Amus bin Pangkong v Jurong Shipyard Limited and Another
[2000] SGHC 67

Case Number : DA 26/1999

Decision Date : 24 April 2000

Tribunal/Court : High Court

Coram : Lai Siu Chiu J

Counsel Name(s) : Cheong Yuen Hee (instructed), Subbiah Pillai and Tiwary Anuradha (Pillai & Pillai) for the appellant; Basil Ong Kah Liang (Madhavan Louis & Partners) for the respondents

Parties : Amus bin Pangkong — Jurong Shipyard Limited; Another

Tort – Breach of statutory duty – Whether burden of proof of what is reasonably practicable is on person injured or person responsible for safety – Whether respondents breached duty – s 33(3) Factories Act (Cap 104, 1998 Rev Ed)

Tort – Negligence – Duty owed by employer to employee – Duty to provide safety equipment – Duty to provide and implement safe system of work – Worker falling while working – Whether duty continuous – Whether employer in breach of duty – Whether breach the proximate cause of worker's injuries

Tort – Occupier's liability – Shipyard owners subcontracting out work in interior of vessel to worker's employers – Whether shipyard owners occupiers of interior of vessel – Whether shipyard owners and worker's employers liable as occupiers – Whether danger faced unusual to invitee

: This was an appeal against the decision of the District Court given on 28 October 1999. The district judge had dismissed the appellant`s claim for damages for personal injuries allegedly caused by the tortious acts of the first and second respondents.

The background

The appellant, Amus bin Pangkong, was employed by Jurong Clavon Pte Ltd (the second respondents) as a general worker since 1994. The first respondents, Jurong Shipyard Limited (JSL), and the second respondents carried on the business of ship repairing.

On 12 February 1997, the appellant was instructed by the second respondents to carry out blastering work in the centre port tank of the vessel Stolt Eagle (the vessel). The work involved the cleaning of the tank of the vessel using a blastering gun. The vessel was undergoing repairs at JSL`s shipyard at the material time. The appellant carried out the blastering work from a platform about 9.5 m from the bottom of the tank. There were handrails positioned about 1 m from the platform. There were no footholds or toeholds on the platform itself. In addition, the tank was pitch dark except for a limited amount of light emanating from the lamps of workers who were working in the tank.

In the course of blastering, the appellant accidentally fell to the bottom of the tank and suffered severe injuries. When he was discovered by his co-workers, they noticed that he was not wearing a safety belt. Investigations carried out by the Ministry of Manpower (MOM) after the accident revealed that there were no toe-boards on the platform on which the appellant was standing. This was a contravention of reg 93(1)(b) of the Factories (Shipbuilding and Ship-repairing) 1994 Regulations (the Regulations). The appellant has not worked since the accident.

Consequently, the appellant commenced an action against JSL and the second respondents. The appellant claimed damages for personal injuries suffered as a result of the negligence of JSL and/or

the second respondents, a breach of their duties as occupiers of the vessel and a breach of their statutory duties under the Factories Act Cap 104 (the Act). He further pleaded the doctrine of res ipsa loquitur which point his counsel wisely abandoned in his petition of appeal and at the hearing together with his claim based on ss 28(1)(a) and (b), 33(1) and 62 of the Act.

Dr Chang Wei Chun (PW1) gave evidence on behalf of the appellant as to his condition after the accident. Tan Geok Leng (PW2), an engineer and factory inspector from the Department of Industry Safety at the MOM, was called upon to give evidence on the practice of his ministry as regards the enforcement of the Regulations. The accident report that was prepared by the MOM was annexed to his affidavit of evidence-in-chief. It was noted that the person who prepared the accident report, one Lee Kah Bee, was not in Singapore at the time of the trial. Accordingly, he was not called as a witness for the appellant during the trial. However, Mohamed Salleh bin Ahmad (Mohamed), Herman bin Ibrahim (Herman) and Idris bin Salleh (Idris) were called to testify on the appellant`s behalf. These three persons had been previously employed as blasterers for the second respondents. Another witness was Zainuddin Jamil (Zainuddin), a co-worker of the appellant who was working in the tank with the appellant when the accident occurred. Karthigesan a/l Eswara Chandran (DW3), the safety officer of the second respondents, was also called as their witness.

Chia Boon Sun (Chia) was a loss adjustor and surveyor who was engaged by the insurers of JSL and the second respondents to investigate the circumstances surrounding the appellant`s accident. Chia (DW1) had obtained a statement from the appellant about three months after the accident.

The decision below

The district judge dismissed all the appellant`s claims against both respondents. She did not think that the appellant was truthful on the issue as to whether he had received safety training from the second respondents. The appellant testified that he was never given any safety training whilst he was employed by the second respondents. In contrast Mohamed (PW4) and Herman (PW5) stated that they had attended safety courses. Idris (PW6) did not undergo any safety training but stated that he already knew how to use the relevant safety equipment due to his previous employment in Malaysia. The district judge felt that the evidence as a whole indicated that employees of the second respondents were given training in the use of safety equipment unless they had already acquired the necessary skill and knowledge, as in the case of Idris. It was against this background that she found it difficult to believe the appellant`s evidence that he had mastered the use of sophisticated equipment, like the blastering gun, by himself.

