30/02; [2002] VSC 449

SUPREME COURT OF VICTORIA

DURA (AUSTRALIA) CONSTRUCTIONS PTY LTD v GIRGIN

Balmford J

11 September, 23 October 2002

OCCUPATIONAL HEALTH AND SAFETY – EMPLOYEE INJURED WHEN FALLING FROM PLATFORM DURING CONSTRUCTION WORK – EMPLOYER REQUIRED TO PROVIDE SAFE WORKING ENVIRONMENT – EMPLOYER TO BE AWARE THAT EMPLOYEE MIGHT ACT INADVERTENTLY OR WITHOUT TAKING REASONABLE CARE FOR THEIR OWN SAFETY – CHARGE FOUND PROVED – WHETHER MAGISTRATE IN ERROR – FINDING BY MAGISTRATE THAT SOME WITNESSES LACKED CREDIBILITY – REASONS FOR DECISION – WHETHER SUFFICIENT: *OCCUPATIONAL HEALTH AND SAFETY ACT* 1985, S21.

An employee was injured while performing construction work for his employer D (Aust) Constructions Pty Ltd. The employer was charged with offences under the *Occupational Health and Safety Act* 1985 in that it failed to maintain a workplace that was safe and without risks to health and failing to provide training, instruction and supervision to enable employees to perform their work in a safe manner. In convicting the employer, the magistrate in rejecting the evidence of three witnesses based on his finding as to their credibility said: "I don't believe that they were totally forthcoming". The magistrate also said that the employee's awareness of the danger did not "really bear much weight". Upon appeal—

HELD: Appeal dismissed.

1. A safe system of work is not a system that is safe only for persons of superior skill whose attention never wanders. Whilst a court is entitled to take into consideration any failure by an employee to take reasonable care for his or her own health and safety, an employer is bound to have regard to the risk that the employee will act inadvertently or without taking reasonable care for his or her own safety or without complying with requirements of an employer with regard to the safety of the workplace. Accordingly, the magistrate was not in error when he found that the actual state of the employee's knowledge was not relevant for determining whether that employee had received sufficient training or instruction so as to enable that employee to carry out his work in a safe manner.

***R v Australian Char Pty Ltd* [1999] 3 VR 834 at 849, applied.**

2. Special cases apart, it is not necessary for a court to try to spell out why the one witness impressed as credible and the other did not. If the matter be one of impression, the law does not require that a court rationalise its impression. Accordingly, the magistrate gave sufficient reasons for his decision.

***Kiama Constructions Pty Ltd v Davey* (1996) 40 NSWLR 639 at 642; [1997] Aust Torts Reports 81-414, applied.**

BALMFORD J:

Introduction

1. This is an appeal under section 92 of the *Magistrates' Court Act* 1989 ("the Magistrates' Court Act") from a final order made on 7 May 2002 in the Magistrates' Court at Heidelberg, sitting at Moonee Ponds, constituted by Mr Cashmore, Magistrate, whereby the appellant ("Dura") was convicted of offences against sections 21(2)(c) and 21(2)(e) of the *Occupational Health and Safety Act* 1985 ("the Act"), and fined $25,000 with $17,000 costs.

2. On 30 May 2002 Master Wheeler stayed those orders until the determination of this appeal, and ordered the following questions of law to be decided:

> (a) Having regard to the whole of the evidence could a reasonable Magistrate properly instructed have found beyond reasonable doubt that the appellant was guilty of the offences charged, and in particular did he err in rejecting the evidence that there was a scaffold barricade with bunting tape on the walkway?
> (b) Did the Magistrate give sufficient reasons for his decision and in particular as to why he rejected the evidence of the respondents (prosecution) witnesses Caruan, Doggert and Medina and [sic] that they knew of the hazard?
> (c) Did the Magistrate err in law when he failed to find that the warning given by Christofi to the injured worker Dovigi did not constitute a sufficient instruction for the purposes of section 21(2)(e)

of [the Act]?
(d) Did the Magistrate err in law when he found that the actual state of knowledge of an employee was not relevant for determining whether that employee had received sufficient training or instruction so as to enable that employee to carry out his work in a manner that is safe?

3. On 26 August 1999 Mr Dovigi, an employee of Dura, while performing construction work at Genazzano College in Kew, fell from the third floor and suffered injury. A concrete walkway between two buildings was under construction. Photographs taken some twelve days later show that on each side of the walkway there was a wall, said to be 900mm high. The form work for the walls had been constructed and the concrete poured, but the form work was still in place. It appears that Mr Dovigi moved from the walkway over one of those walls and was standing on a plywood platform installed on the outer side of the wall and working on the form work on that outer side when he fell.

