1957 *Present :* H. N. G. Fernando, J.

D. OBEYESEKERE, Appellant, *and* G. JANE NONA, Respondent

S. C. 3—Workmen's Compensation C3/141/54

Workmen's Compensation Ordinance—Section 3—"Accident"—Burden of proof—Quantum of evidence.

In the context of Workmen's Compensation law even an intentional and deliberate injury can be an "accident" in relation to the person injured. Murder, therefore, can be an "accident" within the meaning of section 3 of the Workmen's Compensation Ordinance.

In an application for compensation under the Workmen's Compensation Ordinance the burden of proving the conditions essential to the obtaining of an award rests upon the applicant, and if he leaves the case in doubt as to whether those conditions are fulfilled or not, or where the known facts are equally consistent with their having been fulfilled or not fulfilled, he has not discharged the onus which lies upon him.

The applicant's husband had been employed as a watcher on an estate belonging to the respondent. He was murdered by some unknown person pounding him on his head with a blunt weapon while he was sleeping alone in a hut on the estate. No witness, however, was able to depose to any of the circumstances of the murder of the deceased, and the applicant's statement that the deceased would not have been killed if he had not been on the estate was a mere conjecture as to the motive for his murder.

Held, that in view of the failure of the applicant to establish the actual motive for the murder there was no need to determine whether the injury on the deceased was incident to or causally connected with his employment.

APPEAL under the Workmen's Compensation Ordinance.

Frederick W. Obeyesekere, for the respondent-appellant.

No appearance for the applicant-respondent.

Cur. adv. vult.

June 14, 1957. H. N. G. FERNANDO, J.—

Upon the facts found in this case by the Assistant Commissioner, the applicant's deceased husband had been employed as a watcher on an estate belonging to the appellant, and was murdered at some time on the night of 5th November 1954. It would appear that some person unknown had severely pounded the deceased on his head with a blunt weapon and killed him while he was sleeping alone in a hut on the estate. The only question which arose for decision on these facts was whether death resulted from personal injury *by accident arising out of and in the course of* the deceased's employment as a watcher, and that question has been answered in the affirmative by the Assistant Commissioner.

A somewhat similar case which came up in appeal was that of *Krishnakutty v. Maria Nona* [1]. There the deceased had been employed as a night watchman on certain premises; it was his custom to return home each night for a short period to have his dinner, and he was murdered on his way to dinner on a highway which did not form part of his employer's premises. It was held in appeal that he was on the highway for a purpose of his own and not in respect of any special duty which he owed to the employer and that therefore the accident did not arise out of and in the course of his employment. The Assistant Commissioner who decided the present case appears to have assumed that if the murder took place on the premises in question, and not on the highway, the employer should have been held liable, and on that basis has concluded that since the deceased watcher in the present case met his death on the appellant's Estate, it would follow that the " accident " arose out of and in the course of the employment. This in my opinion is a serious misconception and I consider it necessary to explain at some length the manner in which cases of this nature should be examined.

In the first place I should point out that the English authorities clearly establish that the term " accident " in the context of Workmen's Compensation Law has been construed in the wide sense of " any unforeseen and untoward event producing personal harm ", and that even intentional and deliberate injury can be an " accident " in relation to the person injured. The contention that " accident " negatives the idea of intention was rejected by three Judges of the Court of Appeal in *Nisbett v. Rayne and Burn* [2]. Reference was there made to two earlier cases, where an engine driver had been injured by a stone wilfully dropped on the engine by a boy, and where a gamekeeper had been attacked and wounded by poachers. I would with respect adopt this interpretation and hold that murder can be an " accident " within the meaning of section 3 of the Workmen's Compensation Ordinance. But the question whether the murder or injury of an employee is *an accident arising out of and in the course of the employment* can receive different answers according to the circumstances of each case.

