LOTAN A

v.

SECRETARY FOR LABOUR

[SUPREME COURT, 1976 (Kermode J.), 23rd April]

Appellate Jurisdiction B

Workmen's compensation—accident arising out of or in course of employment—whether compensation payable where injury arose whilst workman performing work which he was not engaged to perform—Workmen's Compensation Ordinance (Cap. 77) ss. 2(1), 5(1), 5(1)(b), 22—Workmen's Compensation Act 1923 (13 & 14 Geo. 5 c. 42) (Imp) s. 7—Workmen's Compensation Act 1925 (15 & 16 Geo. 5, c. 84) (Imp) s. 1(2). C

Although a workman might be performing an act for the purpose of his employer's business, he might not be employed to do that act. In those circumstances, therefore, any injury suffered could not be deemed to have arisen out of and in the course of his employment, and the Workmen's Compensation Ordinance s.5 did not apply.

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Cases referred to:

Wilsons and Clyde Coal Company Limited v. M'Ferrin [1926] A.C. 377.
M'Aulay and Anor v. James Dunlop & Co. Ltd. [1926] A.C. 377.
Thomas v. Ocean Coal Co. Ltd. [1933] A.C. 100.

Appeal from the decision of the Magistrate's Court ordering the appellant to pay compensation to the respondent. E

K. C. Ramrakha for the appellant.
Q. Bale for the respondent.

KERMODE J.: [23rd April 1976]—

F

This is an appeal from the decision of the magistrate sitting in the First Class Magistrate's Court at Suva pronounced on the 16th day of January 1976. The appellant, the respondent in the action, was ordered to pay to the applicant, the Secretary for Labour for and on behalf of one Peni Lamaniyavi the sum of $76.52 with no order as to costs.

The action was an application under the provisions of the Workmen's Compensation Ordinance for compensation in respect of an injury received by Peni Lamaniyavi, on the 6th day of August 1974, at the appellant's saw mill at Nakorovou, Serua. The injury received by Peni Lamaniyavi was a serious one involving the loss of a distal phalanx of the middle finger and ankylosis of the distal phalanx of the ring finger of the left hand. The injury was alleged to have been suffered by Peni Lamaniyavi in the course of his employment with the appellant. G

There are two grounds of appeal as under: H

"1. The Learned Trial Magistrate erred in Law and in fact in holding that the Applicant *PENI LAMANIYAVI* was a servant or workman within the meaning of the Act.

2. The Learned Trial Magistrate erred in law and in fact in holding that the workman was, in any event, entitled to succeed despite his own serious wilful misconduct."

The appeal first came on for hearing on the 1st of April 1976. Mr K. C. Ramrakha, who appeared on behalf of the appellant, sought leave of the court, under section 22 of the Workmen's Compensation Ordinance, to argue the appeal. He argued that a substantial question of law was involved as the appeal dealt with the learned magistrate's interpretation and application of section 5(1) of the Ordinance.

Mr Bale, for the respondent, confirmed that a question of law was involved in the appeal and did not oppose Mr Ramrakha's application. Leave was given to the appellant to argue the appeal.

Mr Bale sought an adjournment as there had been very short notice of the hearing and he had only been advised of the hearing the previous day. Mr Ramrakha did not object to the adjournment and the hearing was adjourned to the 5th of April 1976.

On the 5th of April 1976 Mr Bale advised the court that he had fully considered the grounds of appeal and found that he could not agree with the learned magistrate's decision. He conceded that the appellant must succeed on his appeal. He gave reasons for the views he held.

Mr Ramrakha was not called on to argue the appeal and judgment was reserved.

The learned magistrate in his judgment stated that he had to decide the following:

1. Was Peni a workman as defined by section 2(1) of the Act (Cap. 77);
2. Is the respondent prima facie, liable under section 5(1) of the Act; and,
3. If so, does the case fall to be considered under section 5(1) *(b)*.

