[HIGH COURT OF AUSTRALIA.]

SOUTH MAITLAND RAILWAYS PROPRIETARY LIMITED . . . . . Respondent, } Appellant;

AND

JAMES . . . . . Applicant, Respondent.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1943.

SYDNEY, *April* 2, 5, 29.

Latham C.J., Rich, Starke and Williams JJ.

Workers' Compensation—Injury arising out of and in the course of employment—Altercation between workers upon employer's premises—Worker shot and killed by other worker—Subject matter of altercation—"Connection with employer's trade or business"—Inference of fact—Workers' Compensation Act 1926-1938 (*N.S.W.*) (*No.* 15 *of* 1926—*No.* 36 *of* 1938), *ss.* 6, 7 (1), (2).

An action was brought by the widow of a deceased worker for compensation in respect of the death of her husband, who was shot during a discussion with a fellow-employee at the place of employment during working hours. The Workers' Compensation Commission drew the inference (*inter alia*) from the evidence that the deceased, as a qualified tradesman, was anxious to maintain his reputation, and resented gossip which wrongly suggested that he was an unskilful artisan, and that this was the material issue in the discussion of the deceased with the man who shot him. The Commission held that the injury which resulted in the death arose out of and in the course of the employment, and made an award in favour of the widow.

Held, by *Latham* C.J., *Rich* and *Williams* JJ., that the inference drawn by the Commission was open to it on the evidence, and was sufficient to support the award.

Per Starke J.: The inference drawn by the Commission was open to it on the evidence before it, and justified a conclusion that the injury arose in the course of the employment. But the Commission also made and took into consideration other inferences which it was not entitled to take into consideration in determining that the injury arose out of and in the course of the employment. Therefore the case should be remitted to the Commission.

Decision of the Supreme Court of New South Wales (Full Court) affirmed.

APPEAL from the Supreme Court of New South Wales.

Emily Ann James, as the sole and total dependant of the deceased worker, made a claim under the *Workers' Compensation Act* 1926 (N.S.W.), as amended, against South Maitland Railways Pty. Ltd. for £800 compensation in respect of the death of her husband, William Thomas James, who, on 20th November 1941, while in the company's workshop and during the hours of work, was shot by a fellow worker and died there shortly afterwards as the result of the bullet wound so received.

The company denied liability under the Act on the ground, *inter alia*, that the death of James did not result from personal injury arising out of and in the course of his employment with the company.

There was evidence before the Workers' Compensation Commission to the following effect:—

James, who was a qualified fitter and turner employed by the company, had been transferred to work for a fortnight on a lathe ordinarily operated by one Sim. This transfer led to a worker named Hindle making disparaging remarks about James. Hindle was a toolroom machinist who was in charge of the toolroom within the workshop; he was well known at the place of employment to be quarrelsome and a mischief maker.

On the day before James was shot Hindle told Sim, who had returned to the lathe, that James had said that he (James) was going to give Sim a hiding, because a boilermaker named White had told James that Sim was saying that James had spoilt all the tools and damaged the lathe. White had not made the allegation; Sim had not made any such statement; and James had neither spoilt any tools nor damaged the lathe. Sim told James of the conversation between him and Hindle.

On the following day, during working hours, James asked for an explanation from White. White denied that he had made the statement attributed to him, and asked James to accompany him to Hindle and demand an explanation. Sim advised them to leave Hindle alone, but they went over to the toolroom door. Whilst James and Hindle were in conversation, Hindle suddenly produced a firearm and shot James, killing him.

The following inferences were drawn by the Commission:—(*a*) It was the company's act in transferring James to the lathe in question which caused a flare-up of the well-known quarrelsome and somewhat eccentric traits in the machinist, and resulted in (i) the machinist's untrue statement in the workshop about James' method of work on the lathe, and ultimately (ii) the machinist shooting

H. C. OF A. 1943.

SOUTH MAITLAND RAILWAYS PTY. LTD. v. JAMES.

