R v Hunt* [1987] AC 352; [1987] 1 All ER 1; (1986) 84 Cr App R 163; [1986] 3 WLR 1115. To some extent the question whether there is a legislative intention to impose the onus of proof of some particular matter on a defendant is answered by provisions such as s168 of the *Magistrates (Summary Proceedings) Act* 1975 (Vict.) which provides:

> "(1) Any exception, exemption, proviso, excuse, or qualification, whether it does or does not accompany the **[8]** 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, provision, excuse, or qualification is specified or negatived or not no proof in relation thereto shall be required on the part of the informant."

Section 168 of the *Magistrates (Summary Proceedings) Act* and like legislative provisions leave the question whether the matter in issue is an exception to be answered by the ordinary process of statutory construction. See the discussion of s14 of the *Crimes Act* 1914 (Cth) in *Dowling v Bowie*, at p145. And, despite the language of s168 and like legislative provisions, if a matter accompanies the description of an offence, then it will ordinarily be construed as an element of the offence which the prosecution must prove, unless there is something in the form of the language used or in the nature of the subject matter to suggest that it is an exception upon which the defendant bears the onus of proof. Although the form of language may provide assistance, ultimately the question whether some particular matter is a matter of exception is to be determined "upon considerations of substance and not of form": *Dowling v Bowie*, at p140. And, of course, the necessity to have regard to substantive and not merely formal considerations is emphasized by the words of s168(1) of the *Magistrates (Summary Proceedings) Act* and like legislative provisions which make it clear that a matter may be classified as a statutory exception "whether it does or does not accompany the description of the offence". One indication that a matter may be a matter of exception rather than part of the statement of a general rule is that it sets up some new or different matter from the subject matter of the rule. See *Darling Island Stevedoring & Lighterage Co Ltd v Jacobsen* [1945] HCA 22; (1945) 70 CLR 635, per Dixon J at p644. Such is ordinarily the case where, in the terms used in *R v Edwards*, at p40, there is a prohibition on the doing of an act "save in specified circumstances or by persons of specified classes or with specified qualifications or with the licence or permission of specified authorities". See *R v Hunt*, at p375, where Lord Griffiths considered the statement from *R v Edwards* "an excellent guide to construction". If the new matter is a matter peculiarly within the knowledge of the defendant, then that may provide a strong indication that it is a matter of exception upon which the defendant bears the onus of proof.

[9] The argument made on behalf of the informant relied heavily on certain matters pertaining to practicability being peculiarly within the knowledge of an employer. Section 4 of the Act defines "practicable" to mean:

> "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;
>
> (c) the availability and suitability of ways to remove or mitigate that hazard or risk; and
>
> (d) the cost of removing or mitigating that hazard or risk."

It was put that matters bearing on cost and the suitability of ways of removing or mitigating a hazard or risk are matters upon which an employer may be expected to have knowledge not available to an informant. Similar considerations were taken into account in *Nimmo v Alexander Cowan & Sons Ltd* (1968] AC 107, where s29(1) of the *Factories Act* 1961 (UK) (a provision which is similar to s21(1) of the Act) was construed as requiring an employer to plead and prove that it was not reasonably practicable to keep its workplace safe. Like considerations were taken into account in *Kingshott v Goodyear Tyre & Rubber (No.2)* (1987) 8 NSWLR 707; [1987] Aust Torts Reports 80-105 (a case in which special leave to appeal to this Court was refused), where s40(1) of the *Factories, Shops and Industries Act* 1962 (NSW) was construed as requiring an employer to prove that it was not reasonably practicable to provide a safe means of access. See also *Australian Oil Refining Pty Ltd v Bourne* (1980) 54 ALJR 192; (1980) 28 ALR 529, where Murphy J placed

the same construction on s40(1) of the *Factories, Shops and Industries Act*. Although *Nimmo* and *Kingshott* involved civil claims, the legislative provisions considered in those cases imposed both civil and criminal liability. See *Nimmo*, per Lord Reid at p115; *Kingshott*, per Kirby P at p713 and per McHugh JA at p727.