The learned magistrate found that Peni Lamaniyavi's evidence was wholly unsatisfactory and that he was plainly mistaken on a number of vital issues. He also found that the applicant's witness, Tomasi, was of no assistance and the other witness, Vodo, contradicted Peni Lamaniyavi's evidence in a material particular namely that Vodo had not as Peni had alleged told Peni to clear a water pipe with a piece of wire in the course of which Peni received his injury. The record of Vodo's evidence does not indicate that the incident was referred to and I can only assume that the matter was mentioned by Vodo and not recorded.

The learned magistrate found as a fact that Peni did not work for the appellant from the 1st to the 5th of August 1974 inclusive and was told by the appellant on the 6th of August 1974 when he turned up for work that there was no work for him that day.

Although the magistrate found the evidence of Peni wholly unsatisfactory, he did accept his evidence as to how he sustained the injury in the absence of any other evidence as to how the accident occurred. According to Peni, he was endeavouring to clear a water pipe with a piece of wire. The wire was too long and it caught in the revolving saw blade. His hand was pulled into contact with the blade causing the injury to his two fingers.

The learned magistrate found as a fact that Peni had no authority from the appellant to carry out the act of clearing the water pipe and that the act was due to his serious and wilful misconduct. The learned magistrate also found as a fact that Peni was not supposed to be in the mill at the time.

In considering the three points on which the learned magistrate had to make a decision he found as a fact that Peni was a workman as defined by section 2(1) of the Workmen's Compensation Ordinance. In this finding he was correct, as Peni had been employed by the appellant as an unskilled worker on light work for sometime prior to the accident and his employment had not been terminated. On the day in question he was a workman but there was no work offering and he was instructed to go home. A

The learned magistrate held that the appellant was bound by the Workmen's Compensation Ordinance, a finding in the affirmative of the second point he had to decide, namely, that the respondent was prima facie liable under section 5(1) of the Act. The learned magistrate also found that Peni was doing an act "for the purposes of and in connection with his employer's trade" when he was injured and that the injury was both serious and permanent. B

The learned magistrate then considered whether he should exercise his discretion under section 5(1) proviso *(b)* of the Ordinance in view of the fact that the injury was both serious and permanent and notwithstanding the serious and wilful misconduct of Peni. He considered that Peni should be paid one half of the compensation which would otherwise have been payable to him and, after taking into account a sum of $15 which had been overpaid, he ordered the appellant to pay to the respondent on behalf of Peni the sum of $76.52 by way of compensation. As he considered that the matter should have been amicably settled he made no order as to costs. C D

The application to the facts, as found by the learned magistrate, of the provisions of section 5 of the Ordinance, for the purpose of deciding whether the accident arose out of and in the course of employment, and the inferences to be drawn from such facts, are questions of law.

Section 5(1) of the Workmen's Compensation Ordinance reads as follows: E

> "5.(1) If in any employment personal injury by accident arising out of and in the course of the employment is caused to a workman, his employer shall, subject as hereinafter provided, be liable to pay compensation in accordance with the provisions of this Ordinance and, for the purposes of this Ordinance, an accident resulting in the death or serious and permanent incapacity of a workman shall be deemed to arise out of and in the course of his employment, notwithstanding that the workman was at the time when the accident happened acting in contravention of any statutory or other regulation applicable to his employment, or of any orders given by or on behalf of his employer, or that he was acting without instruction from his employer, if such act was done by the workman for the purposes of and in connection with his employer's trade or business." F

Section 5(1) is modelled on section 1 of the United Kingdom Workmen's Compensation Act 1925. G

Subsection 2 of section 1 of the United Kingdom Act is embodied in section 5(1).

Where an accident is "deemed to arise out of and in the course of" a workman's employment, section 5(1) requires in a case such as the instant case: H

i. That the accident resulted in serious and permanent incapacity to the workman.

A ii. That the workman was at the time when the accident happened acting in contravention of an order given by his employer or acting without his instructions.

iii. That the act was done by the workman for the purposes of and in connection with his employer's trade or business.

The learned magistrate found that all three of these requirements were satisfied in the instant case. Prima facie on the magistrate's finding the appellant was liable B to pay compensation.

In considering section 5(1) of the Ordinance, however the learned magistrate did not consider other facts which he found proved and facts mentioned in the appellant's evidence which were not contradicted and whose evidence he accepted.