James. (*b*) James, as a qualified tradesman, was anxious to maintain his reputation, and resented gossip which wrongly suggested that he was an unskilful artisan, and that this was the material issue in his discussion with the machinist both on the day preceding the shooting and on the day of the shooting. (*c*) The advice given to James by the senior tradesman was fatherly, and based on his knowledge of the machinist's temperament. (*d*) James' act in leaving his work at the bench for a few minutes to have discussions with fellow workers nearby was (i) neither prohibited nor unusual, (ii) in the circumstances not only reasonable but incidental to his employment in the workshop, and (iii) did not constitute a break in the course of his employment. (*e*) A reasonable act incidental to James' employment took him to the toolroom doorway, a spot which in fact had a "risk particular" attached to it in the known abnormal temperament of the toolroom machinist working there, and the spot "turned out to be a dangerous spot" when this machinist shot James. (*f*) James' employment materially contributed to the happening of the fatality.

The Commission found that the injury which resulted in the death of James arose out of and in the course of his employment with the company and made an award in favour of the applicant.

Upon a case stated at the request of the company pursuant to s. 37 (4) of the *Workers' Compensation Act* 1926-1938 (N.S.W.) the Full Court of the Supreme Court of New South Wales, by a majority (*Jordan* C.J. and *Davidson* J., *Halse Rogers* J. dissenting), upheld the award made by the Commission.

From that decision the company appealed to the High Court.

Further material facts appear in the judgments hereunder.

Treatt K.C. (with him *Hutton*), for the appellant.

Barwick K.C. (with him *R. L. Taylor*), for the respondent.

Cur. adv. vult.

April 29.

The following written judgments were delivered :—

LATHAM C.J. This is an appeal from a decision of the Full Court of the Supreme Court of New South Wales upon a case stated under the *Workers' Compensation Act* 1926-1938 (N.S.W.). The claim was made by the widow of a deceased worker, William Thomas James, and the Workers' Compensation Commission made an award in her favour of £800. Upon the case stated this award was upheld.

James was a fitter and turner employed by the respondent company. He was shot and killed in the workshop of the company during working hours by a man named Hindle. The evidence accepted by the learned Chairman of the Commission was that there had been workshop talk originating from Hindle which involved James and a boilermaker named White. As to James the statement or insinuation was that he had spoiled some tools and was incompetent as a workman, and as to White the statement was that he had made a false statement that James had intended to assault a workman upon whose lathe James had been temporarily employed. The finding of fact is that White urged James to accompany him to Hindle for the purpose of dealing with these matters. James was disinclined to do this, but, disregarding the advice of a senior employee to get back to his work, when the boilermaker said "I must go and clear my character," he left his work at the bench and went with the boilermaker to the place where Hindle was working at the end of the shop, about sixteen feet away from James' bench. It is found that White spoke to Hindle and that then Hindle and James exchanged words which were not heard by anybody. Hindle then shot James dead.

The only questions which have been discussed upon the appeal are whether the death of James arose out of and in the course of his employment. The Full Court, by a majority (*Jordan* C.J. and *Davidson* J., *Halse Rogers* J. dissenting), held that the death did so arise.

In a judgment in which *Davidson* J. concurred, the Chief Justice said that he was of opinion that "it was open to the Commission to come to the conclusion that James was killed whilst he was doing something sufficiently incidental to the work which he was employed to do to make the injury occur in the course of his employment. He met his death whilst he was on duty at his place of employment, during working hours, at the hands of a fellow employee, and whilst he was endeavouring to investigate disparaging remarks which he had been told that that employee had been making about his capacity to do certain of the work which he had been employed to do. The question is one of fact and degree; and I can see no ground of law upon which we should be justified in interfering with the Commission's ultimate conclusion of fact."

It is not clear upon the findings of fact that James was endeavouring solely to investigate disparaging remarks made about himself. The findings of fact are to the effect that James went over to Hindle for the purpose of helping White to clear his character, rather than to clear his own character. But the Commission drew the following

H. C. OF A. 1943.

SOUTH MAITLAND RAILWAYS PTY. LTD. v. JAMES.

Latham C.J.

inference from the evidence :—" Deceased, as a qualified tradesman, was anxious to maintain his reputation and resented gossip which wrongly suggested that he was an unskilful artisan, and that this was the material issue in his discussion with the machinist " (Hindle) " both on the day preceding the shooting and on the day of the shooting."