The court below was also dissatisfied with the evidence of Mohamed and Idris on the issue of whether safety belts were provided to blasterers. In the course of cross-examination, Mohamed stated that he was taught how to use equipment such as the gas mask, helmet, safety shoes, gloves and ear plugs but was not taught how to operate the blastering gun. Similarly, Idris stated in cross-examination that he and his fellow blasterers were provided with all the relevant safety equipment except the safety belts. The district judge found it hard to accept the evidence of either witness that a safety course conducted by the then Ministry of Labour would cover all types of safety equipment save for safety belts. Accordingly, the district judge concluded that Mohamed and Idris were coached by the appellant as to the evidence they should give and were ready to pin liability on the second respondents as regards the non-provision of safety equipment.

The court below took the view that the bias of the appellant`s witnesses was demonstrated again when Mohamed and Idris were cross-examined on the second respondents` practice vis-.-vis safety rules and regulations. Both witnesses gave the impression that the second respondents blatantly

flouted numerous safety rules and regulations. Accordingly, the district judge found that Mohamed, Herman and Idris were not independent witnesses.

In contrast, the district judge found Chia (DW1) to be an independent and reliable witness. Chia had recorded a statement (see exh `CBS 1` in his affidavit) from the appellant. In his statement to Chia, the appellant admitted that he was wearing a safety belt at the time of the accident but he simply did not anchor the safety belt because he was moving about on the working platform. As the appellant was not fluent in English, the statement was interpreted to him in Malay by one Omar Muthalif (Omar), who was the appellant`s supervisor at the time. According to Chia, the appellant signed the statement after the contents had been interpreted to him. However, the appellant denied that the signature on the statement was his. The district judge chose to believe Chia as she felt there was no reason for Chia to conspire with Omar against the appellant. Accordingly, the contents of the appellant`s statement were accepted as evidence that the appellant was wearing a safety belt on at the time of the accident and he was himself negligent in failing to anchor it to the platform. After considering the evidence of Chia, the appellant`s admission in the statement to Chia and the dubious nature of the evidence of Mohamed, Herman and Idris, the district judge consequently found as a fact that safety belts were furnished to the appellant and the other blasterers on 12 February 1997.

Having assessed the evidence, the court below then went on to address the legal issues. The issues were firstly, whether JSL and the second respondents were liable to the appellant in negligence; secondly whether JSL and the second respondents were liable to the appellant as occupiers of the vessel; and thirdly, whether JSL and the second respondents were in breach of their statutory duties under the Regulations, and were therefore liable to the appellant for damages suffered as a consequence of the breaches.

With respect to the first issue, the appellant alleged that the second respondents had breached their duty of care to him in two respects. He alleged that the second respondents were negligent firstly, in failing to provide him with a safety belt and secondly, in failing to ensure that the blastering work that was executed by the appellant and his co-workers was supervised. As the district judge had concluded that the appellant was in fact provided with a safety belt by the second respondents on the day of the accident, she accordingly found that there was no breach of a duty of care on the part of the second respondents in this respect.

As regards the appellant`s allegation that the second respondents had breached their duty of care in failing to supervise the blastering work, the district judge rejected the appellant`s contention that the second respondents were obliged to ensure the physical presence of a supervisor inside the tank of the vessel together with the blasterers. Whilst the second respondents clearly had a duty to provide a safe system and place of work, she felt that it would be almost impossible for anyone to ensure that the workers continue to use their safety belts given the darkness within the tank. Furthermore, the workers were required to move along the platform in the course of working. It would be impossible for a supervisor to ensure that all of them would re-anchor their safety belts whenever they moved to a new location along the platform. However, the district judge felt that the second respondents were obliged to ensure that the workers were specifically reminded to use safety belts at the commencement of their work. As they had failed to do this, the second respondents were in breach of their duty in this respect.

However, despite the breach of duty on the part of the second respondents, they were not liable in negligence to the appellant as the breach of duty was not the cause of the appellant`s injuries. The district judge noted that the appellant was aware of the importance of using a safety belt before carrying out his work in view of his own evidence that he would request for a safety belt before

commencing work. The learned judge had also found that the appellant had been provided with a safety belt prior to the accident. Despite his awareness of the danger involved, the appellant did not secure his safety belt properly. Accordingly, the district judge concluded that the second respondents were not liable in negligence to the appellant as their breach of duty was not the proximate cause of the accident.

In relation to the second issue, the court below found that JSL and second respondents were not liable as occupiers to the appellant. As regards JSL, the district judge held that they were not `occupiers` of the place in which the appellant was working as JSL did not have a sufficient degree of control over the premises (see **Awang bin Dollah v Shun Shing Construction & Engineering Co Ltd** [1997] 3 SLR 677). Accordingly, occupier`s liability did not attach to JSL.

