IN THE COURT OF APPEAL

AT MOMBASA

(Coram: Madan, Law & Potter JJA)

CRIMINAL APPEAL NO. 23 OF 1981

BETWEEN

EA OIL REFINERIES LTD.....APPELLANT

AND

REPUBLIC.....RESPONDENT

JUDGMENT

Potter JA This is a second appeal from the conviction of the appellant company by a second class district magistrate in Mombasa on a charge of causing the death of a workman through contravention of Sections 75 and 53 of the Factories Act (Cap 514) (herein referred to as "the Act"). The appellant was fined Kshs 2,000.

The particulars of the offence charged were in effect that on the night of March 27-28, 1979, one Wilfred Rawago employed at the appellant's factory at Changamwe died as result of inhaling a dangerous gas while he was working at the top of tank No 601. The death was alleged to be a consequence of the failure of the appellant to provide the deceased with a breathing appliance, in contravention of its duty under Section 53 of the Act. Section 75 of the Act, so far as relevant, is as follows:

"75. If any person is killed, or dies, or suffers any bodily injury, in consequence of the occupier or owner of a factory having contravened any provision of this Act, the occupier or owner of the factory shall, without prejudice to any other penalty, be liable to a fine not exceeding two thousand shillings or, in default of payment, imprisonment for a term not exceeding six months…

Section 53 provides as follows:

"53. Where in any factory workers are employed in any process involving exposure to wet or to any injurious or offensive substance, suitable protective clothing and appliances, including, where necessary, suitable gloves, footwear, goggles and hand coverings, shall be provided and maintained for the use of such workers."

The provisions of the Act are modelled closely on the United Kingdom factory legislation, and many expressions are common to both the Kenya and the United Kingdom legislation. The English authorities on the construction and application of expressions used in both the United Kingdom and the Kenya legislation must therefore be applicable here. We are concerned in this case with the employer's statutory duty to provide and maintain certain safety appliances. We can see no reason to suppose that general conditions in the appellant's oil refinery at Mombasa are substantially different from those in any

comparable oil refinery in the United Kingdom. It should be noted that in *Kanji & Kanji v Republic* [1961] EA 411, the English authorities were held to be applicable to the Tanganyikan factory legislation.

The accident which resulted in the death of Wilfred Rawago occurred around or shortly after midnight on March 27-28, 1979. The deceased was found at about 12.45 am lying unconscious on the third step from the top of the ladder loading to the top of Tank No 601, which is a slop (or waste) tank about eleven metres in height. The deceased was engaged in dip testing the tank, a periodical task which was carried out at regular intervals when the automatic gauge was not working or had to be checked. The task involved opening the hatch cover on the top of the tank and doing a dip test of the contents of the tank and recording the results in a note book, a ten minute task. The deceased was found by another workman Mr Njure (PW 4), who smelt gas when he got near to the tank and thought the tank was overflowing. He found the automatic gauge was fluctuating. He climbed up the tank, but found he was affected by the gas and made his way to the control room and reported to his supervisor Ali Mohamed (PW 7) Mohamed climbed the tank ladder, was rendered unconscious and fell to the ground. Both Mohamed and the deceased were taken to hospital. The deceased was found to have died of poisoning by hydrogen sulphide.

The appellant has an excellent safety record. The appellant had a system of work for meeting the dangers of exposure to hydrogen sulphide (H2S), which was based on the principle that every employee at the refinery is trained to play his part in maintaining safe working conditions. In a modern refinery a safe working system must be centrally controlled. All workmen know that hydrogen sulphide is to be found in crude oil in small quantities, but when found in amounts exceeding 20 ppm (parts per million) it is dangerous and can be lethal. Workmen are trained to detect H2S by its distinctive and unpleasant smell, and to report their suspicions at once to the supervisor in the control room. Action is then taken as the case may require. No workman is allowed in a danger area unless he is wearing a breathing apparatus and there is always a standby person to watch for his safety. If the area is designated a danger area, notices saying “Danger H2S” are put up, and yellow lines are painted on plant where H2S is likely to be present. No one may enter a danger area without wearing breathing apparatus until that area is declared to be a safe area. Tank No 601 had been in use as a slop tank since 1963. Presumably, while it was in use dip checks of the tank were taken frequently. The tank was never in a danger area.

The appellant does not dispute that the deceased died of poisoning by hydrogen sulphide, or that the appellant is liable under Section 75 of the Act if it committed a breach of Section 53. The two questions that arise on this appeal concern the meaning and effect of Section 53, and are:

1. At the material time whether the deceased was “employed in any process involving exposure to any injurious … substance.”

2. At the material time whether a suitable appliance, namely breathing apparatus, was “provided and maintained for the use of” the deceased.

