# RAGHWAN CONSTRUCTION

v.

# MINISTRY OF EMPLOYMENT AND INDUSTRIAL RELATIONS

[HIGH COURT, 1990 (Fatiaki J) 4 June]

Appellate Jurisdiction

*Employment- providing a safe place of employment- duties of occupiers- Factories Act, Cap 99 Section 24 (3).*

A workman fell to his death on a construction site. The employer was convicted in the Magistrates' Court of permitting the workman to work in unsafe conditions contrary to Section 24 (3) of the Factories Act. On appeal it was argued that the requirements of the Section were made of the employees rather than the employer and that permitting contravention of the Section was not an offence. Dismissing the appeal the High Court HELD: (i) the employer had failed to provide the required safety equipment and was therefore responsible for breaching the Act and (ii) that the use of the word "permit" did not invalidate the charge.

Cases cited:

*Gaya Prasad & Ram Prasad v. R* (Crim. App. 15/1987)
*Meigh v. Wickendan* [1942] 2 KB 160
*Mousell Bros. v. London North-Western Rlway* [1917] 2 KB 836
*R v. Barraclough* [1906] 1 KB 20
*Ross v. Associated Portland Cement Mfg Ltd* [1964] 2 All ER 425

*V. Parmanandam* for the Appellant
*Ratu. J. Madraiwiwi* for the Respondent

Appeal against conviction entered in the Magistrates' Court.

**Fatiaki J**:

This appeal has had a long and chequered history. The appellant company was successfully prosecuted in 1986 for an offence of Failing to Provide Safe Place of Employment before the Suva Magistrates Court and was fined $500.

4 months later the appellant company obtained an enlargement of time to appeal and a petition was lodged on the 16th of March 1987. Thereafter the appeal was listed for hearing on no less than 5 occasions 3 times in 1987, and once in 1988 and 1989 before it was eventually argued on the 6th of April, 1990.

In its appeal the appellant company raises 2 grounds namely:

> "(a) That the learned trial magistrate erred in law in finding that your petitioner breached Section 24 (2) of the Factories Act;

and

(b) That the learned trial magistrate erred in law in finding that the word "permitting" in the Particulars of Offence is mere surplusage not acquiring any evidential status nor any special adoption of a specific *mens rea*."

Before dealing however with the grounds of appeal it is convenient to set out the details of the charge that was laid before the Magistrate Court. These read as follows:

"STATEMENT OF OFFENCE

FAILURE TO PROVIDE A SAFE PLACE OF EMPLOYMENT : Contrary to Section 24 (3) of the Factories Act (Cap. 99) read in conjunction with Section 80 (1) and 82 (2).

PARTICULARS OF OFFENCE

RAGHWAN CONSTRUCTION COMPANY LIMITED a limited liability company duly registered in Fiji, on 24 December 1984 permitted ASHOK KUMAR (f/n Ram Deo) to work at a place namely the roof of a construction site adjacent to the Suva Civic Centre from which he was liable to fall a distance of more than two metres without providing that his weight was supported by safe and sufficient means as a result of which the said Ashok Kumar fell to his death."

At the outset it must be stated that the Factories Act Cap.99 (hereafter referred to as the Act) with its 9 Parts and 99 separate sections is at the best of times complicated legislation, particularly, in its reading, interpretation and enforcement and it is adviseable that the authorities charged with the administration and enforcement of the Act should wherever possible seek and obtain the assistance of professional legal advice either from the Office of the Director of Public Prosecutions or the Solicitor-General's Department.

By way of illustration let me pose a question - Is it all clear that a construction site as alleged in the particulars is a place, to which the provisions of the Act are applicable?

On the face of it the more obvious answer to the question posed would be "No, a construction site is not factory!", but a close reading of Sections 9(1)(b) and 9 (4) and the definition of a "building operation" in Section 4 (1) of the Act makes it clear that the provisions of Section 24 also applies to a construction site as well as to any contractor working thereon.

Be that as it may the respondent Ministry in this instance was represented at the trial in the Magistrates' Court by its Deputy Chief Inspector of Factories and the appellant company by Mr. Parmanandam who also argued the appeal.