The second respondents admitted that they owed a duty of care to the appellant as occupiers of the tank. However, they contended that they had taken all reasonable care for his safety and were not liable to the appellant. The court cited **Industrial Commercial Bank v Tan Swa Eng** [1995] 2 SLR 716 where the Court of Appeal held that an occupier would be liable to an invitee if four conditions were satisfied. The four conditions were:

(1) the occupier actually knew or ought to have known of the danger that caused the injury;

(2) the danger was unusual to the invitee, having regard to the nature of the premises and the invitee`s knowledge;

(3) the danger was unknown to the invitee and the significance was not appreciated by the latter; and

(4) the occupier had failed to use reasonable care to prevent damage from occurring, whether by notice, lighting, guarding or otherwise.

Applying the test in ***Industrial Commercial Bank v Tan Swa Eng*** to this case, the learned district judge found that the second respondents were not liable to the appellant as occupiers. Although the second respondents were aware, vicariously through their foreman and supervisor, of the danger that caused the appellant`s injuries, the danger was not unusual as it would be obvious that working on scaffoldings would be dangerous without a properly secured safety belt.

The court then dealt with the appellant`s claims that JSL and the second respondents had breached their statutory duties under the Act and the Regulations. The appellant alleged that JSL and the second respondents had contravened ss 33(3) and (7) of the Act. Section 33(3) of the Act provides:

> *There shall, so far as is reasonably practicable, be provided and maintained safe means of access to an egress from every place at which any person has at any time to work and every such place shall, so far as is reasonably practicable, be made and kept safe for any person working there.*

Section 33(7) of the Act provides:

> *Where any person has to work at a place from which he would be liable to fall a distance of more than 3 metres or into any substance which is likely to cause drowning or asphyxiation, a secure foothold and handhold shall be provided so far as practicable at the place for ensuring his safety.*

The district judge noted that counsel for the appellant did not make any reference to ss 33(3) and (7) in his closing submissions. Additionally, she accepted the submission from counsel for the respondents that the Investigation Report made no mention of a lack of foothold or handhold. In any event, she did not think that the evidence revealed a breach of these provisions.

In the light of her findings, the district judge concluded that the appellant had failed to prove, on a balance of probabilities, his case on all three causes of action brought against both respondents.

The appeal

Being dissatisfied with the decision of the court below, the appellant filed this appeal. In summary, the appellant raised the following grounds on appeal :

(1) the district judge erred when she found that there was evidence to support the second respondent`s contention that the appellant had a safety belt on at the time of the accident. Consequently, the district judge erred when she concluded that the second respondents were not in breach of their duty to provide the appellant with a safety belt;

(2) the duty to provide a safe system of work by way of supervision was continuous in nature and accordingly, the district judge erred in confining the duty to the commencement of the blastering work;

(3) the district judge erred in finding that the second respondents` failure to supervise the workers was not the proximate cause of the appellant`s injuries;

(4) the district judge erred in finding that the first respondents were not occupiers of the tank in the vessel;

(5) the district judge erred in finding that the second respondents were not liable to the appellant as occupiers;

(6) the district judge erred in concluding that there was no breach of s 33 of the Act on the part of the first and second respondents.

Did the district judge err in finding that the appellant had a safety belt on when the accident occurred?

The court had found as a fact that the appellant was wearing a safety belt at the time of the accident. This finding led the district judge to conclude that there was no breach of the duty to provide safety belts on the part of the second respondents. Support for the finding was derived from the contents of the appellant`s statement to Chia in which the appellant allegedly admitted that he had a safety belt on when the accident occurred. Although the appellant`s three (3) colleagues had testified that they were not provided with safety belts by the second respondents prior to the accident, the court below rejected their evidence on the basis that they were biased in the appellant`s favour. The district judge preferred to infer from the evidence that uniforms and additional equipment were provided to the appellant and his co-workers on the day of the accident.

It is trite law that an appellate court should not interfere with a trial judge`s finding of fact unless the finding is plainly wrong or unjustified by the evidence before the court (see **Aircharter World Pte Ltd v Kontena Nasional Bhd** [1999] 3 SLR 1 at p 9). As stated by Lord Thankerton in **Watt v Thomas** [1947] AC 484 at 487 :

> *... an appellate court which is disposed to come to a different conclusion should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses could not be sufficient to explain or justify the trial judge`s conclusion ... The appellate court, either because the reasons given by the trial judge are not satisfactory or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court.*

Bearing in mind the fact that appellate intervention is warranted only in limited situations, I am of the view that the district judge erred in finding that the appellant was wearing a safety belt on the day of the accident for the reasons which I shall now set out.

The district judge erred in placing excessive reliance on the appellant`s admission to Chia in which the appellant admitted to wearing a safety belt when the accident occurred. The appellant`s statement was recorded by Chia about three months after the accident. Chia spoke to the appellant in Malay and recorded the appellant`s statement in English in his own handwriting. Chia stated that he had the contents of the statement explained to the appellant twice, once by himself and another time by the appellant`s supervisor, Omar. I find that the accuracy of the appellant`s statement to Chia is questionable. Chia did not testify to his proficiency in Malay nor was Omar called as a witness by the respondents. The appellant had also disputed the contents of the statement and denied that the signature on the statement was his. Further, Chia can hardly be considered an independent witness as he was an insurance adjuster engaged by the respondents. It is not unlikely he would have been inclined to obtain a statement from the appellant which would be favourable to the respondents. In the light of these facts, the court below should not have attached so much weight to, but should have disregarded, the appellant`s statement to Chia.

