1945 *Present:* **Wijeyewardene J.**

DANUSKODY THEVAR, Applicant Appellant, *and* MICHAEL FERNANDO, Respondent.

708—Workmen's Compensation, C 3/95/43.

Workmen's Compensation—Death caused by accident arising out of employment—Contravention of employer's orders—Scope of employment—Workmen's Compensation Ordinance (Cap. 117) s. 3 (B) 2.

Where a labourer met with his death by an accident arising out of his employment, the fact that he acted in contravention of the orders of his employer would not debar a claim for compensation where the act was done within the scope of his employment.

THIS was an appeal from an order made by a Commissioner for Workmen's Compensation dismissing the appellant's claim for compensation in respect of the death of his son.

The facts appear from the argument.

H. W. Thambiah for applicant, appellant—The deceased, Suppiah, was a labourer employed by the respondent in loading bags of tea leaves from lighter to ship. The bags were carried from lighter to ship by means of a " rope " sling worked by a crane. After loading the workmen are expected to go on board ship, get their names registered, and leave the ship by a gangway. The witnesses state that the workmen had been warned not to go up to the ship in the " rope " sling. In contravention of this prohibition the deceased attempted to enter the ship by means of the " rope " sling and was killed. The question that arises is whether in view of this prohibition the applicant can claim compensation under section 3 of the Workmen's Compensation Ordinance (Chap. 117). It is submitted that there is not a serious and wilful misconduct here. The evidence is not clear that express orders were given that the workmen should not use the " rope " sling for entering the ship. The workmen had a habit of going up the " rope " sling and this was condoned by respondent. It has been held that where a workman leaves his place of work and goes out and is injured on his way he is still in the course of his business—*Gane v. Norton Hill Colliery Co.*[1]; *Webber v. Wansborough, Ltd.*[2]. In *Plumb v. Cobden Flour Mills Co., Ltd.*[3], Lord Dunedin drew a distinction between a prohibition which limits the sphere of employment and a prohibition which only deals with conduct within the sphere of employment. The burden of proving that workman was guilty of serious and wilful misconduct lies upon the employer—*Johnson v. Marshall & Sons, Ltd.*[4]. Further, where death occurs, wilful misconduct on part of workman is no defence—*34 Halsbury (Hailsham ed.) 872; Macguire v. Galbot* [5]; *Noble v. Southern Railway Co.*[6]; *Moore (A. G.) & Co. v. Donnelly* [7]; and *Kelaart v. Piyadasa* [8] are cases which have no application to the facts of the present case.

[1] *(1909) 2 K. B. 539.*
[2] *(1915) A. C. 51.*
[3] *(1914) A. C. 62 at p. 67.*
[4] *(1906) A. C. 409 at p. 411.*
[5] *(1915) B. W. C. C. 555.*
[6] *(1940) A. C. 583.*
[7] *(1921) 1 A. C. 329.*
[8] *(1942) 43 N. L. R. 394.*

H. W. Jayawardene for defendant, respondent—The authorities cited for the applicant do not apply to the facts of this case. The burden of proof lies on the applicant. The accident did not arise " out of and in the course of his employment ". The crane had two slings. The " net " sling alone was used for taking up workmen. Suppiah went up by the " rope " sling not for the purposes of his employment but to get to the ship earlier and so get his pay earlier than his co-workmen. He was acting purely in his own interests and not in the interests of his employer. The deceased workman took an unnecessary risk for his own purposes. The accident therefore did not arise out of and in the course of his employment. *Gane v. Norton Hill Colliery Co.* (*supra*) was distinguished by the House of Lords in *Lancashire & Yorkshire Railway Co. v. Highley* [1]. See also *Stephen v. Cooper* [2]; *Knowles v. Southern Railway Co.*[3]; and *Noble v. Southern Railway Co.* (*supra*), which was considered by Howard C.J. in *Kelaart v. Piyadasa* (*supra*).

H. W. Thambiah in reply—As regards the burden of proof the respondent has admitted that the accident arose " in the course of " the employment but denied that it arose " out of " the employment.

Cur. adv. vult.

March 27, 1945. WIJEYEWARDENE J.—

This is an appeal from an order made by a Commissioner for Workmen's Compensation dismissing the appellant's claim for compensation in respect of the death of his son, Suppiah.

Suppiah was a labourer employed in the Colombo Harbour by the respondent in loading bags of tea leaves. The bags are carried up from the lighter to the ships in the harbour by means of a sling—described by one witness as " merely a loop of a rope "—worked by a crane. When all the bags have been sent to the ship, Suppiah and his co-workmen on the lighter have to go on board the ship, get their names registered by a clerk and leave the ship by a gangway and go ashore in a boat provided by the respondent. On the day in question Suppiah clung to the last load of bags carried by the rope sling. The deckman who was on board the ship saw Suppiah coming up on the loaded sling and gave orders for the sling to be " halted ". Immediately afterwards, the bag to which Suppiah was clinging got unloosened. Suppiah fell down with the bag and was killed.

