Case reconciled 1954 VR 363

[HIGH COURT OF AUSTRALIA.]

SMITH AND OTHERS . . . . . APPELLANTS;
DEFENDANTS,

AND

JOYCE . . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

H. C. OF A. 1954.

MELBOURNE, *Feb.* 26; *March* 1, 2;

SYDNEY, *April* 14.

Dixon C.J., Webb, Fullagar, Kitto and Taylor JJ.

Evidence—Partners—Admission by one partner as to cause of injury inflicted on outsider by employee acting in the course of partnership business—Source of knowledge of maker—Materiality—Admissibility against partner and employee.

In an action for negligence brought by A against B and B's employers, C and D, a partnership, it appeared that A, an apprentice slaughterman had been working close to B, a slaughterman engaged in slaughtering a bullock, when the beast made a violent muscular movement in consequence of which B, who was holding a sharp knife in his hand, quickly extended his arm thereby stabbing A in the throat with the knife. Evidence was given that the process of slaughtering a bullock consists of stunning the animal, then severing its spinal cord with a sharp knife (called pithing), then inserting a length of cane into the wound and pushing it along the spinal cord (called fiddling). The process of fiddling is intended to avoid, so far as possible, violent muscular movements during the ensuing process of bleeding, which is accomplished by cutting the beast's throat or "sticking" it. At the time the bullock made the muscular movement B had "stuck" it. A gave evidence that some time after he had recovered sufficiently to resume work, in the course of a casual conversation between him and C, the latter said in reference to the accident "Trevor" (meaning B) "was a fool to attempt sticking it without fiddling it". C denied in evidence that any such conversation had taken place and B gave evidence that he had pithed and fiddled the beast. It was common ground that C had no personal knowledge of the cause of the accident, not having been present at its occurrence. The jury, which was directed that the only evidence to suggest that B did not pith and fiddle the beast was the alleged statement by C, found that B had been guilty of negligence in that he had, *inter alia*, "failed to pith and fiddle the beast".

H. C. OF A. 1954. SMITH v. JOYCE.

Held, that, notwithstanding that C had no personal knowledge of the facts, the statement attributed to him was capable of constituting an admission because, its meaning being clear, the source of his knowledge was immaterial. The evidence of the statement, however, was admissible only against C and was not sufficient to found a verdict against his partner D and the employee B. *Lustre Hosiery Ltd.* v. *York* (1935) 54 C.L.R. 134, discussed.

Decision of the Supreme Court of Victoria (Full Court) affirming the judgment of *Dean* J. on the verdict of a jury, in part reversed.

APPEAL from the Supreme Court of Victoria.

Dennis William Joyce, by his next friend, Walter Clarence Joyce, commenced an action, as plaintiff, in the Supreme Court of Victoria, on 7th April 1952, against Trevor Smith, William John Bourke and Matthew Francis Bourke. The relevant portions of the statement of claim were as follows :

1. The defendant Smith (hereinafter termed " the first-named defendant ") was at all times material the employee of W. J. and M. F. Bourke (hereinafter referred to as " the second-named defendants ") as a slaughterman. 2. The second-named defendants were at all times material in partnership as wholesale butchers and employed the first-named defendant as a slaughterman. 3. On or about 2nd February 1951, the plaintiff was working at the City Abattoirs, Flemington, Victoria, when he was struck through the neck by a knife in the hand of the first-named defendant. 4. The plaintiff was caused to be struck through the neck as alleged in par. 3 hereof by the negligence of one or other or both the first and second-named defendants. *Particulars of negligence of first-named defendant*:—(i) Striking the plaintiff in the neck with an open razor sharp seven inch long knife. (ii) Using the said knife when he was too close to the plaintiff. (iii) Failing to keep a proper lookout whilst using the said knife. (iv) Failing to ensure that his position was secure whilst using the said knife. (v) Failing to have his boots properly studded. (vi) Failing to exercise due care whilst using the said knife. (vii) Failing to pith and fiddle the bullock which he was sticking before sticking same.

Particulars of negligence of second-named defendants :—(i) Failing to ensure that the first-named defendant had studs in his boots whilst using the said knife. (ii) Failing to ensure that the first-named defendant employed due caution whilst using the said knife. (iii) Failing to provide for efficient supervision of the said work.