Secondly, there was no support for the court`s inference merely from Zainuddin`s evidence that uniforms and additional safety equipment were provided to the appellant and his co-workers ***on the day of the accident*** . Indeed, the district judge`s treatment of Zainuddin`s evidence was unsatisfactory. She chose to accept an isolated part of Zainuddin`s evidence wherein he had stated that every worker was provided with safety equipment including a safety belt ***prior to the day of the accident*** . The district judge even inferred from this statement that uniforms and additional safety equipment were provided on the day of the accident even though this was contrary to what Zainuddin subsequently said in cross-examination. The relevant excerpts of the cross-examination (NE 49 Record of Appeal 311) is set out below :

> *Q: What do you mean by the last line of para 7 of your affidavit of evidence-in-chief?*
>
> *Paragraph 7 :*
>
> *`On 12 February 1997 safety equipment was available for use and I took a set of the safety equipment to use. My friend Irjan had also used a set of the safety equipment but I cannot remember if the [appellant] was using any safety equipment at the material time. The [appellant] has on other occasions*

used the safety equipment given to him. It is therefore not true that the [appellant] was not given any safety equipment to use.`

A: Before you do the blasting, everybody was given the safety belt.

Q: Did you see for yourself all the workers being given safety belts?

A: We were given the equipment before the blasting work and ***that was on a different day*** *(emphasis mine).*

Q: [The appellant] and three other workers formerly working for the [second respondents] gave evidence that there was no safety belt even when they asked for it and were told to work.

A: On that day, there were no equipment. We were given the safety equipment long before [that day]. We keep the equipment ourselves. The equipment consists of lamp, gloves, shoes and ear plugs.

Q: Did you say on 12 February 1997, there was no safety equipment available?

A: Yes.

The district judge chose to ignore the latter part of Zainuddin`s evidence wherein it was clearly stated that nothing was provided on 12 February 1997, which would have contradicted the inference she had made. Her reason for ignoring the latter part of Zainuddin`s evidence was that it was inconsistent with his statement that every worker was provided with safety equipment including a safety belt ***prior to the day of the accident*** . Due to such an `inconsistency`, the district judge concluded that Zainuddin had demonstrated `divided loyalty` to the appellant and the respondents.

In my view, it was wrong for the court below to be selective in the treatment of Zainuddin`s evidence. There was in fact no real inconsistency from which a conclusion of `divided loyalty` could be inferred. It was not contradictory for Zainuddin to say that whilst safety equipment had been provided to the appellant and his co-workers some time before the day of the accident, no such equipment, be it safety belts or other sorts of safety gear, was provided on the day of the accident itself. Accordingly, the court`s inference that uniforms and safety equipment were provided on 12 February 1997 cannot be supported in the light of an express statement to the contrary by Zainuddin.

Apart from the questionable `admission` of the appellant in his statement and the mistaken inference by the district judge, there was no evidence to justify the finding that the appellant had a safety belt on when he was found at the bottom of the tank after the accident. The district judge herself had stated in her grounds of decision as one of the undisputed facts that the appellant was found by his co-workers after the accident without a safety belt on. Accordingly, the district judge was wrong when she found as a fact that the appellant was wearing a safety belt at the time of the accident.

Were the second respondents in breach of their duty to provide the appellant with a safety belt?

I will now consider the issue of whether the second respondents were in breach of their duty to

provide the appellant with a safety belt either prior to or on the day of the accident. At common law, the employer-employee relationship gives rise to a duty on the part of the employer to take reasonable care to carry on operations so as not to subject the persons employed to unnecessary risk. In the decision of **Wilsons and Clyde Coal Co v English** [1938] AC 57, Lord Wright redefined the employer`s duty as threefold: `the provision of a competent staff of men, adequate material, and a proper system and effective supervision`. In relation to the duty to provide adequate material, it has been reiterated time and again that employers are under a duty to provide adequate equipment to their workers and would be liable if an accident is caused through the absence of some item which was obviously necessary or which a reasonable employer would recognise to be needed (see **Williams v Birmingham Battery and Metal Co** [1899] 2 QB 338; **Lovell v Blundells & T Albert Cromptom & Co** [1944] KB 502; and **Ross v Associated Portland Cement Manufacturers Ltd** [1964] 1 WLR 768).

In this case, the second respondents did not dispute the fact that a safety belt was an essential piece of safety equipment in connection with the appellant`s duties as a blasterer. However, there was insufficient evidence supporting the second respondents` contention that safety belts were provided to the appellant and his co-workers. Zainuddin was the only witness who stated that safety belts were provided some time before the day of the accident. However, he denied that any such equipment was given or was available to the workers on 12 February 1997. Zainuddin also reiterated in cross-examination and in re-examination that none of the workers used safety belts on 12 February 1997. On the basis of his evidence and the undisputed fact that the appellant was found without a safety belt on him after he fell, I can only conclude that safety belts were not provided to the appellant and his co-workers on 12 February 1997. It was also unclear if the appellant and his co-workers were provided with safety belts prior to 12 February 1997 as there was very little evidence to this effect, apart from Zainuddin`s ambiguous statement that the workers were given safety belts on a `different day`. In my opinion, the second respondents have breached their duty to provide the appellant with a safety belt.

