IN THE HIGH COURT OF AUSTRALIA

DAJAK

V.

THIESS BROS. PTY.LIMITED

REASONS FOR JUDGMENT

Judgment delivered at BRISBANE

on Tuesday, 2nd June, 1970.

W. M. Houston, Govt. Print., Melb.

DAJAK

v.

THIESS BROS. PTY. LTD.

ORDER

Appeal dismissed with costs.

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JUDGMENT BARWICK C.J.

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The appellant was employed by the respondent as a miner on tunnelling work in the Snowy Mountains of New South Wales. He had had experience in Europe as a stonemason in construction work. At the time of receiving the injury for which he seeks damages in this action he was working with others in the employ of the respondent and was engaged in levelling and clearing the floor of a tunnel preparatory to lining it with cement. The work involved the reduction of the level of rock in some places on the floor of the tunnel and was to be carried out with pneumatic drills known as jack picks. But other implements such as sledge hammers and shovels were at hand.

Upon the failure of the jack pick to fracture part of the floor of the tunnel because of the hardness of the rock at that point, the appellant took in hand a sledge hammer and struck the recalcitrant rock. Apparently it shattered somewhat under the blow. A piece of it struck the appellant in the eye, as a result of which he lost about 70% of the sight of that eye. It seems that this loss of sight is due to the formation of a cataract which at some later stage it may be advisable to remove, a procedure likely to be successful.

The appellant claims that in the performance of the respondent's duty as his employer to use reasonable care for his safety, the respondent, because of the foreseeable danger in using a sledge hammer to attempt to shatter the rock,

ought to have forbidden him to use the sledge hammer at all or at the least ought to have warned him of the danger of using it. He also claimed that he should have been supplied with goggles when using the sledge hammer in the tunnel.

The oral evidence for the appellant given before the Supreme Court of the Australian Capital Territory included evidence given by another employee of the respondent, by name Mandl, who was the foreman in charge of the operations in the tunnel with which the case is concerned. He gave the following relevant evidence :

"Q. And when you say 'hammers', what sort of hammers? A. Well, we call that heavy hammer. Sledge hammer. Sledge hammer we call that, 14 lb. 16 lb.

Q. What sort of tool was Mr. Dajak using? A. What do you mean? When the accident happened or --?

Q. Yes, when the accident happed? A. The hammer.

Q. The sledge hammer? A. Yes.

Q. And do you remember who gave it to him or anything? A. No, I don't think so that somebody gave it to him. He must took it himself.

Q. Was this an usual way of doing it? A. Well, he was trying before the jack pick. He was working the jack pick. Some places it was really too high and actually we didn't work with the hammer there. We was working the jack pick because it's easier. But in that particular part if was a really hard section and we couldn't get it away with the jack pick so I couldn't see or didn't see when Mr. Dajak took the hammer and try to break the rock with the hammer. And then I saw it. His eyes was covered with blood."

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"Q. Now, if one were to do this work with a jack hammer - a jack pick - what is a jack pick? A. A jack pick is a tool which operates from the air. So you have to connect the air. It's more like a drill hammer but it's not - you use more this chipping you know.

Q. And what happens to the rock when you use a jack pick on it? A. Well, some parts of rock split easily so we can clean it up easily after do it but some rocks actually are very hard and when you use the jack pick, well, I would say, - of course, it can happen that rock splinters or however you call it, flies off and well, I would say that is only in hard rock section but if the rock is soft it wouldn't be happen there."

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"Q. Have you ever seen them cut on the face by rock chips as a result of somebody using a hammer? A. No, not this either."

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"Q. You had told him not to use the hammer, had you not? A. No, no,I didn't. No.

Q. Didn't you say to Mr. Dajak and some other men there, that they were not to use sledge hammers to break rock? That they were to use the air powered jack pick? Did you say that or not, Mr. Mandl? A. Yes, in one part I said - I remember when we start in the shifts, we start working with the blow pipe, blowing the (not audible) well, the floor, to get down to the solid rock and we took the measurements. The Department of Work ask so much for the concrete and when we had high section we use the jack pick first.

And sometime it happen that one or two boy pick up the hammer without asking me. I mean that can happen in the tunnel because you can't stay behind everybody all the time, and they just grab the hammer and they try to work with the hammer, but then I said to one bloke - I remember that - 'You can't' ---

Q. Well don't tell us what you said to one bloke. Didn't you tell Mr.Dajak not to use the hammer? A. No, I didn't tell him. I said to one bloke, I said 'Listen, if you can't break the rock with the jack pick, you won't be able to break the rock with the hammer."