Evidence was led before the Commissioner to show that a net sling was used to convey labourers between the lighter and the ship and that they had been warned not to go up or down in an empty or loaded rope sling. There was evidence also to show that Suppiah had been warned on this occasion too not to come up on the loaded sling. The Commissioner has accepted that evidence.

The issues framed by the Commissioner at the commencement of the inquiry were—

(*a*) Did the deceased Suppiah receive personal injury by accident arising out of his employment under the respondent?

[1] *(1917) A. C. 352.* [2] *(1929) A. C. 570.*
[3] *(1937) A. C. 463.*

(*b*) Is the applicant a dependant of the deceased ?

(*c*) What compensation, if any, is payable by the respondent ?

The Commissioner answered issue (*a*) in the negative and issue (*b*) in the affirmative and awarded no compensaton to the applicant. It will be noted that the parties were not at issue on the question whether the accident was " in the course of the employment ".

In dealing with issue (*a*) the Commissioner held—

" This case falls to be dealt with on the lines of the three questions framed by Lord Maugham in *Noble v. Southern Railway Co.*[1]. The answers are as follows:—

(1) Looking at the facts proved as a whole including the order given to the workmen not to use the loaded sling to go up to the ships it must be held that the accident was not one which arose out of the employment of the deceased under the respondent. *Moore (A.G.) & Co. v. Donnelly*[2].

(2) The answer to the first question is in the negative as the accident was due to the deceased contravening an order given to him by the person who supervised his work by going up to the ship on the loaded sling.

(3) The act of the deceased was not done for the purposes of and in connection with his employer's trade or business . . . . . The object appears to have been to get ashore as early as possible after the actual work of loading the bags of tea leaves had been accomplished . . . . It would have been different if the accident occurred when the deceased descended to the lighter from the ship in order to work expeditiously."

I may observe at this stage that in answering the third question the Commissioner appears to have considered the motive of Suppiah in disobeying the prohibition. Such a consideration is irrelevant as Lord Wright observed in *Noble v. Southern Railway Co.* (*supra*):—

" The motive, in the narrower sense of the immediate urge in choosing to go by the prohibited route is immaterial, whether it was to save time or to save himself trouble. The test is objective and depends on the fact that his proceeding to the station was within the sphere of his employment. "

A large number of English cases was cited at the hearing before me. As was remarked by Earl Loreburn in *Blair & Co., Ltd. v. Chilton* [3].

" The Workmen's Compensation Act is an Act leading itself to infinite refinement. The words of the Act itself rule in every case. Previous decisions are illustrations of the way in which Judges look at cases, and in that sense are useful and suggestive; but I think we ought to beware of allowing tests or guides which have been suggested by the Court in one set of circumstances, or in one class of cases, to be applied to other surroundings, and thus by degrees to substitute themselves for the words of the Act itself."

[1] *(1940) A. C. 583.* [2] *(1921) I A. C. 329.*
[3] *(1915) 8 Butterworths' Workmen's Compensation Cases 324.*

Apart from the danger indicated above, a Court has to act cautiously in following the English decisions, as section 3 of the Workmen's Compensation Ordinance is not identical with the corresponding provisions of the English Acts which govern those decisions. It is, I think, desirable to examine the various statutory provisions made in England from 1906.

The Workmen's Compensation Act of 1906 enacted:—

"Section I (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 mentioned, be liable to pay compensation in accordance with the First Schedule in this Act".

"(2) Provided that:—

(*a*) . . . . . .

(*b*) . . . . . .

(*c*) If it is proved that the injury to a workman is attributable to the serious and wilful misconduct of that workman, any compensation claimed in respect of that injury shall, unless the injury results in death or serious and permanent disablement, be disallowed."

Under this Act one of the methods used to show that the injury was not caused by an "accident arising out of the employment" was by proving that the workman was doing some thing which he was prohibited from doing. This gave rise to the distinction drawn in *Plumb v. Cobden Flour Mills Co., Ltd.* [1] between "prohibitions which limit the sphere of employment, and prohibitions which only deal with conduct within the sphere of employment". It was held that it was only a "scope limiting prohibition" that prevented an accident from arising out of the employment.

