[2005–06 Gib LR 161]

KVAERNER GIBRALTAR LIMITED v. STIPENDIARY MAGISTRATE, PERERA and CAMMELL LAIRD (GIBRALTAR) LIMITED

SUPREME COURT (Schofield, C.J.): June 2nd, 2006

Employment—safety—breach of statutory duty—third party liability—information laid charging third party under Factories Ordinance, s.86 to comply with six-month time-limit in Criminal Procedure Ordinance, s.117—no extension of time even if charge against employer only filed at very end of six-month period

Employment—safety—breach of statutory duty—third party liability—if charge against third party using procedure of Factories Ordinance, s.86 fails because out of time, employer remains principal accused but may defend by denying liability and blaming third party—no separate charge against third party if already out of time under Criminal Procedure Ordinance, s.117

The interested party, CL, the operator of the dockyard, was charged in the magistrates' court with breaches of the Factories Ordinance following the accidental death of one of its employees at his workplace.

The death occurred on April 6th, 2003 and informations were laid against CL on October 6th, 2003, exactly six months after the accident. CL claimed that it had been caused by physical changes negligently made to the dockyard by the applicant K, which had been its previous operator. On July 6th, 2005, CL laid informations against K under the Factories Ordinance, s.86(1), maintaining that it had itself used all due diligence to enforce safety and that K had in fact committed the offence without CL's connivance or wilful default. K applied for the informations to be struck out as they had been laid outside the six-month limitation period for the trial of summary offences prescribed by the Criminal Procedure Ordinance, s.117. The Stipendiary Magistrate rejected the application and ordered that the case proceed. K applied for judicial review of, and an order of certiorari to quash, the decision.

It submitted that the Stipendiary Magistrate was wrong in law because the informations against it had been laid outside the six-month time-limit prescribed by the Criminal Procedure Ordinance, s.117.

CL submitted in reply that the proceedings should continue because (a) since it had itself only been prosecuted at the very end of the six-month time-limit, it could not have initiated the s.86 proceedings against K in

time to allow them to be pursued within that period—an absurd and unworkable result which could not have been intended by the legislature when providing the s.86 procedure; (b) the time-limit applied only to the initiation of the proceedings, *i.e.* the laying of the informations against CL, and had been observed; and (c) since the purpose of s.86 was to ensure that the person responsible for the offence be made liable for it, the only way to ensure that this happened in the present case would be to hold that there was no time-limit applicable to s.86 proceedings and allow the proceedings against K to continue.

Held, quashing the decision of the Stipendiary Magistrate:

The Stipendiary Magistrate had been wrong to deny K the benefit of the six-month time-limit prescribed by the Criminal Procedure Ordinance, s.117 and his decision would be quashed. It was true that the interplay between s.117 and s.86(1) of the Factories Ordinance was likely to create an anomalous situation if, as here, the Factories Inspector did not act promptly in laying the original information—but even though a defendant such as CL would be deprived of its right to pursue a third party under s.86, it did not mean that it had to accept liability itself. When proceeded against, it could simply deny liability and point to K as the responsible party. If that happened, there could be no direct prosecution of K, as that would also be out of time by virtue of s.117 and an allegedly guilty party would escape liability—but that was one of the inevitable consequences of making Factories Ordinance offences triable summarily (paras. 8–10; para. 13).

Case cited:

(1) *R.* v. *Newcastle-upon-Tyne JJ., ex p. John Bryce (Contractors) Ltd.*, [1976] 1 W.L.R. 517; [1976] 2 All E.R. 611; [1976] RTR 325, distinguished.

Legislation construed:

Criminal Procedure Ordinance (1984 Edition), s.117: The relevant terms of this section are set out at para. 4.

Factories Ordinance (1984 Edition), s.86(1): The relevant terms of this sub-section are set out at para. 2.

s.86(2): The relevant terms of this sub-section are set out at para. 6.

S.V. Catania for the applicant;

N.P. Cruz for the interested party, Cammell Laird (Gibraltar) Ltd.;

The Stipendiary Magistrate and the Factories Inspector, an interested party, did not appear and were not represented.

1 **SCHOFIELD, C.J.:** An interested party in these proceedings, Cammell Laird (Gibraltar) Ltd. ("CL") operates the dockyard. The claimant, Kvaerner Gibraltar Ltd., was the previous operator of the

dockyard, managing it until about February 1997. On April 6th, 2003, after CL had taken over the dockyard, Rafael Sanchez Ramos, one of its employees, fell to his death when the dock arm from which he was working as a painter fell over 30m. to the bottom of the dock. As a result 15 informations were laid against CL alleging breaches of the Factories Ordinance.