As to the first question, Mr Khanna for the appellant submitted that the deceased was not employed in any such process because the incident was rare, it had never occurred before and was unlikely to occur again. Mr Harwood for the respondent admitted to doubt about his case on this issue because of the rarity of the occurrence.

We think that it is settled law both in Kenya and in England that, where the question is whether, for the purpose of factory legislation, a machine is dangerous or structure is unsafe or a process is accompanied by a risk of injury, the test is one of foreseeability. See *Kanji and Kanji v Republic* [1961] EA 411, and the cases cited therein. See also *Close v Steel Corporation of Wales* [1962] AC 367. The test is objective and impersonal. The question is not whether the occupier of the factory or anyone else knew that the process was dangerous or thought it was safe; nor whether previous accidents had occurred; nor whether the victim of the accident had, or had not, been contributorily negligent.

The question is therefore to be approached by an examination of the process and of the plant and its working. H2S is an unwanted by-product of the distillation of crude oil which is largely burnt off through

chimneys. There is usually a low concentration of H2S in a slop tank; the normal concentration under 20 ppm is considered safe. The tank is connected through valves to another vessel containing petroleum liquids. After the accident the valves were found to be defective. As a result the H2S leaked into Tank No 601 raising the concentration to a dangerous level. Witnesses from the refinery management were constrained to admit that valves can become defective and leak for numerous reasons, and that the management could not always for sure prevent a leakage in the refinery. It seems to us that this risk of leaks was inferent in the nature of the operations carried on in the refinery. We are forced to the conclusion that there was always the possibility of a leak occurring (even if only rarely) due to defective plant, which would cause the concentration of H2S in Tank No 601 to rise to a dangerous level. We think the learned magistrate applied the correct test and came to the right conclusion on this issue, that the appellant owed a duty to the deceased under Section 53. Mr Khanna submitted that the duty was performed by the provision of suitable appliances (ie the self contained breathing apparatus) provided to the knowledge of workmen in the control room. Mr Harwood submitted that the appliance was not provided because it could not be used without the permission of a supervisor.

The learned magistrate found "that although there was breathing apparatus provided and accessible, their use was limited only to certain situations, and were never used for dip checks - until maybe after the incident." Perhaps the reason for the magistrate's decision emerges more clearly from the earlier statement in his judgment that - "This is therefore no excuse for not making it mandatory for employees to wear breathing apparatus when going for dip checks." In reaching this conclusion the learned magistrate was clearly influenced by his opinion that the factory test was an unsafe method of detecting the presence of a dangerous concentration of H2S. As he said in his judgment:

"The deceased for instance must have been overpowered by the smell and got no opportunity to run to the supervisor, inform him of a leakage, got an appropriate apparatus and run up the tank."

The learned judge on first appeal held that the appellant failed in its duty because:

"… it was in those circumstances in that factory for that worker doing that job not sufficient to have various types of gas masks in the compound or in the control room. The appellant should have handed to Mr Rawago or anyone else who did this dip check not only suitable clothes, footwear, goggles and overalls but also a suitable protective breathing appliance, whatever the cost and however cumbersome it might be,"

It is not clear to us whether the judge is or is not agreeing with the magistrate. Presumably the handing over of the appliance is to be accompanied by instructions to use it when doing dip checks. With respect, the learned magistrate and the learned judge have tended to confuse the appellant's statutory duty with his duty at common law to maintain a reasonably safe system of work for operators performing dip checks. Section 53 says nothing about instructions or mandatory requirements of use. The question of the adequacy of the factory method of detecting H2S is undoubtedly relevant to the adequacy of the appellant's system of work, but it is not necessarily so to the duty of provision.

Although this factory legislation is enacted for the protection of workmen, the meaning of a safety provision should not be stretched beyond what is fairly expressed. If it has been intended by the Act to make the wearing of breathing apparatus mandatory in any given circumstances, the section would have said so.

For example, Section 35 of the Act provides that where work has to be done in any tank or other confined space, any person entering the confined space "shall wear a suitable breathing apparatus." The safety provisions of the Act do not set out a safe system of work for all occasions; this would be impracticable.

