1973 *Present:* **Rajaratnam, J.**

D. G. AGNES, Appellant, *and* The PRESIDENT, MULTIPURPOSE CO-OPERATIVE SOCIETIES UNION, RUWANWELLA, Respondent

S.C. 9A/72—Workmen's Compensation C3/P/104/70

Workmen's Compensation Ordinance—Section 3—Accident Arising out of and in the course of a workman's employment—Quantum of evidence—Death of the workman in consequence of violence committed on him—Liability of the employer to pay compensation to the widow of the deceased—Postponement of an inquiry regarding a claim for compensation—Duty of Court not to refuse it unreasonably.

A watcher who was employed at a Co-operative Depot died as a result of violence committed on him during his watch hours. There was sufficient circumstantial evidence to prove that the deceased was doing a watcher's duty when he was killed by a person who presumably had tampered with the locks of the Depot to burgle the stores.

Held, that the watcher was killed as a result of an "accident arising out of and in the course of his employment" within the meaning of section 3 of the Workmen's Compensation Ordinance. His widow was, therefore, entitled to compensation.

In an application for compensation under the Workmen's Compensation Ordinance standards expected in a criminal case should not be applied. Nor should be postponement of the inquiry be refused unreasonably if it is sought *bone fide* to enable the applicant to prove his claim, if such claim is not of a vexatious nature.

APPEAL from an order of the Deputy Commissioner of Workmen's Compensation.

N. Satyendra, as *Amicus Curiae.*

No appearance for the respondent.

Cur. adv. vult.

August 10, 1973. RAJARATNAM, J.—

The question that arises in this appeal is whether the applicant who was a widow of one K. A. Gunasekera, a watcher at a Co-operative Depot had discharged her burden of proving before the Deputy Commissioner that her late husband died as a result of an accident *arising out of and in the course of employment under the respondent* on the 20th of October 1970. I have perused the Record in this case and I find that there was evidence that the

deceased went to work on this particular day to perform his duties as a watcher. There was evidence that the clock was punched up to 2 a.m. in the early hours of 20th of October 1970. There was evidence from one Aron Singho that the practice of two watchers being employed for the stores was discontinued and there was only one watcher to perform the duties that night. There was evidence that the deceased died as a result of violence committed on him during his watch hours.

The Magistrate who visited the scene on the 20th found the body of the deceased with cut injuries on his neck and head. There was a watchman's punching clock still ticking. There was a watcher's stick, a torch and betel leaves presumably kept there for use during the deceased's night vigil. The padlock with an attached hasps seemed to have been wrenched off. There were tables inside the store giving the appearance that they had been shifted from their position. The iron cross-bar in front of the safe had been opened outward. There was a padlock which had been opened and lying on a wooden counter close to the handle of the door of the safe.

The finding in the postmortem report was a verdict of homicide and that death was due to shock and haemorrhage following a cut injury on the neck. According to the evidence of the brother of the deceased, his relatives were asked to come to the Co-operative Union on the 25th October 1970 to make an application for compensation. Thereafter the matter was discussed and a request was made for Rs. 15,000.00 as compensation. According to him the Committee met and discussed about it but was unable to arrive at a decision. They were however informed later that the Committee was unable to come to a decision but was prepared to accept any amount ordered by the Commissioner of Workmen's Compensation. He was not cross-examined on these matters. The only question put to him is whether at the time of the murder he was at Badulla. The applicant made an application on the date of the inquiry that she had another witness and she could not bring him as she did not know that it was necessary to bring him and therefore moved for a date to bring this witness. The respondent however objected to this and I find that the Deputy Commissioner made an order that as the applicant had sufficient time to get ready for the inquiry he must refuse the postponement. He made this order at 12 noon and reserved judgment stating that he has other cases. It is a matter for deep regret and comment that an applicant should have been denied a date under these circumstances. About two months later the Deputy Commissioner arrived at a finding that he was not satisfied that the deceased

died as a result of an accident arising out of and in the course of his employment under the respondent. After having successfully objected to the application by the applicant for a date the respondent placed no evidence before the Tribunal. In the circumstances there was sufficient evidence that the deceased was a watcher, he was doing a watcher's duty, and he came by his death as a result of violence at the hands of person who presumably had tampered with the locks of the Depot to burgle the stores. The circumstantial evidence led was sufficient to prove the above facts. There was nothing more the dependants of the deceased could have proved and if there was anything else it was within the knowledge of the Co-operative authorities. On the evidence placed before the Deputy Commissioner there was no doubt that the deceased died in the course of his employment. The question now is whether the death was as a result of an accident arising out of his employment.

