IN THE HIGH COURT OF SWAZILAND

In the matter between	App. Case No. 8/81
JIM SIJINGO BENETT	Appellant
vs	
REGEM	Respondent
CORAH:	NATHAN C. J.
FOR APPELLANT:	V. DLAMINI
FOR RESPONDENT:	A. TWALA

JUDGMENT

(Delivered 14th Aug. 1981)

NATHAN C. J.

The Appellant was convicted, firstly, of contravening section 5 (1) read with subsec. 6 of the Workmen's Compensation Act 4 of 1963 (failing to pay compensation to the dependant of an employee of the Appellant who had been injured in an accident arising out of and in the course of the deceased's employment); and secondly of contravening Sec. 14 (l) read with Sec. 14(5) of the same Act (failing to report an accident resulting in the death of a workman to the Labour Commissioner within three days).

On Count 1 the Appellant was sentenced to three years' imprisonment which was suspended for 3 years on condition, inter alia, that the Appellant pay compensation to the mother of the deceased, his dependant, in the sum of E2400 in instalments of E100 per month. On Count 2 he was sentenced to a fine of E50 or 100 days imprisonment.

The Appellant has noted an appeal against the conviction and sentence on a number of grounds and was permitted at the hearing of the appeal to add 2 further grounds. I will deal with all these, although not in the same order as they are raised.

1. It is submitted firstly that the Crown failed to prove beyond any reasonable doubt what the cause of the deceased's death was.

There is no merit in this submission. The circumstances leading to the death of the deceased are testified to by Peter Bennett, the son of the Appellant, whom the Magistrate accepted on this point. For present purposes it may be said that the Appellant runs the Morning Star Bus Service. The deceased was employed by him as a bus conductor. On one of the bus journeys at the Victory stop there was an altercation between a passenger who alighted from the bus and a boy who was collecting tickets. The passenger refused to give up his tickets; and produced a knife, threatening to stab the boy who was collecting the tickets. The deceased who had a short knobstick intervened and struck the passenger on the arm, causing him to drop the knife. They continued fighting; the passenger ran away and picked up a stone and struck the deceased at the back of the head. The deceased was taken to a Clinic and then to Hlatikulu Hospital where he died. The passenger was subsequently convicted of Culpable Homicide in the High Court.

This evidence was at no time challenged and is quite sufficient to establish how the deceased met his death. Precise evidence as to cause of death is totally unnecessary.

2. There is far more substance in ground 2, namely that the Crown failed to prove that the deceased sustained personal injury by accident. Sec. 5(1) of Act 4/1963 imposes a liability to pay compensation if personal injury by accident arising out of and in the course of the employment is caused to a workman. One of the elements in this provision is that there must be an injury by accident. The question of what constitutes an accident in the context is not always an easy one, and has exercised the minds of a number of Law Lords and judges in England and South Africa for three quarters of a century. It is surprising that more consideration was not given to this aspect of the case by either the defence or by the Magistrate who, in the course of a generally careful and well-reasoned judgment, seems to have assumed

that the facts that I have set out did constitute an accident.

"Accident" is not defined in Act 4/1963 but a good working definition of it is to be found in the judgment of Lord Macnagten in Fenton v J. Thorley & Co. Ltd,, 1903 A.C. 443 at p. 448, which has been widely followed: "..... the expression 'accident' is used in the popular and ordinary sense of the word as denoting an unlooked-for mishap or an untoward event which is not expected or designed." This definition was approved in Nicosia v Workmens Compensation Commissioner, 1954 (3) S.A. 897 (T) at p. 900 by Roper J who acted both on the Swaziland High Court and Court of Appeal. In the same case reference was made to Lord Lindley's definition in Fenton v Thorley, supra, followed in Briesch v Geduld Proprietary Mines Ltd, 1911 T. P. D. 707: "speaking generally..... an accident means any unintended and unexpected occurrence which produces hurt or loss."

It is pointed out in Halsbury's Laws of England vol. 27 p. 802 that "unexpected' means unexpected by the person who is injured; and that 'accident' may also include occurrences intentionally caused by others, e.g. personal injury resulting from an assault is caused by accident..... Halsbury, in support of his text, refers to the Irish case of Anderson v Balfour, 1910 2 I.R. 497 C.A. (attack by poachers on gamekeeper) and the House of Lords' case, Trim Joint District School Board of Management v Kelly, 1914 A.C. 667, H. L, Anderson's case and Nisbet v Rayne, 1910 2 KB 689 (cashier carrying pay-roll robbed and murdered in train) were both approved in Kelly's case, supra, Kelly's case I may say was that of school boys who planned to hit a master over the head. This was held to be an accident.