The significance of the argument made by reference to the knowledge of an employer may be seen from a passage in the speech of Lord Guest in *Nimmo*, at p122, where his Lordship said:

> "I attach some importance to the consideration that the means of achieving the end were more likely to be within the knowledge of the defenders [employer] than the pursuer [employee]. In some cases it might be comparatively simple **[10]** for the pursuer to make the necessary averments but there will be many cases where, particularly in the case of a death of a workman, it would be unreasonable to expect a widow to have to specify what steps which the defender should have taken to make the working place safe were reasonably practicable."

See also per Lord Pearson at p132. Section 21 of the Act differs from the provisions considered in *Nimmo* and in *Kingshott* in that Pt. III of the Act (in which s21 is found) imposes criminal liability only and confers neither a civil cause of action nor a defence to a civil action: s28. Thus, to the extent that knowledge is a relevant consideration, the comparison is between the knowledge of an employer and that of an informant. By s48(1) of the Act, an informant is either the Minister of State responsible for the administration of the Act or an inspector appointed under Pt. V of the Act.

It may reasonably be supposed that an employer will have superior knowledge of matters peculiar to his workplace, including the cost and suitability of the various suggested means of removing a hazard or risk. However, it may also be supposed that an inspector, upon whom s39 of the Act confers various powers "for the purpose of the execution of [the] Act [and] the regulations", will have superior, or at least wider, knowledge than an employer or some other matters which, in a good number of cases, will bear on the question of practicability. Thus, it may be supposed that an inspector would have wider knowledge as to the severity of, the state of knowledge about, and the availability of ways to remove or mitigate, hazards or risks which occur in industry generally, or occur in some general class of industrial undertaking or in relation to some general class of industrial machines, operations or pursuits.

One consideration tells against overmuch significance being given to the relative knowledge of an employer and an informant. The questions of safety and practicability, in many cases, raise issues of common sense rather than special knowledge. See *Neill v NSW Fresh Food and Ice Pty Ltd* [1963] HCA 4; (1963) 108 CLR 362; [1963] ALR 258; 36 ALJR 297, per Taylor and Owen JJ at p368. See also *Australian Oil Refining Pty Ltd v Bourne* (1980) 28 ALR 529; 54 ALJR 192, at pp193-194; pp532-533 of ALR. In some cases the mere identification of the cause of a perceptible risk may, as a matter of common sense, also constitute identification of a means of removing that risk, thereby giving rise to a strong inference that an employer failed to provide "so far as is practicable" a safe workplace. In other cases the same inference will arise from the identification **[11]** of some method which would remove or mitigate a perceptible risk or hazard. And, in such cases, that inference might well be further strengthened by the failure of an employer to call evidence as to matters, such as cost and suitability, peculiarly within his knowledge. See *Jones v Dunkel* [1959] HCA 8; (1959) 101 CLR 298; [1959] ALR 367; 32 ALJR 395.

A consideration of the relative knowledge of an employer and an informant does not, in our view, provide an indication that the defendant bears the onus of proof on the issue of practicability in a prosecution for an offence under s21 of the Act. In particular, the subject matter of practicability is not necessarily new or different from the subject matter of a rule requiring that a workplace be safe. So much is evident from par.(a) of the definition of "practicable", which looks to "the severity of the hazard or risk in question". And, although matters pertaining to cost and suitability of the means of avoiding a risk or hazard may be peculiarly within the knowledge of the defendant, the question of practicability does not depend on facts peculiarly within the knowledge of a defendant in the same way as does a question whether a proscribed act was done, in the terms used in *R v Edwards*, "in specified circumstances or by persons of specified classes or with specified qualifications or with the licence or permission of specified authorities".