5. At the time the first-named defendant struck the plaintiff through the neck with the said knife as alleged in par. 3 hereof,

he was acting in the course of his employment by the second-named defendants. 6. As a result of being struck through the neck as alleged in par. 3 hereof the plaintiff suffered personal injury pain and shock and was caused loss and damage. And the plaintiff claims damages from each one of the defendants £5000.

By their defence to the statement of claim dated 16th September 1952 the defendants admitted the allegations contained in pars. 1, 2, 3 and 5 thereof, denied those contained in pars. 4 and 6 thereof and pleaded contributory negligence on the part of the plaintiff.

The action was tried before *Dean* J. and a jury of six men. The plaintiff gave evidence that he had been at all material times employed by M. L. Thompson at the Melbourne Abattoirs. Dealing with the alleged conversation which he had with the defendant M. F. Bourke, he said that it was at the abattoirs during the morning-tea break, a short time after he returned to work following his injury when only he and that defendant were present. His recollection of the conversation was that the defendant greeted him after which there was general conversation in the course of which he told the defendant of his experiences in the First Aid room at the abattoirs and in hospital and the defendant said " Trevor was a fool to attempt sticking it without fiddling it ".

In the course of summing up to the jury, the learned trial judge said : " Then the next thing said against Smith is that he failed to pith and fiddle. He says he didn't fail and nobody says he did. There is no evidence whatever that anybody saw him sticking that bullock before he pithed and fiddled it, and he has given most positive evidence to the effect that he did pith and fiddle it. First he said ' if I didn't do that I would have difficulties '. As an experienced slaughterman, he would know that, he would know how much harder it was for himself, he said it was his practice and he did it on this occasion, although apparently he has on occasions seen others not pith and fiddle. The only evidence to suggest there was no pithing and fiddling is evidence given by the plaintiff that about a fortnight after the accident Mr. M. F. Bourke said to him ' Trevor was a fool to attempt sticking it without fiddling it '. Well, Mr. Bourke has denied that any such conversation took place. You have seen them both in the witness box, it is for you to say what you think, which one you think is the more reliable. You may think that the plaintiff has imagined it or invented it or distorted some other conversation consciously or unconsciously, or you may think that the defendant Bourke has denied it knowing it was said, or it was said and he has forgotten it. I only want to point out that apart from that conversation

H. C. OF A. 1954. SMITH v. JOYCE.

there is no evidence that he proceeded without pithing and fiddling and that a very small change in the words used may bring about a very important result. It may have been I suppose—I am not saying this was said, but am merely using it as an example, supposing Bourke had said something like 'well a man would be a fool to stick it without pithing it and fiddling it', or 'Trevor would be a fool if that is what he did'. Some words like that, gentlemen, which may even at the time convey to the plaintiff the suggestion that that is what he was saying had not been done and yet it may not be what was said at all. It illustrates how very easily a conversation can be turned round consciously or unconsciously to convey something quite different from what the person speaking really intended and meant to say. Again, that is one of the matters which I put before you for your consideration, but the evidence with regard to pithing and fiddling rests solely on that". The facts otherwise sufficiently appear in the judgment hereunder.

In answer to specific questions put to them the jury found for the plaintiff and judgment was entered accordingly. So far as material the questions and answers were as follows:—Question 1.—(a) Was plaintiff's injury caused by the negligence of the defendant Smith? Answer: Yes. (b) If yes, what did such negligence consist of? Answer: Failed to pith and fiddle the beast; failed to take proper precautions in use of footwear. Question 2.—(a) Was plaintiff's injury caused by the negligence of the defendants Bourke? Answer: Yes. (b) If yes, what did such negligence consist of? Answer: Failed to provide proper supervision. Question 3. (a) Was plaintiff guilty of negligence which contributed to his injury? Answer: No. Question 4. At what sum do you assess damages? Answer: £2,500.

The defendants appealed from the verdict of the jury and the judgment thereon to the Full Court of the Supreme Court of Victoria, constituted by *Gavan Duffy* and *O'Bryan* JJ. and *Hudson* A.J. In separate written judgments delivered 30th October 1953 it was held (a) by the whole court, that the jury was at liberty to treat the statement allegedly made by M. F. Bourke to the plaintiff as to the cause of the accident as an admission, but it did not bind Smith, nor, since it was not made in the ordinary course of the partnership business, did it bind W. J. Bourke; (b) by the whole court, that there was no evidence of failure on the part of M. F. and W. J. Bourke to provide proper supervision; (c) by *O'Bryan* J. and *Hudson* A.J. (*Gavan Duffy* J. *contra*), that there was sufficient evidence to support the verdict against all the defendants that the negligence of the defendant Smith in failing to take proper precau-

tions in the use of footwear was a contributing cause of the plaintiffs injury. Accordingly, the appeal was dismissed.