A number of English authorities are in our opinion relevant and authoritative. The case of *Bux v Slough Metals Ltd* [1974] 1 All ER 262, is a valuable illustration of the difference between a statutory duty to provide a safety appliance to a workman and the common law duty to maintain for him a reasonable safe system of work. The case concerned the provision of goggles for persons employed in work at a furnace where there was risk to the eyes from molten metal. The plaintiff, a die-caster, was such a person, and he

was provided with goggles by his employers, but along with the other die-casters gave up using them - to the knowledge of the employers. The plaintiff suffered injury to his eyes from molten metal and sued the employers for breach of statutory duty and negligence at common law (ie failing to maintain a reasonably safe system of work). It was held by the Court of Appeal that the employers had fulfilled their statutory duty, but that they were in breach of their common law duty, which in this case was not coextensive with the statutory duty. The statute was silent as the legal position where an employer knew that the goggles provided were consistently not worn by his workmen. The question, in relation to the common law duty, whether instruction, persuasion or insistence with regard to the use of protective equipment should be resorted to, depends on the facts of the particular case, one of which being the nature and degree of the risk of serious harm liable to occur if the equipment was not worn. The evidence showed that the plaintiff would have worn the goggles if instructed to do so in a reasonable and firm manner followed up by supervision. Accordingly the employers were in breach of their common law duty to maintain a reasonably safe system of work by giving the necessary instructions and enforcing them by supervision.

In *Norris v Syndie Manufacturing Co* [1952] 2 QB 135, the Court of Appeal was concerned with the workman's duty under Section 119 of the Factories Act, 1937, to use any means or appliance for securing safety provided for his use. The plaintiff, a tool setter, while engaged in testing a power press after adjustment, inadvertently started the machine and the guard having been removed he sustained injuries to a hand. The employers had acquiesced in his working with guard off, and had instructed him to replace it "after testing and before operation." The employers, however, never told the plaintiff not to use the guard. It was held by the court of Appeal that Section 119 imposed an absolute duty on the workman to use the guard once it was provided and was available for use, as it was in this case. In the High Court the judge had held that the guard had not been provided for use during testing because the plaintiff was impliedly told by his employers that the guard was intended for use in operation only and that he was not expected to use it for testing. As to this Romer LJ had this to say at rr 144 and 145:

"If the judge has found (which he did not find) that the employers told the plaintiff that he was not to use the guard during the process of testing, then *Murray v Schwachman Ltd* [1938] 1 KB 130 is authority for the proposition that the guard was not provided, on the obvious ground that a thing cannot be regarded as provided for use if a prohibition is placed upon its user."

This was not however, the case here, and the argument which was advanced before us (and which is, I think, supported by the language of the learned judge which I have quoted) is that an employer does not "provide" a safety device within "the meaning of Section 119 unless it tells the workmen concerned that they have got to use it. We are unable to find any sufficient warrant for that view. The primary meaning of the word "provide" is to "furnish" or "supply, and accordingly, on a workman's statutory obligation to use is to use safety devices which are furnished or supplied for his use by his employers. I am aware that the section, being a penal section, has to be construed strictly, but cannot see any reason why that should involve reading into the section words that are not there particularly when the section makes perfectly good sense without them.

I respectfully adopt the words of Lord Macmillan in *London and North Easter Railway Co v Berriman*, where he said "where penalties for infringement are imposed it is not legitimate to stretch the language as a rule, however beneficent its intention, beyond the fair and ordinary meaning of its language." Taking, reason for attributing to subsection (1), through the medium of the word "provided", the same effect as it would have had if words such as "if he had been ordered to use them" had been added at the end. It is for parliament, if it thinks proper to do so, and not for the Courts, to add to a statutory obligation a qualification which is not there."

The learned magistrate found that breathing apparatus was provided but its use was limited to certain situations. The question that has caused us concern is whether, in view of the appellant's system of work, a prohibition was placed on the use of breathing apparatus by employees while engaged in dip checking, so that there would be no "provision" in respect of dip checking.

The evidence which gives rise to that concern was given by Mr Harold (DW 1), the Refinery Superintendent. His observations included the following:

"No one is allowed to wear a gas mask without the supervisor knowing why, particularly the circumstances." An employee would be breaking rules if he came to the control room and took a breathing apparatus without the supervisor's knowledge or authority. In any case no employee is allowed to go to the tank wearing a self contained apparatus without someone else on stand by. Under the present circumstances the supervisor would not have allowed the workers to go and put on a mask because it is a safe area."

The evidence of the other employee is not so categorical as this, but nevertheless the general effect of the evidence is, as the magistrate said, that the use of the breathing apparatus was limited to certain situations. We are unable to avoid the conclusion that the employees at the refinery were in effect told that they were not to use breathing apparatus for dip-checks in a "safe" area. We agree with the decision in *Murray v Schwachman Ltd* (supra) that an appliances not provided for use in a process if its use in that process is prohibited. But for that prohibition, we think that the appellants had complied with Section 53 of the Act.

Accordingly we dismiss this appeal.

As **Madan** and **Law JJA** agree, it is so ordered.

Dated and Delivered at Mombasa this 14th day of May 1981.

C.B.MADAN

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JUDGE OF APPEAL

E.J.E.LAW

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JUDGE OF APPEAL

K.D.POTTER

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JUDGE OF APPEAL

I certify that this is atrue copy of the

original.

DEPUTY REGISTRAR