The officers who decided this case and that of *Krishnakutty v. Maria Nona* [1] appear not to have realised adequately the fundamental point that an applicant for compensation under the Workmen s Compensation law has a burden of proof to discharge. In *Pomfret v. Lancashire and Yorkshire Railway Company* [3] it was pointed out that " the burden, and the whole burden, of proving the conditions essential to the obtaining of an award rests upon the applicant and on nobody else, and if he leaves the case in doubt as to whether those conditions are fulfilled or not, where the known facts are equally consistent with their having been fulfilled or not fulfilled, he has not discharged the onus which lies upon him ". The same matter was stated with emphasis by Lord Halsbury in *Barnabas v. Bersham Colliery Co.*, [4] when he said that propositions must be proved in a Court of law by proof of evidence and that is

[1] *(1949) 51 N. L. R. 66.*
[2] *(1910) 2 K.B. 689.*
[3] *(1903) 2 K. B., 718.*
[4] *(103) L.T. 513.*

not satisfied by surmise, conjecture or guess. In that case a workman had an apoplectic seizure while he was performing his ordinary duties and the medical evidence was that the arteries of the brain had degenerated and were in such a state "that they might rupture with slight exertion or with no exertion at all"; it was pointed out that the facts were equally consistent with the conclusion that the seizure was caused by exertion at his work or with the negative conclusion and that in that state of evidence the applicant had not proved his case. Of course, as in any legal proceedings, "proof does not mean proof to rigid mathematical demonstration because that is impossible; it must mean such evidence as would induce a reasonable man to come to the conclusion as a fact that the employment was the cause of the death." The proof may be furnished "by direct evidence or by inference from facts, but the matter must not be left to rest in surmise, conjecture or guess." *Hawkins v. Powells Tillery Steam Coal Co. Ltd.* [1] In the present case no witness was able to depose to any of the circumstances of the murder of the deceased, and his wife's statement that he would not have been killed if he had not been on the estate was a mere conjecture as to the motive for his murder. The real question therefore is whether upon the bare facts which I have recited above it is legitimate to draw any inference upon which liability on the part of the employer can be properly held to arise.

In *Nisbett's case* [2] the deceased had been employed as a cashier and in the course of his duty was in the habit of carrying large sums of money by train to a colliery owned by his employer. While he was travelling in the train in the discharge of his duty, the bag of money was stolen from him and he himself was killed by shots fired from a revolver. The relevant finding of fact by the County Court Judge was that the robbery and the murder were committed because Nisbett carried the money in his bag and on this fact the Judge held that the robbery was a risk incidental to the employment of carrying money about, and that accordingly for the purposes of the Statute the accident arose out of and in the course of the employment. The Court of Appeal agreed with the conclusion that there is a distinct and well known risk run by cashiers and the like who are known to carry considerable sums in cash of being robbed and possibly murdered and that such a risk is incident to their employment. What I consider to be important in the reasoning which founded the decision in that case is that there two points had to be established:—(i) the reason for the murder, that is that Nisbett was murdered because he carried his employers' money; and (ii) that the risk of robbery and murder was an incident of the employment of a "cash-carrying" cashier. With regard to the first point, there was probably direct evidence of robbery, but even if the only evidence was that the cashier had been attacked, robbed of the money and killed, there arose from that situation an almost irrebuttable inference even for the purposes of criminal proceedings that the motive for the murder was robbery. Once this motive was established, the Court had to consider the second point, namely whether the risk of robbery was incident to the nature and conditions of the employment of a person whose duty it was to convey money by train for his employers.

[1] *(1911) 1 K.B. 988.*

[2] *(1910) 2 K.B. 689.*

That there are two steps in the reasoning is I think made clear by a consideration of other important English decisions. In *Alexander v. Dickinson* [1] the deceased, who was employed as a watchman, had to occupy a watchman's cabin at the employer's premises; there was a supply of gas at the cabin with two controlling taps; the watchman was found dead one morning with the cabin door locked and the windows closed; both gas taps were found open; *and the cause of death was asphyxiation by gas.* It was held that the workman was properly in the cabin in the course of his employment; that the cabin was a place to which a risk attached by accidental or negligent manipulation of the taps and that in these circumstances it would be legitimate for a Judge, notwithstanding the absence of evidence as to the immediate circumstances of death, to attribute the accident to the risk unless there was sufficient evidence of suicide. It seems to me that the first step in this reasoning was the fact that the death was due to gas asphyxiation, and the second step that, since gas asphyxiation was in the circumstances a risk which attached by reason of the gas taps in the cabin, the accident might reasonably be said to have arisen out of and in the course of the employment. If gas asphyxiation had not been shown to be the cause of death, the second point may either not have arisen for consideration or else may have had to be differently determined.