Section 3 of the Workmen's Compensation Ordinance provides *inter alia* that 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 the Ordinance. The term " accident " must be interpreted according to its popular meaning. Where a workman employed to turn the wheel of a machine by an act of over exertion ruptured himself, it was held by the House of Lords that he suffered an injury by accident, *Fenton v. Thorley & Co. Ltd.*[1] 1903 A.C. 443. The term " accident " has been held to mean mishap or untoward event unexpected or designed. This case overuled the decision of *Hensey v. White*[2] (1900) 1 Q.B. 481. Accident may also include occurrences intentionally caused by others and personal injury to oneself resulting from an assault. In the case of *Nisbett v. Rayne & Burn*[3] (1910) 2 K.B. 689, C.A., compensation was ordered to be paid in respect of the murder of a bank cashier who was murdered in a train while carrying money for his employer. The assault however must be connected with the employment of the deceased. It must be shown that the employment by its circumstances, involved a special risk of assault not incurred by persons not so employed or not so employed under the same circumstances. The onus is on the claimant to compensation to prove that the accident arose in the course of the employment. When this has been done the presumption ordinarily arises in the absence of evidence to the contrary that the accident arose out of his employment. In the case of *R. v. National Insurance (ex-parte Richardson)*[4] (1958) 2 A. E. R. 689 evidence was given that the ' accident ' did not arise

[1] *1903 A. C. 443.*
[2] *(1900) 1 Q. B. 481.*
[3] *(1910) 2 K. B. 689 C. A.*
[4] *(1958) 2 A. E. R. 689.*

out of the employment. The applicant Clifford Richardson was an Omnibus conductor in uniform on the platform of his bus when he was injured in an assault by one in a gang of youths. It was not shown in evidence that he was singled out because of any circumstances connected with his employment. There was however evidence that others had previously assaulted other persons. The applicant was not singled out because he was an Omnibus conductor and he was wearing a particular uniform or had money on him. There was evidence of indiscriminate acts and under these circumstances it was held in this case that the accident did not arise out of employment. In the case of *de Silva v. Premawathie* [1] 50 N. L. R. 306, it was held, where a Government teacher one of whose official duties was to supervise the distribution of mid-day meal to pupils in attempting to save the meal from being eaten by a cat which entered the kitchen got bitten in the finger and subsequently died of hydrophobia, that he met with this accident arising out of his employment and in the course of the employment. The injuries sustained by the school master arose *because of* and not merely *in the course* of his employment. It was decided by Lord Shaw in the case of *Craske v. Wigan* [2] (1909) 2 K.B. 635, that " arising out of employment " must refer to the nature, the condition, the obligations, and the incidents of employment. It was said that " if by reason of any of these the workman is brought within the zone of special danger and so injured and killed, the broad words of the Statute applies ". In this case the deceased watcher was brought within the zone of special danger by the nature, condition, obligation and incidents of his employment as a watcher. However, there was sufficient evidence of a circumstantial nature pointing to the murder being committed to burgle the Co-operative Depot. There was no evidence placed whatsoever by the respondent to show otherwise. In *Rowland v. Wright* [3] (1909) 1 K.B. 963, a stableman was eating his meal in the stable where he was entitled to be and which was his proper place when a cat suddenly and without provocation sprung at him and bit him. The Court of Appeal held that the accident arose out of and in the course of the stableman's employment because his duties took him into the stable where to his knowledge and his master's knowledge there was a cat habitually kept. " If it had been a stray cat " said the Master of the Rolls, " the case would have presented a totally different aspect ". In the present case the watcher's risk to fall a victim to the violent attentions of robbers is an occupational hazard which must necessarily be within the knowledge of his employer. The risk was increased when the employer according