C There was no work available for Peni that day and he had been instructed by the appellant to go home. He was not supposed to be in the mill at all and was not authorised to clear the water pipe. The appellant's evidence indicates Peni was employed as a carpenter's assistant and he was also employed to cut grass "collect nails etc. and other light work". He was not employed by the appellant to work on or near the saw bench or to clear blockages in the water supply to the revolving saw blades. As the appellant stated, there was a person in charge of each machine. Peni D endeavoured to establish that he had acted under the instructions of Vodo but the magistrate did not believe him.

What the learned magistrate overlooked was that notwithstanding the act of clearing the pipre was an act done by Peni for the purposes of his employer's business he was not on the accepted evidence performing an act which he was employed to do.

E Two cases considered in the House of Lords illustrate the application of section 7 of the United Kingdom Workmen's Compensation Act 1923 which is identical to section 1(2) of the 1925 Act which is incorporated in section 5 of our Ordinance. The cases are *Wilsons and Clyde Coal Company Limited v. M'Ferrin & Kerr on M'Aulay and Another and James Dunlop and Company Limited* reported in [1926] A.C. p. 377.

In M'Ferrin's case a miner believing a shot he had fired had exploded returned to F the shot hole within a period of time during which all persons were prohibited by statutory regulation from approaching the shot hole. The shot exploded and he was seriously and permanently disabled. It was held section 7 applied and the accident must be deemed to have arisen out of and in the course of the employment. He was performing work he was employed to do but acting in contravention of a statutory regulation. But for section 7 the employer would not have been liable.

G In M'Aulay's case he was engaged as a miner. After a shot had been fired he coupled the electric cable to the detonator of the next shot. At the same time a fireman was moving the handle of his firing battery. The shot was exploded and the miner was killed. A statutory regulation provided that the authorised fireman should himself do the coupling. It was held that the miner in coupling the cable to the detonator was arrogating to himself a duty restricted to the authorised shot fire and the accident did not arise out of his employment and section 7 of the Act of 1923 H did not apply.

Viscount Dunedin said at p. 390:

"The operation of coupling was the work of a skilled man. The unskilled man had no right to meddle with it and if he meddled he was doing something which

he was not engaged to do, so section 7 of the 1923 Act has, for reasons given above, no application."

Wilson's and M'Aulay's case were considered in the House of Lords case, *Thomas and Ocean Coal Company Limited* [1933] A.C. 100, where subsection 2 of section 1 of the Act of 1925 was fully considered. Lord Blanesburgh at p. 118 in referring to M'Aulay's case said:

> "But in M'Aulay case there was a vital difference fatal to the claim. Apart altogether from the regulation and its breach, M'Aulay was outside of section 1 subsection 1, because at the time of the accident he was doing something he was not engaged to do at all, and section 7 was powerless to restore him to grace."

In interpreting section 5(1) the provisions of subsection 2 of section 1 of the United Kingdom Act of 1925 incorporated therein cannot be considered in isolation to the rest of section 5(1). These provisions are governed by the words at the beginning of the section. It is a personal injury by accident arising out of the employment of the workman which gives rise to the liability to pay compensation. "Employment" is the work a workman is engaged to do or instructed to do, and the accident must arise out of and in the course of performing such work.

If a workman is injured performing work he is not engaged to do, as in M'Aulay's case the injury cannot be deemed to arise out of his employment.

I do not find it necessary to consider the learned magistrate's finding that the accident was due to the serious and wilful misconduct of the workman and his exercise of his discretion under proviso *(b)* of section 5(1). Despite this finding I doubt that failure by Peni to go home when told to do so and electing to help around the mill can be considered to be serious misconduct. Peni was not authorised to clear the water pipe but there was no evidence that he was prohibited from doing so.

On the evidence accepted by the learned magistrate the clearing of the water pipe was not part of the work Peni was employed to do and the appellant cannot be held liable to compensate him for the injury he sustained. Had evidence of Peni that he was engaged to open the tap to water the blades been believed by the magistrate there is no doubt the outcome of the appeal would have been different.

The appeal is allowed. The judgment of the learned magistrate is set aside and the application dismissed with costs to the appellant of the court below and of this appeal which I fix at $50.00.

Appeal allowed.