In order to justify a court in coming to the conclusion that an injury arose in the course of an employment, it is not enough to show that the injury had something to do with the employment, or that if it had not been for the fact that the worker was employed by the particular employer in question he would not have received the injury. An injury arises in the course of a worker's employment only when it arises when the workman is doing something " which is part of his service to his employer or master. No doubt it need not be actual work, but it must, I think, be work, or the natural incidents connected with the class of work—e.g., in the workman's case the taking of meals during the hours of labour " (*Charles R. Davidson & Co.* v. *M'Robb* (1), per Lord *Dunedin*). It is only when a workman is doing something which he was employed to do, or something which is incidental to that which he is employed to do, that he is acting in the course of his employment—or, in other words, " in effect the same thing—namely, when he is doing something in discharge of a duty to his employer, directly or indirectly, imposed upon him by his contract of service. The true ground upon which the test should be based is a duty to the employer arising out of the contract of employment, but it is to be borne in mind that the word ' employment ' as here used covers and includes things belonging to or arising out of it. For instance, haymakers in a meadow on a very hot day are, I think, doing a thing in the course of their employment if they go for a short time to get some cool water to drink to enable them to continue the work they are bound to do, and without which they could not do that work, and workmen are doing something in the course of their employment when they cease working for the moment and sit down on their employer's premises to eat food to enable them to continue their labours " (*St. Helen's Colliery Co. Ltd.* v. *Hewitson* (2), per Lord *Atkinson*). If the workman is engaged upon his own business, and not upon the business of his employer, directly or indirectly, he cannot be said to be acting in the course of his employment.

I am not prepared to accede to the proposition that quarrels between workmen at their place of employment during working hours and originating in some difference of opinion about their

(1) (1918) A.C. 304, at p. 321.

(2) (1924) A.C. 59, at p. 71.

work (e.g., whether they should strike or not) necessarily involve an employer in liability to pay compensation if men are injured in such quarrels. Each case must be considered upon the basis of the facts proved in that particular case. In the present case the Commission drew the inference which I have stated, namely that James went to Hindle to investigate disparaging remarks with respect to the manner in which James had been doing his work. James would have been acting in the course of his employment if he had taken his complaint to some person in authority. The case is upon the borderline, but, though with much doubt, I am of opinion that there was evidence, accepted as true by the Commission, which was sufficient to justify the inference drawn and so to support the finding that James was acting in the course of his employment when, instead of going to some person in authority, he went to Hindle to investigate the facts as to the making of the allegations to which he objected. If, as might have been the case upon the evidence, it had been found that he went to Hindle to have a quarrel with him, there would, in my opinion, have been no liability to pay compensation. But the inference drawn, which there is some evidence to support, is sufficient to support the award.

For these reasons I am not prepared to differ from the majority in the Supreme Court and I agree in dismissing the appeal.

RICH J. We are asked to assume that what happened in this case was an injury within the meaning of the Act. On that assumption the question for determination is whether the injury falls within the two elements comprised in the compound expression in s. 6 of the *Workers' Compensation Act* 1926-1938 (N.S.W.)—personal injury arising out of and in the course of the employment. The jungle of cases which has grown up in this tract of country has not made the task of interpretation any easier. Instead of sticking to the text phrases and paraphrases have been substituted and illustrations and tests applied which form no criterion, but rather tend to confuse the Commission. A court of appeal will not review the findings of the Commission apart from the question of error in law or unless there is no evidence to support its finding. As the facts in each case differ it is impossible to lay down any exhaustive rule or definition applicable to all cases. The circumstances in which the occurrence in the instant case took place are sufficiently summarized in the judgment of the majority of the Supreme Court, and I adopt them. These circumstances are such as to bring the case within the scope of the Act as evidencing a necessary and reasonable act for the deceased to perform and sufficiently connected with the

H. C. OF A. 1943.

SOUTH MAITLAND RAILWAYS PTY. LTD. v. JAMES.

business of the employer, and thus justify the findings of the Commission: Cf. *McKenzie* v. *William Holyman & Sons Pty. Ltd.* (1).

The appeal should be dismissed.

STARKE J. Appeal from Supreme Court of New South Wales upon a case stated upon questions of law arising in a proceeding before the Workers' Compensation Commission of New South Wales constituted under the *Workers' Compensation Act* 1926-1938.

