1939

Present : **de Krestser J.**

COORAY *v.* KARUPPAIA.

S. C. 717/1938.

In re APPEAL UNDER SECTION 48 OF THE WORKMEN'S COMPENSATION ORDINANCE.

Workmen's compensation—Accident in course of employment—Burden of proof—Circumstances attending accident—Inference of Commissioner—Ordinance No. 19 of 1934.

Where a workman was in a place in which his employment compelled him to be and which brought him within proximity of the peril to which his death could properly be ascribed, and the Commissioner drew an inference that the death was an accident arising out of and in the course of his employment,—

***Held,* that the finding of the Commissioner could not be set aside merely because the evidence was circumstantial and certainty as to how the accident actually happened was unattainable.**

***Johnston v. London, Midland & Scottish Railway Co.* (*28 Butterworth's Workmen's Compensation Cases 118*) followed.**

APPEAL from an order of the Commissioner under section 48 of the Workmen's Compensation Ordinance. The facts are fully stated in the judgment. The question of law argued in appeal was whether her inferences drawn by the Commissioner were justified by the facts proved.

S. Nadesan, for the appellant.—The appeal is on a question of law. Section 3 of Ordinance No. 19 of 1934 defines the liability of an employer to workmen for injuries. The injury must be caused by (1) *accident,* (2) *arising* out of, and (3) *in the course of the employment.* The burden of proving these three requirements is on the applicant, and there is no presumption in favour of the applicant. (*Barnabas v. Bershan Colliery Co.*[1]; *Craske v. Wigan*[2]; *MacDonald v. Owners of the S.S. Banana*[3]; *Pomfret v. Lancashire & Yorkshire Ry. Co*[4]; *Lancashire & Yorkshire Ry. Co. v. Highley*[5].)

The applicant in this case has not discharged this burden. There is no evidence for the finding of the Commissioner that the injury was caused by an accident arising out of the employment. There is nothing to show the actual circumstances which led to the death of the deceased. The Commissioner's finding is based on mere conjecture.

On the evidence adduced it is equally probable that the deceased came by his death through some wilful act which was not incidental to his employment.

S. J. C. Schokman, C.C., for the Attorney-General as *amicus curiae,* on notice.—The only point of law which arises is whether the inferences drawn by the Commissioner are justified by the proved facts of the case. It is not open to the appellant to dispute the Commissioner's findings on the facts.

[1] *103 L. T. R. 513.*
[2] *(1909) 2 K. B. D. 635.*
[3] *(1908) 2 K. B. D. 926.*
[4] *(1903) 2 K. B. D. 718.*
[5] *(1917) Appeal Cases 853.*

In the absence of direct evidence of the cause of an accident resulting in the death of a workman it is open to a claimant for compensation to discharge the burden on him by means of circumstantial evidence. On such evidence it is open to the Commissioner to draw an inference as to how the accident was caused and make a finding as to whether it arose out of and in the course of the employment.

In England the House of Lords in 1931 held after reviewing all the earlier authorities that in such a case an Appellate Court should not interfere with the findings of the County Court or arbitrator who holds the inquiry unless the conclusion come to by the person holding the inquiry is such that no reasonable person could have come to such a conclusion. (Vide *Fisher or Simpson now Johnston v. London, Midland and Scottish Railway Company* [1].) This principle was reiterated in a later case in the House of Lords in which it was further stated that the opinion of the arbitrator should stand even though the appellate tribunal might on the facts have reached a different conclusion. (Vide *Davies v. Armstrong-Whitworth Aircraft, Limited* [2].)

In the case of *Keely v. English Electric Co., Ltd.*[3] the Court of Appeal refused to interfere with the inferences drawn by the County Court Judge even though he made slips regarding the evidence led for the employer.

Cur. adv. vult.

June 12, 1939. DE KRETSER J.—

The deceased Kalimuttu was employed on Primrose estate and on the day of his death had been ordered to uproot illuk grass, and in order to do so he had been ordered by the kangany to look for illuk grass. In the course of doing so, he had to go down a hill which the Commissioner on visiting the spot found had a gradient of between 45 to 60 degrees. A companion of the deceased had been talking to the kangany and when he left he heard a cry of distress, ran up, and saw the deceased fallen on his back and in contact with an electric wire. The man died and his widow claimed compensation which was awarded to her by the Commissioner.

The employer has no right of appeal on the facts and his appeal on points of law has been certified by a Proctor.

The Commissioner found that the deceased slipped and fell and so came in contact with the wire. It is conceded that the deceased met with his death in the course of his employment and it is also conceded that if the Commissioner's finding be accepted the accident arose out of his employment. The point of law taken is that the Commissioner was not justified in coming to this conclusion even if he accepted the evidence for the widow of the deceased.

For the appellant it is contended that where the actual circumstances which led to the death are unknown, the Court is not justified in making guesses. The onus is on the claimant to prove that the accident arose out of and in the course of deceased's employment. *Barnabas v. Bershan Colliery Co.*[4]; *Craske v. Wigan*[5]; *MacDonald v. Owners of the S.S. Banana*[6]; *Pomfret v. Lancashire & Yorkshire Ry. Co.*[7]; *Lancashire & Yorkshire Ry. Co. v. Highley*[8] are quoted in support of this proposition.