The prosecution's case is correctly and conveniently summarised in the learned trial magistrate's judgment where he said :

A

> " The essence of the complaint is that on the 21st December 1984 the defendant company 'permitted' deceased Ashok Kumar, to work at a place being the roof of a building under construction through which he fell to his death, from a height exceeding two metres; without making suitable provision to support his weight by sufficient means so as to prevent such an accident."

B

Now in respect of the first ground of appeal learned counsel for the appellant company made 2 principal submissions:

Firstly, counsel argued that the Act envisages that "employees" as well as "owners" and "occupiers" can commit offences under the Act and in particular Section 24 ( 3 ) is a provision specifically directed at "employees" and therefore the appellant company ought not to have been charged or convicted of the offence under that section.

C

I accept at once that the Act does make specific provision for the commission, prosecution, and sentencing of offences committed by an employed person viz : Sections 80(2) and 82(1)(a) where the employee has contravened duties imposed on him by Sections 70(1) and (2) but that is not a complete answer in itself.

D

With all due respect to the submissions of learned counsel for the appellant company this was not a case of an employed person failing to use or misusing means or appliances provided for securing his safety or of an employee wilfully and unreasonably doing something likely to endanger himself but rather, this was a case of a complete and total failure on the part of an employer to warn of the existence of any danger and to provide any suitable and sufficient means or appliances to secure the safety of its employee.

E

Learned counsel for the respondent Ministry in opposing this submission pointed out that Section 24 (3) imposes an absolute duty on an owner or occupier to provide a safe system of work and means of access by the provision of various types of ladders and boards where an employee is liable to fall a distance of more than 2 metres if the material he is working over or upon fractures. In counsel's submission subsection (3) is only a specific extension or instance of an occupier's more general duty under subsection (1).

F

There is some merit in the submission of learned counsel for the appellant company which is supported by a narrow reading of the wording of Section 24(3) of the Act which states:

G

> "Without prejudice to the generality of subsection (1), no person shall pass over or work on or from, material which would be liable to fracture if his weight were to be applied to it and so situated that if it were to fracture he would be liable to fall a distance of more than 2 metres unless

such one or more of all or any of the following, namely, suitable and sufficient crawling ladders, crawling boards and duck boards (which shall in any case be securely supported and, if necessary secured so as to prevent slipping) as are necessary, are provided and so used that the weight of any person so passing or working is wholly or mainly supported by such ladders or boards unless his weight is supported by other fully safe and sufficient means."

A

The subsection, if it might be paraphrased, plainly prohibits a person from passing over or working on or from material ( which meets 2 requirements ) unless necessary suitable and sufficiently safe means of access and working are provided and properly used by the person.

B

Needless to say it is an employee or workman who is most likely to be the person who passes over, or works on, or works from materials likely to fracture and it is undeniably he who must personally use the means provided, properly.

C

Further support for this view may be gained from an examination of the context and wording of subsections (1), (2) and (4) of Section 24 which are directed at the person primarily responsible for the provision of a safe means of access and a safe place of employment and who, in the scheme of the Act, is the employer, contractor, occupier or owner of the factory.

D

However Subsection (3) cannot and ought not to be read in isolation from the other subsections of Section 24 or indeed the Act as a whole.

As was stated by Atkin, J. in Mousell Bros v. London and North-Western Rlway [1917] 2 KB 836 at p.845:

E

"I think that the authorities cited by my Lord make it plain that while prima facie a principal is not to be made criminally responsible for the acts of his servants, yet the Legislature may prohibit an act or enforce a duty in such words as to make the prohibition or the duty absolute; in which case the principal is liable if the act is in fact done by his servants. To ascertain whether an Act of Parliament has that effect or not regard must be had to the object of the statute, the words used, the nature of the duty laid down, the person upon whom it is imposed, the person by whom it would in ordinary circumstances be performed and the person upon whom the penalty is imposed." (see also: Ross v. Associated Portland Cement Mfg Ltd [1964] 2 All ER 425 per Lord Reid.)

F

G

To otherwise read section 24(3) of the Act is to negate the whole scheme and purpose of the section which is meant to secure the safety of workmen in a factory both as to their means of access to, and in their actual working places, by requiring the provision of warning notices as well as suitable and sufficient safety appliances by the occupier of the factory.