Even if safety belts had been provided to the appellant, the second respondents had a duty to ensure that the appellant and his co-workers used the important safety equipment they were provided with in the course of blastering. I will elaborate on this when I address the second respondents` duty to ensure the supervision of the appellant and his co-workers.

Were the second respondents in breach of their duty to provide a safe system of work by ensuring that the appellant and his co-workers were supervised?

The appellant alleged that the second respondents had breached their duty of care in failing to ensure supervision over the blastering work carried out by the appellant and his co-workers. At the trial, the appellant and second respondents differed in their views on the extent of supervision required. The appellant contended that the second respondents were obliged to ensure that a supervisor was present inside the tank with the blasterers. The second respondents disagreed and stated that they were only obliged to ensure that the appellant and his co-workers were told to wear their safety belts.

The district judge concluded that the second respondents were obliged to ensure that the workers were specifically reminded to use safety belts ***at the commencement of their work*** . As they had failed to do so, the second respondents were in breach of this duty. The district judge disagreed with the appellant`s contention that a supervisor was required to be present within the tank as she thought that it was impossible for a supervisor to ensure that all the workers would re-anchor their safety belts whenever they moved to a new location along the platform. The district judge also

stated that it was impossible for anyone to ensure that the workers used their safety belts given the darkness within the tank.

In my opinion, the court below erred in confining the duty to supervise the appellant and his co-workers to the commencement of the blastering work. The employer`s duty to provide a safe and proper system of work requires that the employer devise a suitable system and instruct his men in what they must do (see **Pape v Cumbria County Council** [1992] 3 All ER 211). The width of the employer`s duty in providing a proper system of work was recently reiterated by the Court of Appeal in **Parno v SC Marine Pte Ltd** [1999] 4 SLR 579 . It was there stated (in [para] 48 at p 574):

> *The employer is responsible for the general organisation of the factory or undertaking; in short, he decides the broad scheme under which the premises, plant and men are put to work. This organisation or `system` includes such matters as coordination of different departments and activities; the layout of plant and appliances for special tasks; the method of using particular machines or carrying out particular processes; the instruction of apprentices and inexperienced workers; and the general conditions of work`.*

On the specific issue of the supervision of employees, it was stated in ***Parno v SC Marine Pte Ltd*** (p 575) that `an employer`s duty includes checking to ensure that the system is followed by its employees`. Similarly, it was stated in **General Cleaning Contractors v Christmas** [1953] AC 180 that the employer must also exercise reasonable care to see that his system of working is complied with by those for whose safety it is instituted and that the necessary safety precautions are observed.

It follows that the second respondents were under an obligation to provide a safe and proper system of work and ***to ensure that such a system was implemented*** . It was insufficient to merely provide the workers with safety belts and other safety equipment. The workers had to be supervised in order to ensure that the safety belts were put to proper use. The district judge felt that a reminder at the commencement of the blastering work was sufficient discharge of this duty; I respectfully disagree. The second respondents were at the very least obliged to ensure that the blasterers were regularly supervised as to the importance of using safety belts and other equipment in the course of the blastering operation.

The district judge had observed that it would be impossible to ensure the use and continuous re-anchoring of the safety belts by the workers since the tank was dark and the workers were constantly moving along the platforms. With due respect, there was no evidence to support these observations. In view of the fact that the appellant and his co-workers would be required to constantly move along platforms high above the bottom of the tank, in a dark environment illuminated only by their lamps, the imposition of a duty of care on the second respondents to ensure that the workers were constantly checked and supervised on the manner in which the safety equipment was used was clearly justified. Moreover, the employer should also be aware that workmen are often careless for their own safety, and his system must, as far as possible, reduce the effects of an employee`s own carelessness (see ***General Cleaning Contractors Ltd v Christmas*** (supra) at pp 189-190, per Lord Reid). Even if it was inconvenient to have a supervisor physically present inside the tank throughout the blastering operation, the second respondents were still required to ensure that a supervisor was nearby and periodically if not regularly, entered the tank to ensure that the workers used their safety equipment. There was no evidence at all that this was done by the second respondents nor was there evidence that it was unreasonable or too onerous to expect the second respondents to do this. Accordingly, it is my conclusion that the second respondents were in breach

of their duty to ensure that the appellant and his co-workers were properly supervised.

Was the second respondents` failure to supervise the workers the proximate cause of the appellant`s injuries?

The court below had found that although there was a breach of duty on the part of the second respondents in failing to supervise the appellant and his co- workers, that breach of duty was not the cause of the appellant`s injuries. The reason was because the appellant was provided with a safety belt which he consciously chose not to secure properly. The district judge found that the appellant was aware of the risk and dangers of blastering from a high platform as he had said that he would request for a safety belt before starting the blastering work.

As stated earlier, I am doubtful whether the appellant was provided with a safety belt by the second respondents since he was found without one after his fall. Even if he was provided with a safety belt on a prior occasion, he was not reminded to use it nor was he checked or supervised on whether he was using one during the blastering process, on 12 February 1997.