4. The relevant provisions of the Act are sections 21(1), 21(2)(c) and 21(2)(e) of the Act, as well as the definition of "practicable" in section 4. Those provisions read:

21. Duties of employers
(1) An employer shall provide and maintain so far as is practicable for employees a working environment that is safe and without risks to health.

(2) Without in any way limiting the generality of sub-section (1), an employer contravenes that sub-section if the employer fails— …
(c) to maintain so far as is practicable any workplace under the control and management of the employer in a condition that is safe and without risks to health;
… or;
(e) to provide such information, instruction, training and supervision to employees as are necessary to enable the employees to perform their work in a manner that is safe and without risks to health.

4. Definitions
In this Act, unless inconsistent with the context or subject-matter— …
"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;
(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;

Question (a)
5. Section 92 of the *Magistrates' Court Act* provides for an appeal on a question of law. and save in strictly limited circumstances this Court cannot substitute its own findings of fact for those of the court below. In the well known passage in *Spurling v Development Underwriting Inc* Stephen J said [1]:

> In the case of decision of magistrates the position in Victoria is well established by a line of decisions culminating in *Taylor v Armour and Co Pty Ltd* [1962] VicRp 48; [1962] VR 346; (1961) 19 LGRA 232, in which the Full Court of this State held that in the case of any question of fact the Court should treat the matter as an appeal from the verdict of a jury and should not make up its own mind upon the evidence but rather confine itself to seeing whether there was evidence upon which the magistrate might, as a reasonable man, come to the conclusion to which he did come. In saying this the Full Court stated that it was following the view of Herring CJ, in *Young v Paddle Bros. Pty Ltd* [1956] VicLawRp 6; [1956] VLR 38; [1956] ALR 301. The Chief Justice, in that case, adopted as the test whether "on any reasonable view of the evidence that decision can be supported"; a party aggrieved can thus only succeed if a decision contrary to the view of the magistrate is "the only possible decision that the evidence on any reasonable view can support" (see at VLR p41)

6. The first part of this question appears to be an attempt to turn a question of fact into a question of law and to rehear the issue which was before the Magistrate. I am satisfied that there was evidence before him on which he could come to the conclusion to which he did come, and it is not necessary for this Court to particularise that evidence.

7. As to the second part of the question, it is not in issue that the presence of bunting tape would have been an indication that access to the area marked off by the tape was prohibited. It does not appear to be suggested that scaffolding alone would carry that message. Although the

photographs which were before the Magistrate do show the existence of scaffolding and bunting tape on the walkway, he noted that those photographs were taken twelve days after the event, and that no photographs of the walkway at the time of the accident were taken. The scaffolding as appearing in the photographs does not constitute a barricade. Mr Bressinuti, the site manager, gave evidence that "the area was bunted off". Mr Doggert, a shop steward, said that the walkway was not taped off, because it had a 900 millimetre parapet wall. Mr Dovigi, the injured worker, said that there was scaffolding on the walkway, but made no reference to bunting tape. Mr Cody, the company secretary, said in an interview with Mr Girgin, an inspector appointed under the Act, that the area was barricaded off with bunting tape. However, he apparently was not called to give evidence; possibly because the record of his interview indicates that he was relying largely on information given him by other people.

8. As the Magistrate noted, each party could point to a possible motive or motives for a witness or witnesses to put a particular version of the facts. Further, he had the opportunity of observing the demeanour of the witnesses over a five-day hearing. I am satisfied that it was open to him to reject the evidence that there was a scaffold barricade with bunting tape on the walkway.

9. The answer to the second part of Question (a) is accordingly No.

Question (b)

10. It has long been established that it is the duty of a court at first instance to record the reasons for its decisions from which an appeal lies to a higher court. Asprey JA commented in *Pettitt v Dunkley*[2]:

> Where in a trial without a jury there are real and relevant issues of fact which are necessarily posed for judicial decision ... and the mere recording of a verdict for one side or the other leaves an appellate tribunal in doubt as to how those various factual issues or principles have been resolved, then, in the absence of some strong compelling reason, the case is such that the judge's findings of fact and his reasons are essential for the purpose of enabling a proper understanding of the basis upon which the verdict entered has been reached, and the judge has a duty, as part of the exercise of his judicial office, to state the findings and the reasons for his decision adequately for that purpose. If he decides in such a case not to do so, he has made an error in that he has not properly fulfilled the function which the law calls upon a judicial person to exercise and such a decision on his part constitutes an error of law.