The defendants appealed from this decision to the High Court of Australia.

Dr. *E. G. Coppel* Q.C. and *H. G. Ogden*, for the appellants.

J. X. O'Driscoll Q.C. and *Peter Murphy*, for the respondent.

Cur. adv. vult.

April 14.

THE COURT delivered the following written judgment :—

On 2nd February 1951, the respondent, whilst working at the Melbourne City Abattoirs as an apprentice slaughterman, was seriously injured by a blow from an extremely sharp knife which, at the time of the accident, was being used by the appellant Smith. The latter was a slaughterman in the employ of the other two appellants who carried on in partnership the business of wholesale butchers under the firm name of Bourke Bros. Following upon the accident an action for damages was brought by the respondent against all three appellants and upon the trial of the action the jury answered certain specific questions in favour of the respondent and assessed his damages at £2,500.

The respondent's claim against the appellants was founded upon negligence and in the particulars of negligence supplied prior to the trial a number of allegations—some of them in very general terms—was made. In view, however, of the specific questions submitted to the jury and the answers made thereto the matters which arise on this appeal fall within a narrow compass and, substantially, it is necessary only to consider whether there was evidence to support the finding of the jury on two specific matters.

At the time of the respondent's injury, Smith was engaged in the process of slaughtering a bullock. The preliminary step of stunning the bullock had been taken and immediately thereafter Smith had performed the process of " pithing " it. This consists of severing the spinal cord with an extremely sharp knife. Thereupon it became Smith's duty to insert a short length of cane into the wound so made and to push it along the spinal cord. This process is known as " fiddling " and is intended to avoid, as far as possible, violent muscular movements during the ensuing process of bleeding which is accomplished by cutting the beast's throat, or " sticking " it, and then severing the main artery. It was common ground that in the absence of fiddling violent muscular movements, capable of

H. C. OF A. 1954. SMITH v. JOYCE. Dixon C.J. Webb J. Fullagar J. Kitto J. Taylor J.

causing danger to those engaged in the slaughtering operation, might take place during the process of sticking. At the time he received his injuries the respondent was standing at a small distance from Smith and was engaged in removing the tongue from the head of a bullock previously slaughtered and Smith was about to bleed the beast with which his attention was engaged. He had, in fact, " stuck " it and was about to cut the main artery. Both men were said to be facing towards one another, though they were bending down so as to perform their respective tasks, and the distance between them was variously estimated at between three and six feet. Whilst they were so engaged the beast appeared to kick violently and Smith removed from the beast's throat the hand in which he was holding his knife in order to ensure safety for his other hand. It is common ground that this was done quickly, that Smith fully extended his arm and that the knife came in contact with the respondent in the vicinity of his neck and face causing the injuries complained of. Perhaps, it should be added at this stage, the respondent in evidence further claimed that Smith slipped on the floor of the slaughter room and it was further alleged, as a cause of this, that Smith was wearing footwear which was unsuitable for the task in which he was engaged.

In answer to specific questions the jury found that the respondent's injuries had been caused by negligence on the part of Smith and negatived contributory negligence on the part of the respondent. The specific negligence which they found against Smith was that he had " failed to pith and fiddle the beast " and that he had " failed to take proper precautions in the use of footwear ".

It is convenient first of all to deal with the question whether there was evidence to support the first of these two specific findings. Smith emphatically asserted that he did not fail to perform the operation of fiddling and there is, of course, no other direct evidence on the point. We were, however, invited to say that the jury was entitled to infer from the mere fact of the violent muscular movement on the part of the beast that this process had been omitted, but it is clear from the evidence that no such inference can or should be drawn. But in any event the jury was not invited to draw any such inference ; they were directed by the learned trial judge that the only evidence to suggest that there was no pithing or fiddling was a statement alleged by the respondent to have been made to him by the appellant M. F. Bourke and this appeal should be considered on the basis that this was the only evidence capable of supporting the jury's finding. This statement was alleged to have been made in the course of a casual conversation between the