In my opinion, the second respondents` breach of duty was the proximate cause of the appellant`s injuries. If the second respondents had provided the appellant with a safety belt and had exercised due care in ensuring that it was properly used, the appellant would not have been injured. The district judge herself conceded in her grounds of decision that ` ***a properly secured safety belt would have broken his fall*** `.

Further, the fact that the appellant had stated that he would request for a safety belt before commencing the blastering work does not affect the chain of causation as it does not conclusively demonstrate that the appellant was aware of all the risks and dangers involved in the blastering process whilst he was working. As stated by counsel for the appellant, the workers or blasterers were illiterate and had little sense of danger. A mere request on the part of the appellant for a safety belt should not be interpreted as an understanding of and an assumption of the risks involved in blastering operations. The observations of Lord Reid in ***General Cleaning Contractors Ltd v Christmas*** (supra) at pp 189-190 that workmen are often careless for their own safety is particularly instructive in this regard. Accordingly, it is my conclusion that the second respondents` breach of duty was the proximate cause of the appellant`s injuries.

Were JSL `occupiers` of the interior of the tank in the vessel?

The court had found that JSL were not `occupiers` as they had no control over the conditions within the tank. The mere fact that JSL had signed on the Application Form (P76) did not mean that they owed a duty of care to the appellant as occupiers of the premises. The court commented that although JSL were occupiers of the shipyard itself, they could not be considered occupiers of the interior of the tank.

In ***Awang bin Dollah v Shun Shing Construction & Engineering Co Ltd*** (supra), the Court of Appeal had to consider the issue of whether the main contractors, Shun Shing, were liable to the plaintiff as occupiers of the construction site despite the fact that the whole of the construction works had been subcontracted to several parties, one of whom was responsible for employing the plaintiff. The plaintiff had been injured as a result of an accident at the construction site. The Court of Appeal held that Shun Shing were occupiers of the entire site including the site office where the accident took place. The Court of Appeal was of the view that Shun Shing had a sufficient degree of control over

the site even though the other subcontractors also had some degree of control over the part of the site where the accident occurred. Being the main contractors, Shun Shing had an interest in the construction work and remained answerable to HDB, the owners of the site, for the work in question. The Court of Appeal did not consider the issue of whether HDB, the owner of the site, were occupiers as HDB was not a defendant in the proceedings.

The Court of Appeal in ***Awang bin Dollah v Shun Shing Construction & Engineering Co Ltd*** adopted the following passage from the judgment of Lord Denning in **Wheat v E Lacon and Co Ltd** [1966] AC 552 at p 578 :

> *... wherever a person has a sufficient degree of control over premises that he ought to realise that any failure on his part to use care may result in injury to a person coming lawfully there, then he is an `occupier` and the person coming lawfully there is his `visitor` : and the `occupier` is under a duty to his `visitor` to use reasonable care. In order to be an `occupier` it is not necessary for a person to have entire control over the premises. He need not have exclusive occupation. Suffice it that he has some degree of control. He may share the control with others. Two or more may be `occupiers`.*

At p 580, Lord Denning observed by way of dictum:

> *... where an owner employed an independent contractor to do work on premises or a structure, the owner was usually still regarded as sufficiently in control of the place as to be under a duty towards all those who might lawfully come there.*

It follows from ***Awang bin Dollah v Shun Shing Construction & Engineering Co Ltd*** and the dictum of Lord Denning in ***Wheat v E Lacon & Co Ltd*** that JSL were occupiers of the shipyard and the interior of the vessel. As owners of the shipyard, they must have had some degree of control and interest over the works on vessels in their shipyard. Indeed, it was stated by Tan Geok Leng (Tan), an engineer and factory inspector from the MOM, that JSL were regarded as the occupiers. Tan also stated that JSL were ultimately responsible for approving the erection of the necessary scaffolding. It was clear that JSL had some measure of control and influence over the operations that took place in the tank. Although they may have subcontracted out the actual blastering work to the second respondents, the fact that they may not have ` ***immediate supervision and control*** ` over the appellant and his co-workers does not mean that they ceased to be occupiers at law (see ***Wheat v E Lacon & Co Ltd*** (supra) at p 579, per Lord Denning).

I disagree with the court`s conclusion that whilst JSL were occupiers of the shipyard in general, they were not occupiers of the interior of the vessel. If the district judge`s conclusion was correct, it would effectively mean that JSL could transfer their responsibilities as occupiers by contracting out the blastering and other works that take place within vessels at their shipyard to other parties, such as the second respondents. This would set a dangerous precedent at law. Accordingly, it is my view that JSL were occupiers of the shipyard, including the interior of the tank in question of the vessel.

Were JSL and the second respondents liable to the appellant as occupiers of the tank?

In view of my conclusion above and the second respondents` admission that they were occupiers of the tank, the issue that needs to be addressed is whether JSL and the second respondents were

liable to the appellant as occupiers of the tank.