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"Q. You do remember now, do you, you do remember now telling him before the accident happened that he was not to use the hammer? A. No, I told you before I didn't told him, I told somebody else and that's correct and if Frank Gergelife, that supervisor, when he took the statement said to me, 'Didn't you told' ---"

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"Q. No, just tell us, was it true or wasit not true? A. Of course it was true, but I didn't tell Dajak."

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"Q. Well, now, don't you agree that you told Dajak not to use the hammer? A. I can't remember - I can't remember that I told Dajak, but I told the other boys. May be Dajak was - was around there too, but I told the boys to don't use the hammer when you see that you can't break that rock with the jack pick, I remember that."

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"Q. When you said, 'If you can't break it with a jack pick you can't do it with a hammer,' and you told him not to use the hammer, why didn't you want them to use the hammer? A. Well, on my own experience I know that if you can't break it with a jack pick which has such a force behind, you won't be able to do it with a hammer and if so well, that's the way that accidents get caused."

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Apart from this evidence, there was no other oral evidence on which it was submitted that it could be concluded that the operation of using the sledge hammer to fracture rock was dangerous or that any serious injury due to pieces of stone dislodged by the use of a sledge hammer ought to have been foreseen. Nor was there any evidence as to the use of goggles on work of the kind on which the appellant was engaged or as to the efficacy of goggles, if worn, to prevent an injury of the kind suffered by the appellant.

But interrogatories had been administered to the respondent and were received in evidence along with the respondent's answers. Included in these interrogatories were the following :

"4. - (a) On the 19th day of August, 1966,

(b) at the time of the accident,

(c) at any, and if so what, time prior to the accident, had the plaintiff -

(i) been warned or instructed by any servant or agent of the defendant to wear any, and if so what, protective eyewear when attempting to chip rock

No

(ii) been issued orprovidedwith any, and if so what, protective eyewear by the defendant,

No

(iii) been given any warning or instructions as to

A. the methods to be used when,

Yes

B. any, and if so what, dangers associated with,

Warned of danger of flying particles of rock

C. any, and if so what, precautions to be taken when, chipping or levelling rock,

To take precautions of not using sledgehammers and to use jack pick instead.

The said warnings and instructions were given approximately 30 to 60 minutes before the plaintiff was injured.

(iv) been given any warning or instruction or direction relating to the work of levelling the floor of the place where the accident occurred,

Yes - approximately 30 to 60 minutes before the Plaintiff was injured.

(v) been given any warnings or instructions to the use of protective eyewear?

No.

5. - As to such warnings and/or instructions and/or directions as are referred to in your answers to earlier interrogatories

(i) say were they verbal, in writing, to be implied, by demonstration or partly so,

Verbal.

(ii) insofar as they were verbal, set out the substance of each conversation constituting the same and say when, where and between whom each such conversation took place. Insofar as they were in writing, identify the relevant documents. Insofar as they were by demonstration, describe such demonstration as clearly as you are able and say when, where and by whom were they delivered to the plaintiff. Insofar as they were to be implied set out the facts, acts and circumstances from which it is alleged such implication arose.

The Plaintiff was told not to use a sledgehammer to break rock but to use a jack pick. This instruction was given by Carl Mandl. He also gave warning that pieces of rock might fly if struck with the sledgehammer

The learned trial judge found a verdict for the respondent. In giving judgment after referring to some of the evidence I have quoted he said :

" There is no evidence that protective equipment, such as goggles, are commonly used for such tasks or that their use is a desirable or practical safety measure. There were in fact no goggles available for use by men working in the tunnel.

It is submitted on behalf of the plaintiff that the plaintiff should have been ordered, or at least warned, not to use the hammer for the task in question.

> Alternatively, it is submitted that goggles should have been supplied, and the plaintiff should have been required or advised to use them. Failure to do these things, it is said, constitutes negligence. I am afraid that I do not agree. In the first place the evidence does not show a sufficient degree of risk that a splinter of rock would fly off and cause injury. There was of course some risk that such a thing might happen, and, of course, if the piece of rock hit an eye, the consequences could be serious. But in a practical world, the test is one of reasonableness (see Vozza v. Tooth & Co. Ltd. 112 C.L.R. 316). One must look to what it is reasonable for an employer in the position of the defendant to do. In the present case the evidence tends to establish that injury in the way mentioned is most unlikely. Experienced people have said that they have not known it to occur. Given the smallness of the risk, the defendant was in my opinion entitled to rely upon the plaintiff's own judgment and experience (he was a first class miner), and was not obliged to control or regulate or advise him concerning his use of the hammer in what was, after all, a simple and straightforward operation."