The accident aspect of the matter cannot entirely be divorced from the question whether it arose out of and in the course of the employment: the one concept throws light on the other. As Williamson J.A. said in Minister of Justice v Khoza, 1966 (1) S.A. 410 AD at 419, approved in W. C. C. v Van Rooyen, 1974 (4) S.A. 816 at 820 (T), "The enquiry on

the particular issue is whether it was the actual fact that he was in the course of his employment that brought the workman within the range or zone of the hazard giving rise to the accident causing injury. If it was, the accident arose 'out of the employment'."

See also the careful judgment of Addleson J in Exparte W. C. C. in se Manthe, 1979 (4) S.A. 812 (E.C.).

In my view the range or zone of hazard of a bus conductor is very similar to that of a gamekeeper who may be set upon by poachers; and if he sustains personal injury in that range or zone of hazard this is an accident within the meaning of Sec. 5 (1) of the Act.

I consequently answer ground 2 of the grounds of the appeal adversely to the Appellant..

3. It is submitted in the grounds of appeal that the Magistrate misdirected himself by not considering whether the death of the deceased was not attributable to the deceased's "serious and wilful misconduct."

In terms of proviso (b) of Sec. 5(1) of the Act compensation is disallowed if it is proved that the injury is attributable to the serious and wilful misconduct of the workman.

The Appellant (whose evidence on a number of points is not acceptable) said that he employed the deceased as a conductor, not as a fighter. In my opinion it was well within the scope of the Appellant's functions to intervene in the altercation between the boy and the passenger, especially when the latter drew a knife. But even if this is not so, it does not, in my view, amount to serious and wilful misconduct. Moreover in terms of sec. 122 (2) (b) of Act 67 of 1938 the question of serious or wilful misconduct would have been a proviso on excuse which could have been established by the defence but did not have to be negatived by the prosecution. There was no attmpt on the part of the appellant, apart from his suggesting that the deceased was a fighter, to establish that he was guilty of serious or wilful misconduct.

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This ground of appeal cannot be upheld.

4. It is submitted that the Crown failed to prove beyond any reasonable doubt that the deceased was employed by the Appellant at the time of his death.

This was the Appellant's main defence and it was carefully considered by the Magistrate. I have no doubt that it was over whelmingly established that the deceased was indeed employed by the Appellant at the time of his death. Without traversing the evidence in the same detail as the Magistrate did, I may draw attention to the following factors: the statement of the Appellant's son Peter Bennett to the Labour Department on 7.12.1978 to the effect that the deceased was employed by the Appellant at the time of his death; the evidence of Mthakathi Ntshangase that the Appellant had told him he did not employ people who are fond of fighting, and, the evidence of Moses Msibi to the like effect; the evidence that the Appellant's wife Tryphina paid Ntshangase E5.00 for the deceased's wages in the current month, as well as E10.00 sympathy money. This was denied by the Appellant's wife. The Magistrate considered Tryphina's evidence at length and I entirely agree with his analysis thereof. Then there is the Appellant's statement in his letter to the Labour Dept. of 15th May 1979, Ex. B which makes it clear that the deceased was an employee of the Appellant. The Appellant says that this is not his signature; but I have no doubt on a comparison of this with his signatures on the documents marked E that it is his signature. In regard to the Courts competence to make this comparison, see, in addition to R v Kruger 1941 O. P. D. 33; E v Fourie, 1947 (2) S.A. 972 (E), and R v Kumalo 1947 (4) S.A. 156 (N) cited by the Magistrate, the decision of the Swaziland Court of Appeal in Ndwandwe v Bex, 1970-76 SLR 386.

It was submitted in the Supplementary Grounds of Appeal that the documents were only hearsay evidence as the handwriting was not admitted. There is no merit in this submission.

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5. It is submitted that the Magistrate erred in declaring the Appellant's son Peter Bennett to be a hostile witness.

As is pointed out by the Magistrate in his Supplementary Reasons for Judgment, at the trial Counsel for the defence withdrew his opposition to the prosecutor's application that the witness be declared hostile. Moreover even if the witness should technically not have been declared hostile, the statement which he made in Ex. A appears to me nevertheless to have been admissible in evidence, and no prejudice to the Appellant flowed from the declaration of the witness as hostile.

6. It is submitted that the Magistrate refused to record the defence counsel's submissions at the close of the close of the defence case and this was an irregularity in that it suggested that the Magistrate might be brassed against the Accused. This ground was not argued at the hearing.