In my view not only do the opening words of subsection (3) support this view but the latter part of the subsection itself recognises (in the past tense) a duty of the occupier to provide suitable and sufficient means of access as are necessary having regard to the particular working environment contemplated by the subsection. It is noteworthy that the Particulars of Offence averred *inter alia* a failure on the part of the appellant company to provide that the deceased employee's weight was supported by safe and sufficient means as a result of which the deceased fell to his death.

Additionally the Statement of Offence in which the offence is shortly described as a Failure to Provide a Safe Place of Employment also makes specific reference to the provisions of Section 80(1) of the Act. That section provides (so far as relevant for present. purposes):

> "In the event of any contravention in or in connection with or in relation to a factory, of the provisions of this Act, the occupier ..... of the factory shall, subject as hereinafter in this Act provided, be guilty of an offence."

Of an identically worded provision in the Factories Act 1937 (U.K.) Viscount Caldecote C. J. said in Meigh v. Wickendan [1942] 2 K.B. 160 at pp.164 and 165:

> "The occupiers responsibility under the Act does not depend on proof of personal blame or even of knowledge of the contravention. The policy of the Act seems to be to fasten responsibility, in the first instance, on the occupiers. The occupier, however, may bring the person who is alleged to be "the actual offender" before the court, and if this person is found to have committed the offence, the occupier may be found not guilty :See S.1 37 (the equivalent of our Section 86). The Factories Act, 1937, is drastic in its provisions. It is clearly framed in such a way as to make it certain that someone can be found who can be convicted of an offence in the event of a contravention. "

In this prosecution the appellant company is charged as the 'notional occupier' of the 'notional factory' premises (see: section 9 (4) of the Act) in respect of its failure to provide any of the safety items enumerated in subsection 3 of section 24 of the Act.

Needless to say Section 90(1) of the Act provides that :

> " it shall be sufficient in the information to allege that factory is a factory within the meaning of this Act and to state the name of the ostensible occupier of the factory, or where the occupier is a firm, the title of the firm. "(see: proviso to Section 122(a)(iii) of the CPC Cap.21.)

The particulars in this case not only identified the employee by name but also the "ostensible occupier" by its company name and the premises by its physical location. It also described in general terms the failure of the defendant company

and a requisite characteristic of the work place viz: "... from which he was liable to fall a distance of more than two metres."

A

In my view although the Particulars of Offence could have been more clearly and carefully worded it gave reasonable information as to the nature of the offence charged. Furthermore the absence of any objection to the particulars is not an irrelevant factor having regard to the nature of the prosecution's case and the cross-examination of the witnesses.

B

The learned magistrate in his lengthy judgment correctly directed himself as to the ingredients of the offence created by Section 24 (3) of the Act when he said at p. 3:

> "In this case that which the prosecution have to prove is surely this (1) that the deceased was at the material time an employee of the defendants (2) that the material premises fell within the contemplation of the Factories Act and specifically within Section 24(3) [without prejudice to the generality of S.24(i)] (3) that the defendants committed a relevant act or omission referable to the deceased in contemplation of the stated offence particularly the requirements of S.24(3).The object of the legislation must be the protection of the workers in this section by keeping the place of work safe. Section 24(3) of Cap. 99 goes to say how, in the case of material liable to fracture and giving rise to a fall of more than 2 metres, such safety is to be achieved."

C

D

Then after setting out the largely undisputed evidence of the prosecution's witnesses the learned magistrate made the following findings:

E

" (1) That the deceased Ashok Kumar was at all material times an employee of the Defendant Company within the contemplation of the Factories Act;

(2) That the building in which he met his death was one in which he was working for the Defendant Company in contemplation of the requirements of S.24(3) of the said Act; and

F

3) That the deceased was passing over or working on or from material liable to fracture when it did fracture and at the material time no suitable or sufficient crawling ladder, crawling board or duckboard was provided as required by S.24(3)."

G

The second submission of learned counsel for the appellant company on the first ground of appeal was that, there was no evidence before the trial magistrate to establish that the deceased was an employee of the defendant company.