His Honour did not advert in his reasons for judgment to the answers to interrogatories which I have set out but in the course of dealing with a claim that the appellant contributed to his own injury by a lack of care for himself, he said that he was not satisfied that the appellant was instructed not to use a sledge hammer to strike the rock in the tunnel. The trial judge indicated that if he had found a verdict for the appellant, it would have been for the sum of $7600 which sum would include an amount of $85.50 agreed as out of pocket expenses.

The appellant submitted to this Court that the trial judge ought to have found that the respondent ought to have instructed the appellant not to use a sledge hammer to crack the rock in the floor of the tunnel or, alternatively, that the respondent ought to have warned the appellant against the risk of injury if a sledge hammer were so used. It was submitted that the said answers to interrogatories, particularly that which claimed that Mr. Mandl had told the appellant not to use a sledge hammer to break rock, and that he had also warned the appellant that pieces of rock might fly if struck by the

sledge hammer, constituted evidence of the respondent's appreciation of the danger involved in using a sledge hammer in the circumstances and of the necessity to give such an instruction or warning. It was claimed that the trial judge could not ignore this evidence and that because he had made no reference to it in his reasons for judgment, he in fact had done so.

There was no evidence that the appellant was required to use the sledge hammer. On the contrary, the system of work in preparing the floor of the tunnel for concreting according to the evidence called for the use of the jack pick. Thus the use of the sledge hammer by the appellant on this occasion could not be said to be part of his required work. But in any case the use of a sledge hammer to fracture rock is a simple commonplace operation. It was quite obvious that the attempt to fracture the rock may succeed and the rock fracture and particles be expelled from its surface. The appellant was an experienced worker with stone and of recent times a miner working with rock. In my opinion, the performance of a duty to use reasonable care for the workmen's safety did not call for the giving of any instruction or warning as claimed by the appellant. I would be the of the same opinion even if the respondent's answers to the interrogatories did afford evidence that in the respondent's view it was proper to give such an instruction or such a warning. But in my opinion those answers did not go so far. They went no further than that the respondent claimed that such an instruction and such a warning had been given by the foreman Mandl. In the event, when Mandl was called, he was not prepared to ~~support the answers to the~~ interrogatories. In those circumstances, the trial judge was not bound, and indeed in my opinion was not entitled to prefer the answers to

interrogatories to the evidence of Mandl. In particular, he was not entitled to regard them as supporting an inference that it was necessary to give an instruction or a warning. Finally on this aspect, I do not think that it at all follows from the circumstances that he did not refer to them in his reasons for judgment that the trial judge failed to recollect the answers to interrogatories.

In my opinion, the trial judge was not in error in refusing to hold that the respondent as an employer was bound in performance of his duty of care for his employee, in the circumstances of the case and having regard both to the nature of the work to be done and the familiarity of the appellant with it, to have instructed him not to use a sledge hammer to break rock on the floor of the tunnel or to have given him a warning as to the dangers of so using a sledge hammer. I agree with the passage I have quoted from the trial judge's reasons for judgment.

Being of opinion that the verdict for the defendant was right, there is no need for me to discuss the amount of the damages which might otherwise have been awarded to the appellant.

I would dismiss the appeal.

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JUDGMENT OWEN J.

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In August 1966 the appellant, who was employed by the respondent Company, was working in a tunnel which was being made in connection with the Snowy Mountains Scheme. His task and ~~that of other men working~~ with him was to level the rock floor of the tunnel preparatory to the pouring of concrete and for this purpose the men were supplied with jack picks and sledge hammers. In the course of his work the appellant struck some hard rock with a sledge hammer in order to break it up and a piece of the rock flew up and struck him in the eye with the result that it was seriously injured. He brought an action for damages against the respondent in the Supreme Court of the Australian Capital Territory claiming that his injury was caused by the respondent's negligence in failing to warn him of the danger that if he struck a rock with a sledge hammer particles of rock might splinter off and strike him and in not providing him with some form of protective goggles against such a happening. The action was heard by Fox J. who found in favour of the respondent. His Honour took the view that on the evidence the danger that injury might be caused to a person in the position of the appellant was a slight one and that, in these circumstances, he was of opinion that a failure to warn the appellant of the risk or to supply him with some device to protect his eyes did not constitute any breach of the duty of care owed to the appellant. It was not disputed that there was evidence, which his Honour obviously accepted, to support these findings and the submission for the appellant that this Court should take a different view of the facts was based upon some answers made by the respondent to interrogatories

