SHEPHERD v. REX.

1909. *August* 23. INNES, C.J., and SOLOMON and CURLEWIS, JJ.

Criminal procedure. — Bodily injury. — "Act or omission." — Mining regulations. — Breach of duty. — Ordinance 31 *of* 1905, *sec.* 6 (*b*).

By sec. 6 (*b*) of Ordinance 31 of 1905 any person who by any act or omission causes serious bodily injury to another is liable to criminal consequences. *Held*, on appeal, that the act or omission referred to must be such as to constitute the breach of a legal duty imposed on the person charged.

Appeal against a conviction by the Resident Magistrate of Germiston.

The appellant was charged with contravening sec. 6 (*b*) of Ordinance 31 of 1905, read with regulation 36 of the Mines and Works Regulations, 1903, framed under the Ordinance, in that he, by his act or omission, had caused the death of a native. The facts are not material to this report.

He was convicted and sentenced to pay a fine of £10 or in default fourteen days' hard labour. He appealed on the ground that the conviction was against the weight of evidence.

Gregorowski, for the appellant.

C. W. de Villiers, for the Crown.

INNES, C.J.: Sec. 6 (*b*) of Ordinance 31 of 1905 makes it a criminal offence for any person to cause serious bodily injury to any other person by any act or omission, or by contravention of the Ordinance or of any regulation made thereunder. The accused was charged on two counts. First, with having caused the death of the native Wontali by an act or omission, in that he failed to see that the doors of the cage in which the native was descending were properly fixed before it started; second, with having caused the native's death by wrongfully giving the signal for sending off the cage without seeing that all persons

had entered and that the doors were properly closed. The words "act or omission," as they are used in the Ordinance, must, I think, refer to such acts or omissions only as constitute a breach of some duty imposed upon the person charged in respect of the matters with which the statute deals; and such a duty may be created either by regulation or by common law. Though the two counts are not very happily worded, I think they were each intended substantially to allege a breach of regulation 36. Both counts (though the first uses the words "act or omission") expressly refer to the regulation, and the second adopts its language. The regulation in question provides that "the signals for raising or lowering a person or persons shall only be given by qualified European banksmen and onsetters, who shall be responsible for the observance of the rules . . . and that the correct signals are given and the doors and covers of the cages properly fixed." The magistrate does not say expressly upon which of the alternative counts he convicted the accused: but it is clear from his reasons that he found him guilty of sending the cage down without seeing that the doors were properly closed, and that all the persons who meant to descend were inside before he gave the signal to lower away. And it is a matter of no importance whether that default be referred to the regulation or to the common law. Under either it would be a breach of duty for any man placed in charge of such operations, and whose duty it was to supervise the sending down of the cages, to give the signal to lower away a cage before he was certain that the persons who intended to enter it were inside and that the doors were properly closed. So that the form of the counts did not prejudice the accused, and I am not surprised that no objection was taken to it and that the ground of appeal is solely that the finding is against the weight of evidence.

We must, therefore, consider the facts. Did the appellant give the signal to lower the cage without seeing that the doors were shut, and that all the persons who were about to descend were inside? One of those going down was the deceased, Wontali: and there is the evidence of three natives called by the Crown, who state that he endeavoured to enter the cage after it had started: that he had got one foot in, but failed

to secure a foothold inside the cage, that he gave a scream, and disappeared. His body was discovered a considerable distance down the shaft, upon the north-east side, though he had endeavoured to enter the cage upon the south side. The magistrate accepted the evidence of the Crown witnesses as correct, and I do not think we can go behind his finding.

It is contended by Mr. *Gregorowski* that it was impossible for the accident to have happened in the manner described by the native witnesses, regard being had to where the body was found. It is clear that the deceased fell upon the roof of the cage. It cannot seriously be suggested that he threw himself down: he must have fallen upon it after it was below him. The magistrate inspected the spot in company with the attorney for the defence and the inspector of mines: and having done so, and having had regard to the construction of the shaft at that point, he considered that it was quite possible for the accident to have happened as described: and we should not be justified in saying that it was impossible. With regard to the question of the exact position in which the body was found, of course a body falling upon the top of a cage having a gable roof would not fall plumb down to the bottom of the shaft. It would rebound or slide off at an angle, and the unfortunate native may well have slid off in a northerly direction to where his remains were ultimately found. I do not think we are justified in interfering in any way with the verdict. The appeal fails, and the conviction and sentence must be confirmed.

SOLOMON and CURLEWIS, JJ., concurred.

Appellant's Attorneys: *A. & B. Alexander.*