In substance, the duty of an occupier to an invitee would be to prevent damage or injury from any unusual dangers on the premises he knew or ought to know and which the invitee does not know about. In ***Industrial Commercial Bank v Tan Swa Eng*** (supra) , the Court of Appeal laid down four conditions which had to be satisfied before liability can attach to occupiers. The conditions are :

> *(1) the occupier actually knew or ought to have known of the danger that caused the injury;*
>
> *(2) the danger was unusual to the invitee, having regard to the nature of the premises and the invitee`s knowledge;*
>
> *(3) the danger was unknown to the invitee and the significance was not appreciated by the latter; and*
>
> *(4) the occupier had failed to use reasonable care to prevent damage from occurring, whether by notice, lighting, guarding or otherwise.*

I agree with the district judge that JSL and the second respondents were not liable to the appellant as occupiers. In my opinion, condition (2) was not satisfied in relation to JSL and the second respondents as the danger in this case was not unusual to the appellant, having regard to the nature of the premises and the appellant`s knowledge. As there are hardly any local decisions that discuss or define what constitutes an unusual danger, some assistance may be derived from English decisions that considered this point. These English decisions are relevant as they predate the Occupier`s Liability Act 1957 in England which effectively replaced the common law rules on occupier`s liability.

It is clear that what constitutes an unusual danger is a matter of fact and degree in all circumstances. In **London Graving Dock Co v Horton** [1951] AC 737, the House of Lords held that an unusual risk is one which is not usually found in carrying out the task which the invitee has in hand. Accordingly, in **Stowell v Railway Executive** [1949] 2 KB 519, a patch of oil on a railway platform was an unusual danger to a person who was there to meet a passenger. In contrast, a defective window was held not to be an unusual danger for a window cleaner in **Christmas v General Cleaning Contractors Ltd** [1952] 1 KB 141.

The English position was followed in the Malaysian Federal Court in **Lee Lau & Sons Realty Sdn Bhd v Tan Yah & Ors** [1983] 2 MLJ 51 . In that case, recovery was denied to a forklift operator who was killed when the machine fell on him. Upon the instructions of the defendants` servant, the plaintiff had jacked up the machine and rested it on two tree stumps. These collapsed when the plaintiff was inspecting the machine. The Federal Court held that the fact that there may have been a dangerous situation per se did not constitute unusual danger. Citing ***London Graving Dock Co v Horton*** (supra), the Federal Court held that the occupier`s duty was confined to protection against unusual dangers and an unusual risk is not one which is usually found in carrying out the task which the invitee has at hand.

For similar reasons, the danger in ***Industrial Commercial Bank v Tan Swa Eng*** (supra) was unusual. In that case, the occupiers were tenants who occupied the ground floor of the New World Hotel. The hotel collapsed and caused the death of two of the occupiers` customers. It was clear that the danger of the premises collapsing was a danger which was unusual to the two deceased as `no

customer is expected to guard against such dangers when he walks into the occupier`s premises as an invitee` (per Lai Kew Chai J at p 721).

In my opinion, the danger faced by the appellant in this case was not unusual. The risk of falling off a high platform is inherent in the task of blastering whilst moving along a platform positioned some 9.5 m above the bottom of a tank, in dark conditions. The danger was not unusual to the task the appellant was required to carry out. In view of my conclusion in this regard, I do not think it necessary to examine whether or not the other conditions have been satisfied. Suffice it to say that the appellant should be denied recovery under this claim.

Were JSL and second respondent in breach of s 33 of the Act?

The district judge found that there was no breach of ss 33(3) and (7) of the Act. In her grounds of decision she stated that JSL and the second respondents were also in breach of ss 33(8) and (9) of the Act. However, sub-ss (8) and (9) were not specifically pleaded by the appellant. Accordingly, I will only consider whether sub-ss (3) and (7) have been breached.

Section 33 of the Act provides :

> *(1) All places of work, floors, steps, stairs, passages, gangways and means of access shall -*
>
> *(a) be of sound construction and properly maintained; and*
>
> *(b) so far as it is reasonably practicable, be kept free from any obstruction and from any substance likely to cause persons to slip.*
>
> *...*
>
> *(3) There shall, so far as is reasonably practicable, be provided and maintained safe means of access to and egress from every place at which any person has at any time to work and every place shall, so far as is reasonably practicable, be made and kept safe for any person working there.*
>
> *...*
>
> *(7) Where any person has to work at a place from which he would be liable to fall a distance of more than 3 metres or into any substance which is likely to cause drowning or asphyxiation, a secure foothold and handhold shall be provided so far as practicable at the place for ensuring his safety.*
>
> *(8) Where it is not suitable to provide a secure foothold and handhold as required under subsection (7), other suitable means such as a safety belt and fencing shall be provided for ensuring the safety of every person working at such places.*
>
> *(9) Where a safety belt is provided pursuant to subsection (8), there shall be sufficient and secured anchorage, by means of life line or otherwise for the safety belt, and the anchorage shall not be lower that the level of the working position of the person wearing the safety belt.*

> *(10) No person shall require, permit or direct any person to work at a place from which he would be liable to fall a distance of more than 3 metres or into any substance which is likely to cause drowning or asphyxiation unless the requirements of subsection (7) or (8) have been complied with.*
>
> *...*

With respect to s 33(3) of the Act, counsel for both respondents stated that the burden of proof was on the appellant to prove a breach of the section. This view was, with due respect, mistaken. In ***Awang bin Dollah v Shun Shing Construction & Engineering Co Ltd*** (supra), the Court of Appeal addressed the issue of the burden of proof in relation to s 33(3) of the Act. Whilst acknowledging that the duty under s 33(3) was not absolute, being qualified by the phrase `so far as is reasonably practicable`, the Court of Appeal stated that the burden of proving what is reasonably practicable in relation to s 33(3) lies not on the person injured but on the person responsible for maintaining the safety of the workplace. Support for this view was derived from the House of Lords` decision of **Nimmo v Alexander Cowan and Sons Ltd** [1968] AC 107.