administered by the appellant. In those answers the respondent had stated that the appellant had been warned of the danger of flying particles of rock if a sledge hammer instead of a jack pick should be used on hard rock. The learned trial judge was, however, not satisfied that such a warning had been given to the appellant who had had considerable experience of this type of work and had previously worked for many years as a stone-mason. He considered, however, as I have said, that the risk of injury from splintering particles of rock was slight and that in these circumstances, and having regard to the appellant's experience in work of this kind, the absence of a warning of the risk of injury from flying particles of rock and the fact that protective goggles had not been supplied to the appellant was not a breach of the duty of care owed by the respondent to the appellant. Accordingly he found in the former's favour and from that decision this appeal is brought. On the appeal counsel for the appellant, while conceding that there was evidence upon which the conclusion might be reached that the risk of injury was slight, relied upon the fact that in his reasons for judgment the learned trial judge, while making an earlier general reference to the fact that interrogatories had been administered and answered, made no express reference to the fact that in the course of its answers the respondent had stated that the appellant had been warned of the danger that particles of rock might fly if a sledge hammer and not a jack pick was used on hard rock. Counsel submitted that the omission to make express mention of this indicated that his Honour, in considering the degree of risk involved, had failed to take into account these answers and that, for this reason, his findings of fact should not be allowed to stand and that we should find that negligence on the part of the respondent was established. I will assume, without so deciding, that the answers in question afforded some evidence, by way of admission, that the risk of injury was regarded by the respondent as being sufficiently great as to

make it unreasonable not to warn the appellant of it or not to supply him with protective goggles but taking that evidence at its highest in the appellant's favour it was in no way conclusive on the point. I am far from satisfied, however, that the learned trial judge failed to take into account the answers to the interrogatories nor can I see any good reason why those answers should be treated as outweighing the oral evidence, which his Honour accepted, that the risk was a slight one. In these circumstances I am not prepared to differ from his Honour's conclusion that negligence on the part of the respondent was not established.

I would therefore dismiss the appeal with costs.

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JUDGMENT WALSH J.

At the trial of the action in which this appeal has been brought the learned trial Judge found that negligence on the part of the respondent had not been established in respect of its failure to warn its employee, the appellant, of the danger of injury from using a sledge-hammer to strike a hard rock surface or in respect of its failure to provide him with protective goggles. In my opinion this Court should not disturb those findings of fact.

If the learned Judge had found that the respondent had been negligent in failing to give a warning to the appellant, I think that such a finding would have been open on the evidence, having regard to the answers made by the respondent to certain interrogatories and to the fact that it had sought unsuccessfully to establish that the appellant himself had been guilty of contributory negligence in failing to give heed to a warning of the danger of using a sledge-hammer which the respondent alleged had been given to him. But the question whether or not there was any evidence which would have supported a verdict in favour of the appellant is not the question to be decided. The trial Judge had to consider the circumstances disclosed by the whole of the evidence and to decide whether in those circumstances the respondent's duty to take reasonable care for the safety of the appellant required it to give him a specific warning. Assuming that there was evidence, by way of admission by the respondent, that it had knowledge of a risk concerning which it was desirable to give a warning to its employees, this had to be considered with the other evidence in the case and it did not compel a finding that the failure to give a warning was a breach of duty. As his Honour said the test was one of reasonableness. I do not think that he was wrong in concluding

that in the circumstances the respondent's duty of care did not oblige it to advise the appellant against the use of the hammer in the work which he had to perform. In my opinion his Honour's finding on this question of fact was not only a finding which he was entitled to make but was the right finding.

In my opinion the evidence did not justify a finding that the respondent was in breach of its duty in that it did not provide the appellant with protective goggles and his Honour was right in refusing to be satisfied that in this respect the respondent had been negligent.

In my opinion the appeal should be dismissed.