2 CL allege that the cause of the accident was modifications made to the dock arm made at a time when Kvaerner were the operators of the dockyard. Accordingly, CL availed itself of the provisions of s.86(1) of the Factories Ordinance and laid informations against Kvaerner alleging nine offences. Section 86(1) reads:

> "Where the occupier or owner of a factory is charged with an offence under this Ordinance, he shall be entitled, upon a charge duly made by him and on giving to the prosecution not less than three days' notice in writing of his intention to have any other person whom he charges as the actual offender (whether or not that person is his agent or servant) brought before the court at the time appointed for hearing the charge; and if after the commission of the offence has been proved, the occupier of the factory proves to the satisfaction of the court—
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> (a) that he has used all due diligence to enforce the execution of this Ordinance and of any relevant Order or rule made thereunder; and
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> (b) that the other person had committed the offence in question without his consent, connivance, or wilful default,
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> that other person shall be convicted of the offence, and the occupier or owner shall not be guilty of the offence, and the person so convicted shall, in the discretion of the court, be also liable to pay any costs incidental to the proceedings.
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> The prosecution shall have the right in any such case to cross-examine the occupier or owner if he gives evidence and any witnesses called by him in support of his charge, and to call rebutting evidence."

3 The informations against Kvaerner were laid on July 6th, 2005. They alleged offences relating to acts or omissions which took place between 1992 and 1997. When Kvaerner answered the summonses issued on those informations it applied that they be struck out as offending the six-month time limitation imposed in summary cases by s.117 of the Criminal Procedure Ordinance. The learned Stipendiary Magistrate rejected Kvaerner's applications and ordered that the case should proceed as against it. Kvaerner has sought the judicial review of the learned

Stipendiary Magistrate's order and an order of certiorari that it be quashed.

4 All offences under the Factories Ordinance shall be tried in the magistrates' court (see s.88(1) of the Factories Ordinance). Section 117 of the Criminal Procedure Ordinance provides:

> "Except as otherwise expressly provided by any law, the magistrates' court shall not try an information unless the information was laid, or the complaint made, within six months from the time when the offence was committed:
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> Provided that this section shall not restrict any power to try summarily an indictable offence under section 112, 285 or 286, or under the provisions of any law whereby an indictable offence may be tried summarily with the consent of the accused but not otherwise."

5 CL's submissions were that in this case the accident occurred in the early hours of April 6th, 2003, and the Crown laid information against CL on October 6th, 2003, which is exactly six months after the accident. If the submissions made by Kvaerner on limitation are correct, then the s.86(1) defendant, *i.e.* Kvaerner, would have to be summonsed before CL even knew that it was facing the summonses issued against it. This, argued CL, would provide an absurd result and cannot have been what the legislature intended. If CL is prevented from seeking to rely on s.86(1) because the Crown served the summonses so late in the day, it was submitted that CL would be entitled to have the summonses against it set aside as being contrary to s.8 of the Gibraltar Constitution Order. Be that as it may, it was submitted, such a result is not likely because s.86(1) creates a special category of case and its procedures are free-standing. CL submitted that if there is no time-limit then the fact that Kvaerner committed the offences from the date of its flawed work, and continually through its occupation of the dockyard thereafter, should provide no obstacle to it facing the consequences of its criminal negligence. CL submitted that the Factories Ordinance is intended to punish those who create dangers for their employees and Kvaerner cannot escape the consequences of its actions simply because the danger remains latent for more than six months. Section 86(1) is intended to ensure that the person or occupier responsible for, in this case, causing the death should face the penalties that the law provides.

6 The learned Stipendiary Magistrate upheld these submissions. The relevant portion of his judgment reads:

> "Section 86(1) is based on s.37(1) of the Factories Act 1937. The English section has a reference to the 'laying of a new information' charging the actual offender. Our section merely states that 'upon a

> charge duly made . . . to have any person whom he charges as the actual offender brought to court.' There is only one information, the original one (in this case against Cammell Laird) that has to be laid within six months of its commission. To subject s.86(1) to the usual limitation would neutralize its application in many cases, therefore producing absurd, unworkable results. Such results, [common sense] and *Bennion on Statutory Interpretation*, at 831–832 (2002) tell us should be avoided when construing statutes. Section 86(1) must therefore be outside the scope of s.117 of the Criminal Procedure Ordinance."

I respectfully disagree with the learned Stipendiary Magistrate and would base my decision on the provisions of s.86(2) of the Factories Ordinance which reads:

> "When it is made to appear to the satisfaction of an inspector at the time of discovering an offence—
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> (a) that the occupier or owner, as the case may be, of the factory has used all due diligence to enforce the execution of this Ordinance and of any relevant order or rule made thereunder; and
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> (b) by what person the offence has been committed; and
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> (c) that it has been committed without the consent, connivance, or wilful default of the occupier or owner and in contravention of his orders,
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> the inspector shall proceed against the person whom he believes to be the actual offender without first proceeding against the occupier or owner of the factory."