That is because questions of cost and suitability are but aspects of the overall question of

practicability. And they are aspects upon which, in a good many cases, the practical evidentiary burden will, in any event, fall on a defendant for, as earlier indicated, evidence as to the nature of the risk, the cause of the risk or means by which the risk may be avoided will often be all that is necessary to ground an inference that practicable means of avoiding the risk were not taken. The informant's argument also relied on the object of the Act, namely, the promotion of occupational health and safety, and on the command in s35(a) of the *Interpretation of Legislation Act* 1984 (Vict.) that "a construction that would promote the purpose or object [of the Act] ... shall be preferred to a construction that would not promote that purpose or object". A similar consideration was taken into account in *Nimmo*. Lord Guest stated of the provision there under consideration (at p122):

> "The object of the section was to provide for a safe working place by imposing criminal and civil liability on the occupier in the event of breach. There is doubt as to the construction of this section. The question appears to me to depend upon which construction will best achieve the result to be attained, namely, to make and keep the working place safe."

[12] The choice directed by s35(a) of the *Interpretation of Legislation Act* is not as to the construction which "will best achieve" the object of the Act. Rather, it is a limited choice between "a construction that would promote the purpose or object [of the Act]" and one "that would not promote that purpose or object". The command in s35(a) might well preclude a construction of s21 of the Act placing the onus of proof in relation to practicability on an informant if that would have the consequence that the purpose or object of the Act was, in some way, impeded or frustrated. However, that consequence does not follow merely because, in some cases, the question of practicability may turn on a consideration of the cost or suitability of the available means of removing or mitigating a risk, particularly when evidence on other aspects of practicability will, in a good many cases, have the practical effect of shifting the evidentiary burden on matters pertaining to cost and suitability onto the defendant. The decision in *Nimmo* also rested in part on a discerned legislative intention to impose a duty different from that arising at common law. Thus, Lord Guest (at p122) considered that it was not intended to "equiperate the duty under the statute to the duty under common law, namely, to take such steps as are reasonably practicable to keep the working place safe". And Lord Upton stated (at pp125-126):

> "it is the duty of the employer to make the place safe so far as is reasonably practicable. It is his duty with his experts to consider the state of the place of work in all its circumstances and to take whatever steps he can, so far as reasonably practicable, to make it safe. He must know and be able to give the reasons why he considered it was impracticable for him to make the place safe. If he cannot explain that, it can only be because he failed to give it proper consideration, in breach of his bounden duty to the safety of his workmen."

If a statute imposes civil liability (whether or not it also imposes criminal liability), that may support a construction which does more than repeat, in legislative form, the substance of a civil obligation arising under the common law. However, that is not the present case, for Pt III of the Act imposes criminal liability only. There is one matter which, in our opinion, tells decisively against a construction of s21 of the Act which would place the onus of proof in relation to practicability on an employer. The obligation imposed by s21(1) – even as elaborated in s21(2) in respect of plant **[13]** and systems of work (par.(a)), use, handling, storage and transport of plant and substances (par.(b)), the maintenance of the workplace (par.(c)), provision of facilities (par. (d)) and the provision of information, instruction, training and supervision (par.(e)) – is perfectly general. And, as the definition of "practicable" shows, the question of practicability is one which must be answered by a consideration of the means by which a risk can be removed or mitigated.

Different considerations may apply to other legislative provisions as, for example, a provision which imposes a specific requirement or lays down a specified procedure to be followed in particular circumstances, so far as that requirement or procedure is practicable. In such a case the requirement or procedure is clear. If the requirement or procedure is not complied with, the only issue is whether it is practicable. But where a general obligation is imposed, the means which might practicably be adopted are confined only by the nature of the risk or hazard. That is because, as was pointed out in *Gibson v British Insulated Callenders Construction Co* [1973] SC (HL) 15, per Viscount Dilhorne at p27, if it were established that one or even several methods were impracticable, it would not follow that the workplace was as safe as practicable. If the onus is on a defendant, the issue, if confined at all, is confined only by the "means of making the place safer which the ingenuity of ... counsel can suggest" in the course of cross-examination: *Gibson*,

per Lord Diplock at p28. It is impossible to read into s21 of the Act an intention to place the onus of proof of the issue of practicability on a defendant when that onus would entail the additional burden of anticipating and negating the practicability of every possible means of avoiding or mitigating a risk or accident that might be raised in the course of cross-examination.

The informant's argument as to the onus of proof on the issue of practicability fails.