In *Moore (A.G.) & Co. v. Donnelly* (*supra*) a miner, in the course of his employment fired a shot by means of a fuse and detonator and retired to a place of safety. The shot missed fire. Acting in contravention of certain Statutory Orders made under the Coal Mines Act, the miner returned to the place of the shot in less than one hour, when the shot blew off in his face and disabled him permanently. It was there held that the miner was not entitled to compensation. Lord Birkenhead L.C. stated:—

"On principle, no distinction can logically be drawn between a prohibition founded upon statute and one imposed by the employer to regulate the employment. . . . Where a prohibition for which the employer is responsible, in matters comparable to those under discussion, is brought clearly to the notice of the workman, his breach of it takes him outside the sphere of his employment, so that the risk in which he involves himself has ceased to be reasonably incidental to that employment."

As a result of this decision, the Legislature amended the Law by an Act of 1923 providing that even in such circumstances as those in *Moore (A.G.) & Co. v. Donnelly* (*supra*) the accident "shall be *deemed* to arise

[1] *(1914) A. C. 62.*

out of and in the course of the employment ", if the act done by the workman in contravention of orders was done by the workman " for the purposes of and in connection with his employer's trade or business ". That Act of 1923, was an amending Act to be read with the principal Act of 1906, and the relevant provision was contained in section 7 which read:—

" For the purposes of the principal Act, an accident resulting in death or serious and permanent disablement 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 any orders given by or on behalf of his employer, or that he was acting without instructions 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."

In the new Act of 1925 the relevant provisions are as follows:—

Section I (I)—Same as section I (I) of the 1906 Act.
Proviso—(*a*)—Same as section I (2) (*a*) proviso of 1906 Act with a slight amendment.
Proviso (*b*)—Same as section I (2) (*c*) proviso of 1906 Act.
Section I (2)—Same as section 7 of the 1923 Act.

Wilsons and Clyde Coal Co., Ltd. v. M'Ferrin and *Kerr or M'aulay & another v. James Dunlop and Co., Ltd.* [1] show the scope of section I (2) of the Act of 1925. In the first case M'Ferrin and Henry, two miners, had to bring down a "nose" of coal by blasting. Each miner had to bore a hole, charge it with an explosive, stem it and then light a strum. After stemming his hole M'Ferrin gave the usual warning to all in the vicinity. He then lit his strum and went to a place of safety. Hearing a shot going off, M'Ferrin thought it was his, having forgotten temporarily there were two shots to go off. After a few minutes M'Ferrin went back to find out if his shot had brought down the coal. The shot which went off was Hendry's shot. His shot had, in fact, misfired and went off in his face when he returned and injured him seriously. In returning within an hour he contravened the provisions of a Statutory Order. Though the facts were similar to those in *Moore (A.G.) & Co. v. Donnelly* (*supra*) it was held that the workman was entitled to compensation in view of section I (2). In the second case M'Aulay, a miner, was engaged along with a fireman and another miner, in firing by electricity a series of shots in a mine. When one of the shots had exploded, M'Aulay came from his place of safety and coupled the cable to the detonator of the next shot. At the time the fireman was moving the handle of his firing battery, which was still attached to the cable, to free some mechanism which had jammed. The shot exploded and M'Aulay was killed. There was a statutory mining regulation which provided that the person authorised in writing by the Manager to fire the shots should himself do the coupling. It was held that in coupling the cable to the detonator, M'Aulay was arrogating to himself a duty

restricted to the authorized shot firer and that the accident did not arise out of the employment and that section I (2) did not apply.

I shall discuss now the case of *Noble v. Southern Railway Co.* (*supra*) relied on by the Commissioner. In that case the Court of Appeal had to consider again the effect of section I (2) of the English Act. Noble, the husband of the claimant, was a fireman employed by the Railway Company, and attached to the locomotive depot at Norwood Junction. He was asked to go to East Croydon to carry out duties there. For that purpose he had to walk from the depot to Norwood Junction and then take train to East Croydon. The recognized route from the depot to Norwood Junction was along a lighted footpath. There was another route which was shorter along the lines of the Railway. That route was a dangerous one and its use by the employees of the Company was prohibited by written instructions which stated further that an employee using that route would be acting " outside his employment ". Noble went along the prohibited route and was killed by an electric train. The decision of the House of Lords was in favour of the claimant. In the course of his judgment, Lord Porter said:—

> " The so-called prescribed route is not a limit outside which the man has ceased to be acting within his employment. He may indeed be acting in contravention of his master's orders, but except in this respect he is not going outside the sphere of his duties."

Dealing with the doctrine of " added peril " Viscount Maugham said:—

> " It is clear that if the case comes within sub-section (2) the man will be entitled to compensation notwithstanding the added risk which the man has run by his disobedience. That obviously is the very object of the sub-section in the case of death or serious and permanent disablement being caused by the accident."