In *Mitchison v. Day Brothers* [2] which was a case of assault on the driver of a van at a time when he was in charge of the van, Buckley, L. J. pointed out that the question to decide is whether *the occurrence* is such that there has resulted personal injury by accident arising out of the employment, thus rendering necessary a consideration of the circumstances of the occurrence. While in straightforward cases, such as contact with machinery in a factory, the reason for the "occurrence" may be more or less obvious and not require explanation unless an employer seeks to offer one, the need to examine the reason for the occurrence seems to me always present in the case of physical violence deliberately caused. If not, an employee, who deliberately provokes another to violence by insulting him in the course of a private argument, might claim that there was an "accident"; in such an event, the question which (as Buckley L. J. points out) always arises, namely, whether there was an "accident" or not, has obviously to be answered in the negative, and the further question whether there was an accident arising out of the employment does not arise at all.

The case before me is one in which the first of the two points (that is, the reason for the murder) has not been established. There are clearly two possible motives which can be reasonably assigned for the murder of the deceased, namely (*a*) personal enmity, and (*b*) the desire to kill him because of his performance, or to prevent the performance, of his duties as a watcher; and in the absence of any evidence or circumstances indicating that the latter was the real motive, the former one remains at least equally possible, and the actual cause of the murderous assault is left in doubt. In a number of English cases of assaults upon employees in which compensation has been awarded, the motive was never in doubt

[1] *(1939) 3 A.E.R. 204.* [2] *(1913) 1 K.B. 603.*

but was clearly established, either by evidence or by circumstances from which the motive could quite easily be inferred, and the awards were ultimately made because the risk of assault from such a motive as that established was considered incident to the nature of the employment. Thus in *Smith v. Stepney Corporation* [1] it was clear that the workman who was an attendant at a public lavatory was assaulted by a drunken sailor because the attendant demanded payment of the penny which was the usual charge for the use of the lavatory. Again in an Irish case which is referred to in the judgment in *Nisbett's* case, three poachers had attacked a gamekeeper, a circumstance which even without further evidence amply justified the conclusion that the motive for the assault was connected with poaching. And, as I have already pointed out, the motive was in no doubt whatsoever in the case of the murdered cashier Nisbett.

The importance of first fixing the motive for the assault, before proceeding to inquire whether the injury was one by accident arising out of the employment, is made clear if we were to consider the case of *Nisbett* with a variation in the facts. Suppose for example that Nisbett was travelling in the train on the business of his employer *in order to inspect a colliery*, but that he was known to be a successful gambler who carried on his person large sums in cash for the purposes of betting : if he had been attacked and robbed while travelling in the train, the motive for the attack would have been the robbery of cash known to be his own and not that of his employer. If that motive was established, then clearly it could not have been held that the risk of assault with that motive was incident to his employment. While the Court readily inferred that the risk of assault and robbery was an incident or risk attaching to the employment of a travelling cashier, no inference of any such risk could reasonably be drawn in the case of an employee whose duties do not involve the conveyance of cash.

In *Holden v. Premier Waterproof and Rubber Co.* [2], an employee was murdered by a fellow workman in the premises of the employer and it was clear that the assault took place at a time during which the employee was engaged in his duties as such. But it was proved that the " reason " for the murder (if I may call it such in the circumstances) was that the fellow workman had suddenly been seized with homicidal mania. The Court held that, although there was an " accident " which arose *in the course* of the employment, the risk of such an assault was not one attached to the employment and the accident did not arise *out of* the employment. The judgments on this latter point are both able and instructive, but for present purposes the important feature is that it was necessary before dealing with that important and difficult point, first to form a conclusion, upon the evidence, as to the circumstances of the assault. Without such a conclusion, there would have been no material upon which to decide whether or not the accident arose out of the employment.

I would hold that if the motive for an assault cannot be established by an applicant according to the ordinary modes of proof, whether upon evidence or proper inference from circumstances, the case does not reach

[1] *22 Butterworth—Workmen's Compensation Cases p. 451.*
[2] *144 L. T. 519 & 2 B.W.C.C. 460.*

the stage where the need arises to determine whether or not the injury was incident to or causally connected with the employment. In this view of the matter the inability of the applicant to establish the actual motive for the murderous attack on her husband is conclusive of the case. I would therefore allow the appeal and set aside the award of compensation and of costs made by the Assistant Commissioner.

Appeal allowed.