The proceedings were brought by the widow of a deceased worker, James, against the appellant for compensation under the Act in respect of a personal injury to the worker arising out of and in the course of the employment (Act, ss. 7 (1), 6: "Injury"). The worker was shot and killed by a fellow-workman in a workshop of the appellant. Several questions of law were stated, but, shortly, the case raised the question whether there was any evidence that the death of the worker arose out of and in the course of his employment.

The Supreme Court answered that question in the affirmative; hence this appeal.

It was not disputed in argument that the shooting of the worker was an injury within the scope of the *Workers' Compensation Act* (*Nisbet* v. *Rayne & Burn* (2); *Trim Joint District School Board of Management* v. *Kelly* (3)). The argument was that the injury did not arise out of and in the course of the worker's employment.

The proper construction of these words is now fairly well settled. The words "out of" require that the injury had its origin in the employment, whilst the words "in the course of" are not equivalent to "during"; the injury must occur in the course of the employment, that is, whilst the worker is doing something which is part of his service to his employer or master or incidental to the employment, or, in other words, whether the workman was at the time of the injury about his own business or that of his master (*St. Helens Colliery Co. Ltd.* v. *Hewitson* (4); *Charles R. Davidson & Co.* v. *M'Robb* (5); *Reed* v. *Great Western Railway Co.* (6); *Harris* v. *Associated Portland Cement Manufacturers Ltd.* (7); *McKenzie* v. *William Holyman & Sons Pty. Ltd.* (8)).

The material facts proved in this case may be summarized:—

1. The deceased worker, James, was a turner and fitter, and Hindle, a fellow-worker, was a machinist in charge of the toolroom.

(1) (1939) 61 C.L.R. 584, at p. 593.
(2) (1910) 2 K.B. 689.
(3) (1914) A.C. 667.
(4) (1924) A.C., at p. 91.
(5) (1918) A.C., at pp. 314, 317, 321, 324.
(6) (1909) A.C. 31.
(7) (1939) A.C. 71, at p. 91.
(8) (1939) 61 C.L.R. 584.

2. The deceased worker and Hindle, who was said to be of a quarrelsome disposition, were not apparently on friendly terms. On the day before James was shot Hindle told a fellow-worker, Sim, that the deceased worker, James, was going to give him a hiding and that White, another worker, had told him so and added because Sim had been "going about talking over the shop that James had spoiled all the tools and damaged" a lathe which Sim had been working upon.

3. James saw Sim later in the day, and this conversation took place :—

James : "Good-day, Charley, how are you getting on ? "

Sim : "All right Bill, but I am surprised at you asking me that after what you had to say about me in the shop."

James : "What have I had to say Charley ? "

Sim : "You have been saying that you were going to give old Charley Sim on the lathe over there a hiding."

James : "Who told you that Charley ? "

Sim : "Roy Hindle had told Wally White that."

James : "Has that man been trying to cause trouble again ? "

According to Sim, James left him and went to Hindle, but he did not hear anything.

(4) Early the next day James saw White, and this conversation took place :—

James : "I do believe you have been speaking about me."

White : "Who made that accusation ? "

James : "The storekeeper, Roy Hindle."

White : "I will only be too pleased to go along with you to verify or otherwise."

Both James and White went to see Hindle. White said to Hindle :—"I have been accused of speaking about Billy James. I want you to be sure of what was said." James spoke to Hindle, who said :—"Haven't you had enough of this ? "

White heard no more. Hindle then shot James, who was killed.

The Workers' Compensation Commission held on this evidence that the shooting of James was an injury arising out of and in the course of his employment.

It is clear enough on the evidence that the injury to the worker did not occur whilst he was doing anything that was part of the work he was engaged to do by his employer. And it is equally clear, I think, that, if the worker sought out Hindle simply to fasten a quarrel upon him, then an injury sustained whilst he was so engaged would not be within the course of his employment. But the Commission drew the following inference :—"Deceased, as a qualified

H. C. OF A. 1943.

SOUTH MAITLAND RAILWAYS PTY. LTD. v. JAMES.