With the submission I am unable to agree. There was undisputed evidence led

before the learned trial magistrate that the deceased was a "workmate" of 2 acknowledged employees of the appellant company and that he was at the appellant company's construction site on the day in question. Furthermore the evidence is clear that the deceased fell through the roof at a time (i.e. between 8.30 a.m. and 9.00 a.m.) when other employees of the appellant company were working on the roof.

There was in my view more than sufficient evidence to support the first of the trial magistrate's findings enumerated above and more particularly, to raise the evidential presumption afforded by Section 91(1) of the Act which provides:

> "If a person is found in a factory at any time at which work is going on ……., he shall, until the contrary is proved, be deemed for the purposes of this Act to have been employed in the factory."

The second ground of appeal deals with the word "permitted" in the Particulars of Offence.

In this regard learned counsel for the appellant company submits that there is no offence provided for in Section 24 of the Act of "permitting" such as to be found in the Traffic Act (Cap 176) viz: Section 23 (1), 35 (5) and Section 4(1) of the Motor Vehicles Third party Insurance Act (Cap.177).

This issue was first raised before the learned trial magistrate in a submission that the appellant company had no case to answer. In dismissing the submission at that stage the learned magistrate ruled :

> "I cannot hold that the use of the word permitting can be confined so as only to include actively permitting i.e. that would inevitably mean the establishment of a separate offence of 'permitting' rather than simply the usage of the word to encompass 'allowing' in the sense that an employee, not being specifically prohibited from entering a particular area, is allowed by reason of his contract, of employment to be on a site occupied by his employers. In any event I am not viewing this as such a limited case as Mr. Parmanandam suggests and any objection to the wording of the charge has come late in the day. I am content to approach the case without any technical limitation by the use of "permitting" if either counsel wishes me to do otherwise let it be made clear now.

It is noteworthy that in spite of the ruling and the "invitation" of the learned trial magistrate, no application was made to amend the charge nor did learned defence counsel seek to recall any prosecution witnesses for further cross-examination.

In his final judgment the learned trial magistrate dealt extensively with defence counsel's submissions as to the use of the word "permitted" in the particulars of the offence charged saying inter alia:

> "..... allegations which are not essential to constitute the stated offence and which may be omitted without affecting the charge or vitiating the indictment, do not require proof and may be rejected as mere surplusage. The prosecution need only prove sufficient of the particulars to constitute the offence. See : R. v. Barraclough [1906] 1 KB 20."

A similar view was taken by Sheehan, J. in Labasa Criminal Appeal No. 15 of 1987 Gaya Prasad and Ram Prasad v. R. in respect of an erroneous reference to an inappropriate penalty section in the Statement of Offence in the charge there under consideration.

Then after reiterating the view he took of the meaning of the word "permitted" as used in the Particulars of Offence the learned trial magistrate said :

> "The object of such view is to give practical effect to the perceived intention of the Act to protect employees as a matter of social and public interest against the failings of their employers, albeit employers who may otherwise be the most conscientious and commendable of employers who have simply failed even on one occasion to live up to the requirements of the Act.

It is true neither Section 24 or Section 80(1) of the Act contains the word "permit" but that in itself does not theoretically-speaking preclude it from being a contravention of the provisions of the Act, if it is properly proved.

It is noteworthy that in the Interpretation Act (Cap. 7) the term "contravene" is defined in terms of a "failure to comply". In other words in my view permitting the commission of a prohibited act can amount to a "contravention" of the prohibited act.

In the result nothing turns on the use of the word "permitted" in the "Particulars of Offence" in the circumstances of this case or of the offence section under consideration.

If however I should be wrong in my view then I would have no hesitation in holding that the use of the word "permitted" in the Particulars of Offence was surplusage that only rendered the charge defective and cannot in anyway, be said to have prejudiced or embarrassed the appellant company in the conduct of its defence.

In the event I would have no hesitation in finding in terms of the proviso to Section 319 (a) of the Criminal Procedure Code Cap. 21 that no substantial miscarriage of justice has actually occurred.

The appeal is accordingly dismissed.

*(Appeal dismissed.)*