In ***Nimmo v Alexander Cowan and Sons Ltd*** , Lord Guest stated (at pp 121-122) :

> *The object of [s 33(3)] was to provide for a safe working place by imposing criminal and civil liability on the occupier in the event of breach ... To treat the onus as being on the pursuer seems to equiperate the duty under statute to the duty under common law, namely, to take such steps as are reasonably practicable to keep the working place safe. I cannot think that the section was intended to place such a limited obligation on employers.*

In the same case, Lord Upjohn stated (at pp 125-126):

> *[T]he whole object of the Factories Act is to reinforce the common law obligation of the employer to take care for the safety of his workmen ... I cannot believe that Parliament intended to impose on the injured workman ... the obligation to aver with the necessary particularity the manner in which the employer should have employed reasonably practicable means to make and keep the place safe for him ... it is the duty of the employer to make the place safe so far as is reasonable practicable. It is his duty with his experts to consider the state of the place of work in all circumstances and to take whatever steps he can, so far as is reasonably practicable, to make it safe. He must know and be able to give reasons why he considered it was impracticable for him to make the place safe. If he cannot explain that, it can only be because he failed to give it proper consideration, in breach of his bounden duty to the safety of his workmen.*

In ***Awang bin Dollah v Shun Shing Construction & Engineering Co Ltd*** (supra), the Court of Appeal held that Shun Shing had breached their statutory duty under s 33(3) of the Act as they had not shown that they had taken any steps to ensure that the site office was of sound construction and was properly maintained. They also had not shown that they had taken steps, so far as was reasonably practicable, to ensure that the site office was made and kept safe for any person working therein. The fact that the site office collapsed in the circumstances in which it would ordinarily have withstood is clear evidence that Shun Shing had breached their statutory duties.

In a similar vein, it was not disputed that the appellant was found at the bottom of the tank without a safety belt on. In my view, this was a clear indication that the appellant was either not provided with a safety belt or was not supervised or reminded to use one while blastering. JSL and the second respondents did not adduce sufficient evidence to show that they had taken steps, so far as was reasonably practicable, to ensure that the platform inside the tank of the vessel was kept safe for workers who carried out the blastering operations. There was no evidence to show that the workers who were required to perform the blastering works were adequately supervised on the use of safety equipment nor was there cogent evidence that the workers were given safety equipment on the day of the accident. Accordingly, there was a breach of the duty under s 33(3) of the Act. For the reasons already stated, I have no doubt that this breach of duty was the cause of the appellant`s injuries.

As for s 33(7) of the Act, I agree with the district judge that the Investigation Report did not make any mention of a lack of foothold or handhold, or that any foothold or handhold was not secure. In the absence of any evidence to this effect, it cannot be said that s 33(7) has been breached. Accordingly, the claim under this provision should be dismissed.

Contributory negligence

The district judge suggested in her grounds of decision that the appellant himself might have been contributorily negligent. According to her, if the appellant had been standing firmly on the platform, he would have not lost his balance and fallen to the bottom of the tank.

In my view, there was no evidence to support the suggestion that the appellant was not standing firmly on the platform. Even if he was not standing firmly, the appellant would not have fallen if he was wearing a safety belt. Furthermore, the appellant`s awareness of the importance of the safety belt cannot be interpreted to mean that he fully appreciated the significance of the risks involved in not wearing one. As stated in ***Parno v SC Marine Pte Ltd*** (supra), ` ***the whole object of the law in imposing a duty on employers to provide a safe system of work is precisely to protect an employee from his won inadvertence or carelessness*** `. Although it is not necessary for me to express my view in this regard, I did not think the evidence indicated that the appellant himself had been contributorily negligent. In any case the defence of contributory negligence was not pleaded - I disallowed the application by counsel for the respondents to amend his clients` defence to add this plea, before hearing of the appeal commenced. The application to amend was made far too late in the day and if allowed, would have caused irreparable prejudice to the appellant`s case which no order for costs could possibly compensate, not to mention that the case would have to be re-heard to adduce further evidence on this issue.

Conclusion

In my opinion, the district judge erred in finding that the second respondents were not liable in negligence to the appellant. She also erred in concluding that both respondents were not in breach of s 33(3) of the Factories Act. Accordingly, I would allow the appeal. The judgment below is therefore reversed (together with the order for costs) in the appellant`s/plaintiff`s favour. There will be interlocutory judgment in favour of the appellant against the respondents and the Registrar of the Subordinate Courts is directed to assess damages due to the appellant. Costs of this appeal are awarded to the appellant and the security for costs should be refunded to the appellant`s solicitors.

Outcome:

Appeal allowed.