respondent and M. F. Bourke about a fortnight after the former had recovered sufficiently to resume work and the latter is alleged to have said : " Trevor " (meaning Smith) " was a fool to attempt sticking it without fiddling it ". The respondent was closely cross-examined on this evidence and M. F. Bourke denied that any such conversation had taken place. Indeed, he maintained that he had no knowledge of how the accident had happened. Nevertheless, the jury found that there was an omission to " pith and fiddle the beast ". There is, of course, no evidence whatever of an omission " to pith " and the finding of the jury must be understood as a finding that, although pithing had taken place, the process of fiddling, which should have taken place immediately thereafter, was omitted. It is conceded that such an omission would have constituted negligence but in relation to the evidence concerning the alleged omission two submissions were made. The first of these was that, in the circumstances, the evidence was so insubstantial and tenuous that it should not have been submitted for the consideration of the jury and the second was, that the directions of the learned trial judge in relation to the evidence on this point were so unsatisfactory that the verdict should not be allowed to stand.

In support of the first of these submissions it was contended that it was for the learned trial judge to consider whether the evidence disclosed that M. F. Bourke had sufficient knowledge of the facts " to found " an admission by him. We confess to considerable difficulty in the circumstances of this case in appreciating this contention but counsel for the appellant purported to base it upon observations in *Lustre Hosiery Ltd.* v. *York* (1). It is, of course, a question of law whether a statement made by a party to an action is capable of constituting an admission on any relevant issue, but this, in general, must be determined by an examination of the words used. As was said in *Lustre Hosiery Ltd.* v. *York* (2) : " If they disclose an intention to affirm or acknowledge the existence of a fact " they will constitute evidence of an admission " whatever be the party's source of information or belief ". Indeed, if the words are sufficiently clear they will constitute such evidence even though it may appear quite clearly that the party had no knowledge whatever of the fact or facts which he has purported to admit. But as was pointed out in that case upon the question whether a party " intends to affirm or acknowledge a state of facts the party's knowledge or source of information may be material " (3). Illus-

(1) (1935) 54 C.L.R. 134.
(2) (1935) 54 C.L.R., at p. 143
(3) (1935) 54 C.L.R., at p. 143

H. C. OF A. 1954.

SMITH v. JOYCE.

Dixon C.J. Webb J. Fullagar J. Kitto J. Taylor J.

trations of cases where the meaning of a party's words may to some extent be thought to depend upon the state of his knowledge are given in that case and it is unnecessary to repeat them here; it is sufficient for the purposes of this appeal to say that this is not such a case. The meaning of the statement attributed to M. F. Bourke is not of doubtful significance; it purports to characterize his employee as foolish for having omitted to fiddle the beast before sticking it and, the meaning being clear, the source of M. F. Bourke's knowledge is immaterial. But even if it were a material matter for consideration any attempt to examine the source of his information would be of little help for Bourke not only denied the making of the statement but asserted that at the relevant time he had no knowledge whatever of the circumstances in which the respondent's injuries had been caused. If, however, the jury was satisfied that the statement was made, as apparently its members were, it is not unreasonable to assume that they were not prepared to accept his assertion that he had no knowledge of the circumstances in which the accident happened. It is obvious, since Bourke was not present at the time, that he had no personal knowledge of the circumstances but he was, of course, in a position where he might well have received information from either Smith himself or from his brother who was the other member of the partnership.

The second submission concerning the alleged statement is concerned with its probative value and it is, we think, sufficient to say that we have read the directions of the learned trial judge with care and we are satisfied that he omitted nothing which from the point of view of the appellants' case should properly have been said.

The finding that Smith had "failed to pith and fiddle the beast" was, however, based on evidence which, it is conceded, was admissible only against M. F. Bourke and was not sufficient to found a verdict and judgment against the other two appellants. Accordingly, it becomes necessary to consider whether there was sufficient evidence to support the further finding of the jury that Smith "failed to take proper precautions in the use of footwear", and also whether such a finding, in the circumstances, is sufficient to justify a verdict for the respondent.