[1] *(1948) 50 N. L. R. 306.*

[2] *(1909) 2 K. F. 635.*

[3] *(1909) 1 K. B. 963.*

to the evidence reduced the number of watchers from 2 to 1. In the present case the accident arose because of something in the course of his employment and because he was exposed by the nature of his employment to the peculiar danger of falling a victim to a murderous assault by intruders in pursuit of the goods or cash in the stores. There was sufficient evidence in this case that the accident was in every sense during his employment, and also arising out of his employment. The risk that the deceased faced was not a risk common to all mankind. In *Simpson v. Sinclair* [1] 1917 A.C. 127, the House of Lords laid down as stated earlier that " arising out of employment " applies to the nature, condition, obligations and the incidents of employment. In other words the accident was because of his employment.

I have considered the case of *Krishnakutty v. Maria Nona* [2] 51 N.L.R. 66. In this case the deceased was a night watchman returning home every night for dinner. One night he was murdered on his way home on a high-way which did not form the part of the premises in which he was employed to keep watch. It was correctly held that this accident did not arise out of and in the course of his employment. I have also considered the case of *Obeyesekera v. Jane Nona* [3] 59 N.L.R. 41, where the deceased had been employed as a watcher in an estate. He was murdered by some unknown person pounding him on his head with a blunt weapon while he was sleeping alone in the hut in the estate. No witness was able to depose to the circumstances of the murder of the deceased and the applicant's statement was that the deceased would not have been killed if he had not been on the estate as a watcher. H. N. G. Fernando, J. (as then he was) held that the applicant's statement that the deceased would not have been killed if he did not live on the estate was a mere conjecture as a motive for a murder and 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 incidental to and casually connected with his employment. In the present case however there was evidence that the deceased was watching the Depot store into which there had been an intrusion and there were sufficient circumstances to causally connect the murder with the employment.

It is a matter of great regret that the circumstances of this case should have presented any difficulty to the Deputy Commissioner for him to have denied the applicant of an appropriate compensation for the loss of her husband who died as a result of an accident in the course of and arising out of

[1] *(1917) A. C. 127.* [2] *(1949) 51 N. L. R. 66.*
[3] *(1957) 59 N. L. R. 41.*

his employment. It is also a matter of regret that in cases of this nature, standards expected in a criminal case are applied. Deputy Commissioners of Workmen's Compensation Tribunals should within the provisions of the Ordinance pursue relentlessly a course of justice and not permit employers to take undue advantage of applicants who as in this case find considerable difficulties in placing their cases before the Tribunal. I refer to the application made by the applicant for a date on one occasion and the refusal for a date. This was not a case under the circumstances in which it could be said that the application for compensation was a vexatious application. It was a genuine application made by the widow whose husband met with his death during his watch hours. There were circumstances which led to a reasonable inference that the murder was committed with the motive to burgle the Depot. In such a case it was not correct for a Deputy Commissioner to have refused a date and for the respondent to object to it. Such refusals no doubt may be justified in applications of a vexatious nature. The Tribunal must have some appreciation of the merits of the case when it refuses or allows a date. In this case the only assistance the respondent gave the Tribunal was to oppose to dates and place obstacles in the way of the applicant proving her case. He chose to give no evidence. He relied on the helplessness of the applicant.

I set aside the order of the tribunal dismissing the application and make order that the applicant is entitled to compensation on the basis that the deceased was killed as a result of an accident arising out of and in the course of his employment. I send the record back to the Tribunal to enter order accordingly and after notice to parties determine the compensation according to the provisions of the Ordinance. I direct that this order for payment be given effect to as early as possible.

The appeal is allowed. The Registrar will take immediate steps for the early disposal of this matter.

The Court wishes to place on Record its deep sense of gratitude to Mr. Satyendra who was requested by me to act as *Amicus Curiae* in this matter as neither the appellant nor the respondent was present at the hearing of this appeal. Mr. Satyendra as *Amicus Curiae* in the highest traditions of the Bar was of invaluable assistance to Court.

Appeal allowed.