Starke J.

tradesman, was anxious to maintain his reputation and resented gossip which wrongly suggested that he was an unskilful artisan, and that this was the material issue in his discussion with " Hindle " both on the day preceding the shooting and on the day of the shooting." This inference was open to the Commission on the evidence before it. Hindle was in charge of the toolroom, and, though the worker's act in seeking Hindle was not an act the worker was employed to do, still it was an act incident to his employment or not so far removed from the employment contemplated by the employer and worker as to exclude it from the course of his employment. It was a natural thing for any worker to do, and not altogether foreign to the employer's interests. Unfortunately the Commission also made and took into consideration various other inferences, that were either irrelevant or unfounded, and which it was not entitled to take into consideration for its ultimate conclusion that the injury to the worker arose out of and in the course of his employment. These were :—

1. It was the respondent's act in transferring the deceased worker James to the lathe in question which caused a flare-up of the well-known quarrelsome and somewhat eccentric traits of Hindle and resulted in Hindle's untrue statement in the workshop about James' method of work on the lathe and ultimately Hindle shooting James.

This seems to regard the employer as *particeps criminis* in the shooting by Hindle, which is unfounded and unjustified by the evidence.

2. A reasonable act incidental to the deceased's employment took him to the toolroom door, a spot which in fact had a " risk particular " attached to it in the known abnormal temperament of Hindle, working there, and the spot " turned out to be a dangerous spot " when Hindle shot the deceased.

But to say that the employer added a peril to his workshop in the employment of Hindle cannot be sustained on the facts proved in this case either as an inference of fact or a conclusion of law.

3. Deceased's employment materially contributed to the happening of the fatality.

I do not understand what " contributed " means, but, if it means that the injury would not have happened if the worker had not been employed, then it is a truism and throws no light upon the question whether the injury happened in the course of the worker's employment in the relevant sense.

On the whole I would remit the case to the Commission to reconsider its decision disregarding the irrelevant matters already mentioned.

WILLIAMS J. This is an appeal against a rule of the Full Supreme Court of New South Wales made on 18th December 1942 where, by a majority, it was ordered that questions 1 and 3 in a case stated by the Workers' Compensation Commission of New South Wales should be answered in the negative and that question 2 should be answered in the affirmative.

Of the three questions I need only refer to the second, which reads as follows :—" Is there any evidence to support the Commission's finding that deceased's employment materially contributed to the happening of the fatality." There was evidence at the hearing that the appellant was the employer of the respondent's husband William Thomas James, who, on 20th November 1941, while employed in the appellant's workshop and during the hours of work, was shot by a fellow worker and died there shortly afterwards. The respondent claimed £800 compensation from the appellant as the sole and total dependant of the deceased worker. Liability was denied by the appellant under the Act on the ground that the death of James did not result from personal injury arising out of and in the course of his employment with the appellant.

James was a qualified fitter and turner who had been employed as such for some eight months prior to the fatality. Hindle, the fellow worker who shot James, was a toolroom machinist who had been employed for more than ten years prior to the fatality and at the relevant time was in charge of the toolroom within the workshop. It was common knowledge in the works that Hindle could not take a joke and that he was very quick tempered and quarrelsome. When Sim, a senior tradesman, was transferred from a lathe for two weeks and put on to other work James was put on to the lathe by the foreman. Hindle thought that James ought not to have been put on to the lathe and said that he had been given the job because he was a favourite of the boss. At the end of two weeks Sim returned to the lathe, which he found to be in good order except for a loose set screw, a minor fault which could have occurred while any skilled worker was using the lathe. On the day before the fatality Hindle told Sim that James was going to give him a hiding because a boilermaker named White had told James that Sim was saying that James had spoilt all the tools and damaged the lathe. The boilermaker had not made this allegation against Sim ; Sim had not made any such statement ; and James had neither spoilt any tools nor damaged the lathe. On the day of the fatality James left his work and had a conversation with White. White and James walked over to Sim and had a conversation with him. He advised them to leave Hindle alone, but White said he must

H. C. OF A. 1943.

SOUTH MAITLAND RAILWAYS PTY. LTD. v. JAMES.