The initial difficulty on this aspect of the case is to determine the meaning of the finding. Does it mean that Smith was negligent in wearing rubber shoes rather than studded leather shoes or boots; or does it mean that the jury was of the opinion that the rubber soles of the shoes used by Smith were worn to such an extent that the wearing of them in the circumstances constituted negligence? We find it very difficult to say. In the main the claim upon the

evidence for the respondent was that it is necessary to wear hob-nailed shoes or boots to prevent slipping, that leather shoes equipped with studs are safer to wear than rubber-soled shoes and that on a floor, which both parties admitted to be very slippery, it is difficult for a workman to keep his feet unless leather boots with studs are worn. Indeed, one witness for the plaintiff asserted that a man who worked in the slaughter house in rubber shoes "would be looking for trouble". The respondent's witnesses agreed that a small proportion—estimated by one witness at about twenty per cent—of the workmen engaged in the slaughter house wear rubber boots or shoes. Smith, whilst admitting that he wore rubber shoes, maintained that their soles were provided with ridges to prevent slipping. He agreed that if thrown suddenly off balance it would be difficult to avoid slipping in such shoes but he did not, we think, concede that a workman wearing leather shoes equipped with studs would be in any better case. He had, he admitted, slipped on occasions when wearing rubber shoes of the same construction but this had happened rarely.

Upon the evidence, of which we have given a brief outline, was it open to the jury, as was suggested, to make its finding on the basis that the shoes worn by Smith were peculiarly defective? In our view it was not. The only evidence as to their particular nature and condition was that given by Smith and, even if the jury accepted the respondent's evidence that Smith slipped and disbelieved the evidence of the latter as to the nature and condition of his footwear, they were not entitled to infer from the fact that he slipped that his footwear was peculiarly defective. That this is so is clear particularly when it is borne in mind that the jury was, apparently, of the opinion that Smith had omitted the process of fiddling and that there had been a sudden and violent convulsive movement on the part of the beast.

But although we experience a difficulty in ascertaining what is meant by the jury's finding on this point, we are inclined to the view that what they really meant was that the wearing of rubber boots or shoes was negligent in the circumstances for, upon this aspect of the case, this was the real issue between the parties. Nevertheless, we are not able with safety to conclude that this is what the finding means and our difficulty in the matter is not diminished by the fact that although the learned trial judge initially formulated the issue as being whether it was negligent to wear rubber boots rather than boots or shoes equipped with studs went on to say: "Now, we are not told very much about the shoes in this case. We are told they were three months' old by Smith himself,

H. C. OF A. 1954. SMITH v. JOYCE. Dixon C.J. Webb J. Fullagar J. Kitto J. Taylor J.

that they had a tread on them. Of course, there are rubber shoes and rubber shoes, there are some with flat soles that could readily slip, and others, I have no doubt, with serrations and grooves and projections on the soles which would not slip at all or very little, and there is no evidence at all about the kind of shoes that were being worn, and it is not simply a question of comparing rubber shoes of all kinds with leather shoes with studs of all kinds, but more a question of whether these particular shoes were of such a kind that they were dangerous and it was negligent to wear them ".

On the whole we feel that this direction left it open to the jury, whilst concluding that Smith was not negligent in omitting to wear leather shoes or boots equipped with studs, to find that he was negligent in wearing rubber shoes of the particular nature and condition of those worn by him on the occasion of the accident. There is, in our opinion, no justification in the evidence for such a finding.

We are, however, of the opinion that there was sufficient evidence to enable the jury to conclude that the wearing of rubber-soled shoes or boots rather than leather shoes or boots equipped with studs involved an element of risk not only to the person wearing them but also, in the circumstances prevailing, to other persons working in the vicinity and that the evidence as to the risk so involved justified a finding that to omit the precaution of wearing suitable footwear was to neglect to exercise that degree of care which the circumstances required. We are also of the opinion that, having reached such a conclusion, the jury was also entitled to find that this omission was a substantial cause of the accident. But since it is by no means clear that the jury did so find the judgment, though it should stand as against the appellant M. F. Bourke, cannot stand against the other two appellants. The reasons which we have given, normally, would lead to a new trial but during the course of argument counsel for the respondent intimated that if the opinions of the Court led to such a result he would be content to rely upon his judgment against M. F. Bourke. This being so, we are of the opinion that there should not be an order for a new trial as against the other two appellants unless a specific application for such an order is made.

Appeal of the defendant M. F. Bourke dismissed with costs.

Appeal of the defendants W. J. Bourke and Trevor Smith allowed and order of Supreme Court varied by setting

aside the verdict against them and the judgment for damages and costs against them and so much of the order for the costs of the appeal to the Supreme Court as directs these defendants to pay such costs.

Solicitors for the appellants, *A. C. Secomb & Tibb.*
Solicitors for the respondent, *John W. & Frank Galbally.*

R. D. B.