

AT LAUTOKA

Appellate Jurisdiction
Civil Appeal No. 7 of 1980

BETWEEN:

MOHAMMED YAKUB KHAN & CO.

Appellant

A N D :

THE LABOUR OFFICER FOR AND ON
BEHALF OF JALE NAWAI

Respondent

Messrs. Gordon & Company
Crown SolicitorSolicitors for the Appellant
for the RespondentJ U D G M E N T

The complainant Jale Nawai was at the material time employed by the appellant. In his evidence the complainant called himself a mechanic welder assistant. In the particulars of his claim he is described as a welder assistant. The statement of defence claimed that he was a garage boy. The only evidence on the point is the evidence of the complainant himself who said in respect of his duties "If something breaks I weld it. If anything goes wrong I have to change it. Also cleaning round garage. No defined limits of my work. I can do anything I am told."

On the day in question a digger wouldn't start and the complainant in an attempt to start it put jumper leads from a lorry to the digger's battery. The battery exploded in his face and he received injuries.

There was no doubt that what he was doing was for the purposes of and in connexion with his employer's trade or ^ubusiness, so that in accordance with section 5(1) of the Workmen's Compensation Ordinance the work must be deemed to be in the course of his employer's business.

Various arguments were raised as to the exact time of the incident and whether it was just before or just after the time when he would normally start work, but in view of the wording of section 5(1) I cannot see that this makes any difference at all.

So the complainant should be entitled to compensation unless proviso (b) to that section applies - namely unless the injury could be attributed to his own serious and wilful misconduct. This in fact is the main ground of defence pleaded by the appellant in the magistrate's court, namely that the complainant's injury was attributed to his own serious and wilful misconduct. The other relevant grounds pleaded were that the complainant was a garage hand, not a welder assistant, and that he had tried to start a 12 volt tractor by connecting it with jumper leads to a 24 volt battery which he shouldn't have done.

So far as the complainant's employment is concerned, there was only his own evidence that he was a welder mechanic assistant and therefore/^{that} must be accepted, as must his evidence of what his duties were. Also undisputed was his evidence that though he had no training in electrical work, he had started vehicles before with jumper wires, he had done it by himself and with the foreman Manoj. In fact Manoj had told him previously to join jumper wires - presumably to start vehicles. In the light of this evidence and in the absence of any contradicting evidence it must be accepted that he was not acting outside the terms of his employment.

The first two grounds of this appeal are as follows -

- "1. The learned trial magistrate has erred in law by not directing his mind to the fact that the injury to the workman Jale Nawai was attributable to the serious and wilful misconduct of that workman in that he attempted to start a digger by using a jumper lead from the truck battery to that of the digger battery when he was specifically warned by a fellow workman not to do so.
2. The learned magistrate erred in law by not properly evaluating the evidence of the workman's own witness Prem Chand when his evidence was in direct conflict with the evidence of the workman."

These two grounds can be dealt with together. The position was that the workman first gave his evidence and counsel for the respondent then called a further witness Prem Chand in support of the workman's claim. Half way through Prem Chand's evidence counsel applied to treat him as hostile, counsel saying that his evidence was contrary in some undisclosed way with a previous statement made by him. The application was apparently refused the magistrate merely saying -

"I don't know if hostile witnesses come into these proceedings. You may just leave the witness to the respondent (present appellant) if you wish. Court will decide on evidence." Which is really rather an extraordinary position for the court to take.

The purpose of treating a witness as hostile, once a basis for this is established, is of course to attempt to destroy his credibility so as to counteract any adverse evidence he has given. If this is not done, the side calling the witness is more or less stuck with the evidence he has given. When he came to deal with the evidence of Prem Chand in his judgment the magistrate said "I believe Jale rather than Prem Chand. Bearing in mind the completely negative attitude of the respondent, as evidenced by the Statement of Defence, in which respondent did not even admit having employed Jale at all, notwithstanding the particulars of the accident given by Respondent earlier in which Jale was shown as an employee, it does not surprise me that Prem Chand has changed his story to suit the respondent." Not only was there nothing properly before the court to justify the magistrate's assertion that Prem Chand had changed his story to suit his employer, but it appears

000121

he only had counsel's remark from the bar that Prem Chand's evidence was contrary to a previous statement - the extent of the contradiction being quite unspecified. If this was the reason for rejecting Prem Chand's evidence it was quite an improper reason. The ground of appeal that the magistrate had not properly evaluated Prem Chand's evidence is quite valid. Prem Chand's evidence cannot be dismissed like that, for better or for worse the evidence of Jale and Prem Chand must be considered together. And their evidence must be considered particularly with relation to the appellant's ground that Jale's injury was the result of his own serious and wilful misconduct.

First it will be seen that there was no evidence - from Jale or from Prem Chand - that Jale had been specifically warned by a fellow worker not to try to start the digger using the jumper wires.

Second although Jale said that he had been told to try to start the digger by Sahir Khan, one of the appellant's sons, and that Prem Chand had told him where to put the ground and live leads, this seems to be contradicted by Prem Chand who said that Jale came and said he knew how to start the digger and proceeded to help them to do so.

But even accepting Prem Chand's evidence the position is that three of them were trying to start the digger, himself, Nasir Khan (another of the appellant's sons) and Jale. He said that three people were necessary for the job, one on each end of the leads and one to start the motor, that he had connected the jumper leads to the lorry, and finally he said that the digger battery blew because the terminals were misconnected. The implication is that he had misconnected the terminals, not Jale.

So this was not a case of Jale, entirely on his own connecting up the wires and causing the battery to blow up. He was helping Prem Chand and Nazir Khan to start the digger, the faulty connections if such there were, were apparently caused by Prem Chand. If Jale had been doing something he shouldn't have done, you would hardly expect Prem Chand the driver and mechanic and Nasir Khan, the son of the appellant to stand by and let him to do it. And it is not the case that starting engines with jumper leads from another vehicle is improper or necessarily dangerous - that is one of the reasons for having jumper leads. And it seemed to be a not uncommon practice in the appellant's works. But attaching jumper leads between a 24 volt battery and a 12 volt battery requires some care - the connection to the 24 volt battery has to be half way along so that you don't get the full 24 volts. This connection seems to have been made by Prem Chand not Jale.

The nett result is that even if the magistrate had properly evaluated Prem Chand's evidence, and in the absence of any evidence from the appellant that this way of starting the digger had been forbidden, or

that Jale had been forbidden to help start the digger, I would agree with the magistrate's conclusion that there was no evidence before the court that Jale's injury was attributable to his own serious and wilful misconduct.

The appeal is therefore dismissed, with costs to be taxed if not agreed.

LAUTOKA,
4th June, 1980

sgd(G. O. L. Dyke)
JUDGE