The effect of this decision as may be gathered from the various judgments appears to me to be as follows:—The question has to be considered first whether the accident arose " out of and in the course of the employment " within the meaning of section I (I) of the Act. In the consideration of this question the Judge of the County Court should ignore the order in contravention of which the workman was acting when he was killed or seriously injured. The order to be ignored may be even one of such a nature as would have been held before 1923 to be a " scope-limiting " order. If the answer to the question so considered is in the negative then the claim fails. An instance given by Lord Atkin is that of a guard not employed as engine driver and injured while driving the train. His injury would not arise out of and in the course of his employment, apart from the fact that his employers had made an express regulation that no guard was to drive an engine. Another instance is afforded by *M'Aulay & another v. James Dunlop & Co., Ltd.* (*supra*). If the answer to the question is in the affirmative then the further question has to be considered whether in view of the contravention of the order or regulation it is or it is not an accident arising out of the employment. If the answer to that question is also in the affirmative the claim succeeds. If the answer to this further question is in the

negative, then the Judge must inquire whether the " act was done by the workman for the purposes of and in connection with his employer's trade or business ". The inquiry should not be whether the act was done for the purposes of and in connection with the *workman's job*. If the answer to that inquiry is in the affirmative then by section I (2) " the accident shall be deemed to arise out of and in the course of the employment " and the claim will succeed. Otherwise the claim will fail.

In the above case Viscount Maugham stated concisely in another form the questions which the County Court Judge will have to answer:—

(1) " Looking at the facts proved as a whole, including any regulations or orders affecting the workman, was the accident one which arose out of and in the course of his employment " ?

(2) " If the first question is answered in the negative, is the negative answer due to the fact that when the accident happened the workman was acting in contravention of some regulation or order" ?

(3) " If the second question is answered in the affirmative was the act which the workman was engaged in performing done by the workman for the purposes of and in connection with his employer's trade or business" ?

It was those three questions which the Commissioner thought he was obliged to answer in considering the first issue in this case and he answered those questions:—

(1) No.
(2) Yes.
(3) No.

It has to be considered whether the Commissioner was right in proposing to himself those three questions.

The relevant provisions of our Ordinance are:—

" *Section 3.* If personal injury is caused to a workman by accident arising out of and in the course of his employment, his employer shall be liable to pay compensation in accordance with the provisions of this Ordinance:

Provided that the employer shall not be so liable—

(*a*) . . . . . .

(*b*) in respect of any injury, not resulting in death, caused by an accident which is directly attributable to—

(i.) . . . . . .

(ii.) the wilful disobedience of the workman to an order expressly given, or to a rule expressly framed, for the purpose of securing the safety of workmen, or

(iii.) . . . . . ".

If one adopts the method of approach suggested by Viscount Maugham in *Noble v. Southern Railway Co.* (*supra*) the Commissioner should have put to himself only the first two questions suggested by him as section 3 (*b*) (ii) of our Ordinance does not render it necessary to consider whether or no the workman contravening any order was acting " for the purposes of and in connection with the employer's trade or business ".

The Commissioner having answered those two questions, the first in the negative and the second in the affirmative, should have held in favour of the appellant. He misdirected himself when he proceeded to consider the third question formulated by Viscount Maugham which finds no place in a case governed by our Ordinance.

In going by the rope-sling instead of the net-sling Suppiah was, no doubt, disobeying his master's orders in that respect but he was not placing himself outside the scope of his employment. He was at the time engaged in performing his duty—going to the ship to have his name registered—and was not " engaged in a frolic of his own under the pretence of doing his master's work ". If the mere fact that at the time of the accident the workman was doing an act in wilful disobedience of the employer's order rendered the accident to be one not arising out of the emplyment, then the Legislature has failed to achieve its object in creating an exception in section 3 (*b*) in respect of claims arising from the death of a workman, because the success of every claim depends on the proof that the injury was caused by an accident arising out of the employment.

Adapting the line of reasoning in *Noble v. Southern Railway Co.* (*supra*) to cases under our Ordinance I am of opinion that the Commissioner should have approached the consideration of the first issue by asking himself first whether the accident arose out of the employment within the meaning of section 3, ignoring the prohibition with regard to the use of the rope-sling. If he answered that question in the negative then the claim would fail (vide *Kelaart v. Piyadasa* [1]). If he answered that in the affirmative then it did not matter that the deceased met with his death because he acted in wilful disobedience of the prohibition regarding the use of the rope-sling.

I set aside the order of the Commissioner and send the case back to him for the assessment of compensation. The appellant is entitled to costs of the proceedings before the Commissioner and the costs of appeal.

Appeal allowed.