11. As Cussen ACJ, Mann and Lowe JJ said in *Brittingham v Williams*:

> We must not be taken as laying down as a universal rule that a Judge is bound upon request to give reasons for his decision ... . But in many cases ... a judicial officer should state the facts he finds and the reasons for his decision. Such a statement is desirable for the information of the parties, and in order to afford assistance to the Court of Appeal in the event of there being an appeal."[3]

12. However, in the present case the Magistrate's decision to reject the evidence of the three witnesses to whom this question relates was based on his finding as to the credibility of these witnesses. The Magistrate took the view that "all three knew a lot more to the background to this than they were prepared to tell me about ... I don't believe that they were totally forthcoming in their evidence as to their knowledge of the history of it." In *Soulemezis v Dudley (Holdings) P/L* McHugh JA said[4]:

> Where the resolution of the case depends entirely on credibility, it is probably enough that the judge has said that he believed one witness in preference to another; it is not necessary "for him to go further and say, for example, that the reason was based on demeanour": *Connell v Auckland City Council* [1977] 1 NZLR 630 at 632-3.

13. Similarly, Mahoney P said in *Kiama Constructions Pty Ltd v Davey* that "it is, special cases apart, not necessary for a trial judge to try to spell out why the one witness impressed him as credible and the other did not ... if the matter be one of impression, the law does not require that a trial judge rationalise his impression."[5]

14. I am satisfied that the Magistrate gave sufficient reasons for his decision generally and in particular for rejecting the evidence of the three witnesses referred to. Therefore the answer to Question (b) is Yes.

Question (c)

15. Mr Whitten submitted that Mr Christofi was an employee and agent of Dura, that he warned Mr Dovigi of the danger in that capacity, and that the warning therefore constituted information or instruction by Dura for the purpose of section 21(2)(e). The evidence of Mr Christofi was that he told Mr Dovigi, shortly before he fell, that he should not go into the area from which he fell because it was not safe because it had no hand rails.

16. However, the Magistrate made no finding as to whether that warning was given. In his reasons for decision he said: "Although I take the view this may have been said, I am not prepared to conclusively find that it was said. It is emphatically denied by Dovigi." That being so, Question (c) does not arise and needs no answer.

Question (d)

17. Mr Whitten relied on the use of the expression "as are necessary" in section 21(2)(e). In his submission, because Mr Dovigi knew at all times that the walkway was dangerous, it was not necessary for the employer to provide any further instructions to him.

18. In fact the Magistrate did not find that Mr Dovigi's awareness of the danger was not relevant; his finding was that he did not think it "really bears much weight". That finding was consistent with the judgment of the Court of Criminal Appeal, constituted by Phillips CJ, Smith and Ashley JJ, in *R v Australian Char Pty Ltd*[6]. In that case the respondent had been convicted of offences against section 21(2)(a) and (e) of the Act. The Court approved a direction by the trial judge in the following terms:

> So far as concerns the employer's duty to provide a safe system of work is concerned [sic], a safe system of work is one that is safe for an average workman taking reasonable care for his own safety. It is not a system that is safe only for persons of superior skill whose attention never wanders. An employer is bound to have regard to the risk that his employee will act inadvertently, or without taking reasonable care for his own safety …. Whilst you are entitled to take into consideration any failure by any particular employee … to take reasonable care for his own health and safety, … in considering whether the Crown has established either count against the accused company, the law still requires that employers have the regard to the risk that their employees will act inadvertently, or without taking reasonable care for their own safety … or without complying with requirements of an employer with regard to the safety of the workplace.

See also the judgment of Harper J in *Holmes v RE Spence & Co*[7].

19. The answer to Question (d) is accordingly No.

Conclusion

20. For the reasons given, the appeal will be dismissed with costs.

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[1] [1973] VicRp 1; [1973] VR 1 at 11; (1972) 30 LGRA 19.
[2] 38 FLR 199; [1971] 1 NSWLR 376 at 382; 5 Fam LR 137.
[3] [1932] VicLawRp 35; [1932] VLR 237 at 239; 38 ALR 176.
[4] [1987] 10 NSWLR 247 at 280.
[5] (1996) 40 NSWLR 639 at 642; [1997] Aust Torts Reports 81-414.
[6] [1999] 3 VR 834 at 849.
[7] (1992) 5 VIR 119 at 123-4.

APPEARANCES: For the Appellant Dura (Australia) Constructions: Mr MH Whitten, counsel. Noble Lawyers. For the Respondent Girgin: Mr M Rozenes with Mr KT Armstrong, counsel. Fiona Thompson, Worksafe Victoria.