Williams J.

clear his character and that he and James must talk to Hindle. James then went with White to the toolroom door. James was then about sixteen feet away from the bench where he should have been working. A conversation occurred between Hindle and James, but shortly after it commenced Hindle suddenly aimed a firearm at James and shot him. James was at this time about three feet away from Hindle. James died shortly afterwards.

The Commission drew the following inferences of fact:—(*a*) It was the respondent's act in transferring the deceased worker James to the lathe in question which caused a flare-up of the well-known quarrelsome and somewhat eccentric traits in the machinist, and resulted in (i) the machinist's untrue statement in the workshop about James' method of work on the lathe, and ultimately (ii) the machinist shooting James. (*b*) Deceased, as a qualified tradesman, was anxious to maintain his reputation and resented gossip which wrongly suggested that he was an unskilful artisan, and this was the material issue in his discussion with the machinist. (*c*) The advice given to deceased by Sim was fatherly, and based on his knowledge of the machinist's temperament. (*d*) Deceased's act in leaving his work at the bench for a few minutes to have discussions with fellow-workers nearby was (i) neither prohibited nor unusual; (ii) in the circumstances not only reasonable but incidental to his employment in the workshop; (iii) did not constitute a break in the course of his employment. (*e*) A reasonable act incidental to deceased's employment took him to the toolroom doorway, a spot which in fact had a "risk particular" attached to it in the known abnormal temperament of the toolroom machinist working there, and the spot "turned out to be a dangerous spot" when this machinist shot the deceased. (*f*) Deceased's employment materially contributed to the happening of the fatality.

Before this Court it was not seriously contended that the Commission was not entitled to find that the injury to James arose out of his employment. It is therefore sufficient to say that I agree with the Supreme Court that there was ample evidence to support this finding.

A more difficult question is whether there was evidence on which the Commission was entitled to find that the injury arose in the course of his employment. It was contended for the appellant that the evidence proved that James' object in approaching Hindle was to clear White's reputation. I agree that this inference was open on the evidence. White did not tell James that Hindle had said that he was an unskilful workman. Hindle had said to White that it was Sim who was making the charge. After Sim had denied doing so, it was a question whether White had told the truth. In one sense White and James went to Hindle to clear White's character, but in the background there was

the fact that James was principally concerned to protect his own reputation. It was open to the Commission, therefore, to draw the inference that James went to Hindle to find out if the charge that he was an unskilful artisan was emanating from Hindle. This charge was of a serious character and related to the work on the lathe which James had been employed by the appellant to do. James may have wanted to see if he could not put an end to the charge by a discussion with Hindle, or at least to make certain that it was Hindle who was to blame, before he took a more decisive step such as approaching the foreman or the management.

It would not be in the course of the employment for workers to discuss their private affairs or ventilate their private quarrels in their employer's time ; but it must often be necessary for workmen in the course of their employment to discuss some matter relating to their work. A discussion between Hindle and James in order to ascertain whether Hindle was making charges that James was a favourite with the management who had been given work which he was incompetent to do would be a conversation which the Commission could reasonably find was incidental to James' employment and not to his private affairs. In view of Hindle's quarrelsome temperament it would have been wiser for James to have approached the foreman rather than Hindle, but a distinction exists between acts done in the course of the employment in an improper or unusual or negligent manner and acts done outside the course of the employment, however fine that distinction may be (*Lancashire and Yorkshire Railway Co.* v. *Highley* (1) ; *Taylor* v. *Lock* [*No.* 2] (2) ; *Riley* v. *Wearmouth Coal Co. Ltd.* (3)). It was not only damaging to James that such a charge should be made. Suggestions that James had been given work for which he was unfitted by favouritism and that a senior worker like Sim had said that he had damaged important machinery in the workshop were matters which concerned the employer.

It was therefore open to the Commission to hold that the injury arose in the course of the work which James was employed to do.

I agree that the appeal should be dismissed.

Appeal dismissed with costs.

Solicitors for the appellant, *Sparke & Helmore*, Newcastle, by *Gill, Oxlade & Broad.*

Solicitors for the respondent, *Braye, Cragg, Cohen & Chapman*, Newcastle, by *Braye & Malcolmson.*

J. B.

(1) (1917) A.C. 352, at p. 359.
(2) (1930) 144 L.T. 428.
(3) (1940) 4 All E.R. 342, at p. 346.