The record indicates that the Magistrate did in fact record certain of the defence's submissions, although not, contrary to what the Magistrate says in his reasons for judgment, that the charge was defective. It

does not appear to me that there is any substance in this point. A judicial officer must use his own discretion in regard to the amount of argument that he records; he cannot be expected to record every piece of argument, relevant or irrelevant. The fact that the Magistrate prepared so complete a judgment as he did indicates in my view that he was fully cognisant of all the matters urged by the defence.

In regard to the suggestion that the charges were defective, Mr. Dlamini submitted that the charge should have alleged that the Appellant was liable to pay the compensation. In regard to this an assessment had been made upon the Appellant and it is clearly implicit in the charge that he was liable to pay. Mr. Dlamini also took the point that the Appellant should have been charged with a contravention of Sec. 5(6) read with 5 (1) and not of Sec. 5(1) read with 5(6). Once the two subsections are to be read together there can be no merit in this point.

7. It is submitted in the grounds of appeal that the Magistrate erred in not considering whether the Appellant's failure to report to the Labour Commissioner was without reasonable cause. This was also not argued at the hearing. The Magistrate in his reasons says this point was not made in the lower Court. It is true that Sec, 14(5) of the Act says that any employer who fails to comply with this section without reasonable cause shall be guilty of an offence. But I think it is clear that this is another instance of a negative proviso, qualification or excuse, the onus of establishing which would be on the defence. There is nothing on the record to suggest that there was any reasonable cause or excuse for the omission to report.

8. It is generally submitted that the Magistrate erred in rejecting the defence version as it might seasonably be true.

In regard to this, as I have already indicated, the defence case was that the deceased was not employed by the Appellant, and on this I consider that the evidence is overwhelmingly against the Appellant and that the defence cannot reasonably be true. It is unnecessary for me to go into further detail on this question.

9. It is submitted in the Supplementary Grounds of Appeal that the Magistrate erred in finding that the deceased was acting for the purpose of and in connection with the Appellant's trade or business when he got injured. This was not argued at the hearing. There is clearly no merit in it. Sec. 5(1) is concerned with whether there was an injury by accident arising out of and in the course of the employment - and not with the purpose of the Appellant's trade or business. But on the evidence there is no doubt that the deceased was acting for the purpose of the Appellant's trade or business.

10. Finally it is submitted that the sentence is unduly harsh and severe. Subject to one qualification I can find no indication that this is so. In regard to Count 1, the maximum penalty for a contravention of Sec. 5(1) is a fine of E200 or imprisonment for 12 months or both. The Magistrate

has sentenced the Appellant to six months imprisonment the whole of which is suspended on condition that he pays to the complainant, the mother of the deceased, compensation in the sum of E2400 in instalments of E100 per month. It is not suggested that the sum of E2400 has been wrongly calculated. In my opinion it cannot be said that this sentence was in any way excessive. On the contrary it appears to me that the Magistrate acted with considerable humanity towards the Appellant, in ordering, as a condition of the suspension, that the E2400 be paid in instalments of E100 per month, which must obviously be of much less value than a lump-sum payment would be.

In my opinion the only fault that can be found with the sentence imposed by the Magistrate is that in terms of the 1st condition of suspension the sentence is liable to come into operation if there is any conviction for a contravention of the Workmen's Compensation Act committed during the period of suspension. I am prepared to ameliorate this by adding to condition (a) the words "and for which the Accused is sentenced to imprisonment without the option of a fine."

In regard to Count 2, the failure to report, the prescribed penalty is a fine not exceeding E200 or in default of payment imprisonment not exceeding 1 year. The Magistrate imposed sentence of a fine of E50 or 100 days imprisonment; and he deferred payment for 3 days. This sentence is well within the limits imposed by Sec. 14 of the Act. The legislature obviously, and rightly, regarded it as of importance that there should be timeous reports of accidents giving rise to compensation under the Act; and it cannot be said that the sentence is in any way unduly harsh or severe. Even if this Court would have imposed a slightly lesser sentence had it been sitting as a Court of first instance, the sentence imposed by the Magistrate cannot be regarded as obviously calling for correction, this being the test adopted for alteration of sentences on appeal.

I have carefully considered all the grounds of appeal raised by the Appellant.

In the result the Appeal must be dismissed and the convictions and sentences confirmed subject to the amendment of condition (a) of the Conditions of Suspension of the sentence on Count 1 set out above. Payment of the first instalment of the E2400 is to be made not later than 12th September, 1981.

C. J. M. NATHAN

CHIEF JUSTICE.