[1] *(1931) 24 B. W. C. C. 1.*
[2] *(1933) 26 B. W. C. C. 299.*
[3] *(1935) 28 B. W. C. C. 118.*
[4] *103 L. T. R. 513.*
[5] *(1909) 2 K. B. D. 635.*
[6] *(1908) 2 K. B. D. 925.*
[7] *(1903) 2 K. B. D. 718.*
[8] *(1907) Appeal Cases 352.*

Crown Counsel, to whom I am indebted for appearing as *amicus curiae*, referred me to *Keeley v. English Electric Co., Ltd.*[1] and volume 24 of the same series, page 1, where we find the case of *Fisher or Simpson now Johnston v. London, Midland & Scottish Ry. Co.* The latter is a decision in 1931 by the House of Lords.

The main point made by Crown Counsel was that an Appellate Court should not interfere with a finding of the person authorized to hold the inquiry unless it was such that no reasonable person could have arrived at that conclusion. Viscount Dunedin emphasized that "each case must be dealt with and decided upon its own circumstances, and inferences may be drawn from circumstances, just as much as results may be arrived at from direct testimony". He said, "I may begin with stating two propositions as to which there is now no controversy. The first is that the questions of "arising out of the employment" and "in the course of the employment" are two separate questions and must both, as well as the fact that there was an accident, be made good by the claimant. The second is that the finding of an arbitrator cannot be set aside unless it is either wrong in law, or if it is a finding in fact, is such as a reasonable man ought not to come to ". He went on to say that if the man was in a place where his employment compelled him to be which place had an element of danger sufficient to account for the death, and the other possibilities had been nagatived by the inquirer who drew an inference that the death was an accident arising out of and in the course of employment, that was an inference that could not be set aside merely because the evidence was merely circumstantial, and certainty as to how the accident actually happened was unattainable".

He summed up as follows:—

"The result of the cases of unaccounted-for death seems to me to be as follows: If the deceased was in the course of his employment; . . . . if there are facts from which it may be deduced that his employment brought him within, or allowed him to be within proximity of, the peril to which his death could properly be ascribed, and the arbitrator comes to the conclusion that the accident which causes death arises out of, as well as in the course of, his employment, his judgment should not be disturbed. *Secus*, if he comes to the opposite conclusion".

Lord Tomlin expressed himself in a similar way. Lord Thankerton said the same thing: he quoted with approval Lord Robson's statement that "where a workman is killed in the course of his employment while engaged in some act reasonably consistent with his master's service, I think it requires some more definite evidence than the appellants can suggest in this case in order to found the inference that he was moved by a wrongful intention."

Turning now to the present case, it cannot be said that the claimant's case was not based on evidence, and by evidence one means not merely direct oral evidence but also circumstantial evidence. I do not think it can be said that the Commissioner's finding was merely a guess nor that it was such that no reasonable person could have arrived at the same conclusion.

[1] *28 Butterworth's Workmen's Compensation Cases 118.*

We must remember that the Commissioner was on the spot and would understand things much more fully than we could merely from a perusal of the record. For example, he would know in which direction the wire ran, whether it was across the path which the deceased was taking or whether it ran alongside of him.

The fact that all that appellant's Counsel could urge was that the wire had been found to be about three feet above the ground and, therefore, if the deceased slipped and fell he could not have come in contact with the wire, and that at the inquiry the only theory advanced was that the deceased must have been carrying his mammoty over his head and in such a way that the blade of it came in contact with the wire, the fact that only these two points were made indicate the only possible alternatives that could have been thought of.

With regard to the first, it is giving the Commissioner's finding too limited a meaning to say that he found that the wire was on the ground; for it is quite conceivable that when the man slipped and fell he grabbed instinctively at what was nearest and that happened to be the wire that was close to the ground.

In the second place, there is no justification for holding that the wire had been three feet above the ground just before the man slipped, for the evidence is that he was seen fallen on his back and grasping the wire. By the time the Arachchi arrived the wire was not in his grasp and was then about three feet high. Clearly therefore there had been an interference with the wire, probably with the idea of rescuing the man. It is quite possible that the wire which had been on the ground was raised to a height of three feet.

With regard to the theory set up at the inquiry, this was rejected by the Commissioner who doubted that the current would pass along the wooden handle of the mammoty. I share this doubt. There is a further fact, that if such a thing had happened the man's hand would have been gripped on the handle by the current and one cannot understand how the very next moment he was seen grasping the wire. There is also the fact that if he had been carrying the mammoty elevated above his head, which is an unusual position to carry a mammoty in, with the fall of the man the mammoty would have been thrown or have fallen in a position different from that in which it was found, namely, with the blade close to his ear. That indicates that the man was carrying his mammoty over his shoulder in the position with which we are all familiar, and that when he fell the mammoty retained its position, more or less. Of course if he stumbled across the wire, or if the blade of the mammoty came in contact with the wire accidentally as he walked alongside the wire, the case for the appellant would not be improved.

I have said enough to show that, whatever may have been the actual manner in which he came in contact with the wire, the man was killed in the course of his employment while engaged in an act reasonably consistent with his master's service, and there is no justification to infer that he was moved by a wrongful intention.

The Commissioner's finding has not been shown to be unreasonable, and the appeal is therefore dismissed.

Appeal dismissed.