7 The first point to make is that it is accepted by CL, quite rightly in my view, that the proper way for it to bring Kvaerner before the court was by laying an information and issuing summonses thereon (see s.106(1) of the Criminal Procedure Ordinance). Section 117 of that Ordinance, which lays down the six-month limitation period, refers to the trial of an information, so, at first blush at least, these charges laid by CL against Kvaerner fall within the provisions of s.117.

8 Let us suppose that CL is right in its conclusion that it is Kvaerner and not CL who is responsible for the situation which led to the unfortunate death of Mr. Ramos. This means that the Factories Inspector erred in laying information against CL and not Kvaerner. On CL's arguments on limitation, Kvaerner is then criminally liable. If, on the other hand, the Factories Inspector got it right and decided CL was not responsible and that Kvaerner was responsible, then he would be barred by the six-month limitation period in s.117 from proceeding against

Kvaerner. Taking that argument a stage further (and it is not suggested by anyone that such is the case here), what if the Factories Inspector realized that he was time-barred against bringing proceedings pursuant to s.86(2) and so deliberately went against Kvaerner to avoid the effect of s.117? Such cannot have been the legislature's intention.

9 Mr. Cruz has argued that the worst mischief in finding for Kvaerner on this point is that that the person who is responsible for the offence will walk away. But this is the case whenever a prosecution falls foul of s.117. The legislature has deemed it proper to make all offences committed under the Factories Ordinance summary offences which automatically brings into play the limitation period contained in s.117.

10 CL also argues that s.86(1) is intended to ensure that the right person is held responsible for the offences and not the party who has acted with due diligence and who could not be aware of what had been done to create and leave in place a latent danger. However, my understanding is that just because Kvaerner cannot be held criminally responsible does not mean that criminal responsibility will fall on CL. Whilst a finding that Kvaerner is protected by s.117 means that CL loses the sword of s.86(1); it does not mean that CL loses the shield of the defences open to it, including defences averring that Kvaerner is responsible.

11 Mr. Cruz has prayed in aid of his arguments the English decision in *R.* v. *Newcastle-upon-Tyne JJ., ex p. John Bryce (Contractors) Ltd.* (1), in which the defendants appeared to answer a charge of permitting the use of a motor vehicle not complying with regulations under the Road Traffic Act. The prosecutor had laid information within six months of the offence so as to comply with the English section which is equivalent to our s.117. The hearing took place more than six months from the date of the offence in the information and at the hearing the prosecutor applied to amend the information to allege a different offence by deleting the allegation of permitting unlawful use, thereby making the charge that the defendants used the vehicle unlawfully. The defendants had a possible defence to the original charge and objected to the amendment. The justices allowed the amendment and the defendants applied for an order quashing their decision on the ground that the amendment was an expedient to circumvent the six-month time-limit. In refusing the defendants' applications, May, J. had this to say ([1976] 1 W.L.R. at 520):

> "In my view the six months' limitation provision in section 104 of the Magistrates' Court Act 1952 is to ensure that summary offences are charged and tried as soon as reasonably possible after their alleged commission, so that the recollection of witnesses may still be reasonably clear, and so that there shall be no unnecessary delay in the disposal by magistrates' courts throughout the country of the summary offences brought before them to be tried. It is in this

> context that their power to permit the amendment of an information under section 100 referred to by Lord Widgery, C.J. in *Garfield* v. *Maddocks* [1974] QB 7, 12 is to be exercised. It must be exercised judicially. It must be exercised so as to do justice between the parties. But where it can be so exercised, where an information can be amended, even to allege a different offence, so that no injustice is done to the defence, I for my part can see no reason why the justices should not so exercise it even though the amendment is allowed after the expiry of the six months' period from the commission of the alleged offence."

12 To my mind I do not think that this helps CL's case. The offences alleged against Kvaerner occurred at least eight years ago. If in *Ex p. Bryce* the decision to amend had been taken eight years after the commission of the offences, I am certain that it would not have been held to be a judicial exercise of the magistrates' discretion.

13 The provisions of s.117 do create an anomalous situation in the context of proceedings under s.86(1) of the Factories Ordinance. It means that unless the Factories Inspector acts promptly then a defendant may be deprived of the sword tendered by that section. This is an odd result, but not an absurd one—certainly not as absurd as denying a defendant of the benefit of the limitation period provided by s.117 should the Factories Inspector make an erroneous decision on who to prosecute rather than the correct one. And in a case such as the present, CL is not deprived of its right to defend the informations laid against it.

14 Other reasons have been put forward as to why the decision of the learned Stipendiary Magistrate was in error, but in my judgment the decision I have made adequately deals with the application before me and I shall grant Kvaerner the orders it seeks. I shall hear argument on the question of costs.

Application granted.
