

FULL COURT

BEFORE:

Mr. Justice Kelly

Mr. Justice Connolly

Mr. Justice Macrossan

BRISBANE, 1 DECEMBER 1982

JAMES VASS MILNE

v.

MALCOLM WILSON DENT

Ex parte JAMES VASS MILNE

JUDGMENT

MR. JUSTICE KELLY: In my opinion the appeal should be allowed with costs. The orders made by the stipendiary magistrate should be set aside and it should be ordered that the matter be remitted to the stipendiary magistrate to enter all necessary adjournments and to proceed according to law. I publish my reasons.

I am authorised by my brother Connolly to say that he agrees with my reasons and with the orders which I propose.

MR. JUSTICE MACROSSAN: I agree with those reasons and with the orders proposed.

MR. JUSTICE KELLY: The order of the Court will be that the appeal be allowed with costs, the orders made by the stipendiary magistrate be set aside and the matter be remitted to the stipendiary magistrate to enter all necessary adjournments and to proceed according to law.

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IN THE SUPREME COURT OF QUEENSLAND    O.S.C. No. 22 of 1982

JAMES VASS MILNE

v.

MALCOLM WILSON DENT

Ex Parte: JAMES VASS MILNE

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KELLY J.

CONNOLLY J.

MACROSSAN J.

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Judgment delivered by Kelly J. on 1st December, 1982.  
Connolly J. and Macrossan J. concurring with those reasons.

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"Appeal allowed with costs. Orders made by the Stipendiary Magistrate be set aside and the matter be remitted to the Stipendiary Magistrate to enter all necessary adjournments and to proceed according to law."

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JAMES VASS MILNE

v.

MALCOLM WILSON DENT

Ex Parte: JAMES VASS MILNE

JUDGMENT - KELLY J.

Delivered the First day of December 1982.

The appellant was the complainant in a complaint under the Navigation (Loading and Unloading - Safety Measures) Regulations 1961 as amended which came before the Magistrates Court at Cairns on 21st and 22nd June, 1982. The complaint was that on 4th July, 1981 at Cairns the respondent being a person in charge of the unloading of the ship Anangel Triumph did contrary to reg. 68 of those Regulations fail to take appropriate measures to safeguard Rune Irgemar Zackrisson being a person engaged in the unloading of the said ship against injury by the displacement of unsecured cargo namely fertilizer.

At the conclusion of the evidence for the prosecution counsel for the respondent submitted that there was no case to answer. The stipendiary magistrate upheld that submission on the basis that there was no evidence that the respondent was the person in charge within the meaning of the definition of that term. He then dismissed the charge and discharged the respondent and also made an order for costs against the appellant. The ground of the Order to Review is that the stipendiary magistrate erred in law in holding as he did.

Regulation 68 provides that:-

" The person in charge of the loading or unloading of a ship shall take appropriate measures to safeguard persons

engaged in the loading and unloading against injury by the displacement of unsecured cargo or other material.

Penalty: Two hundred dollars."

By reg. 5, unless the contrary intention appears in the Regulations:-

"'person in charge', in relation to the loading of a ship, means -

- (a) the master or member of the crew of the ship; or
- (b) the supervisor or foreman of the loading or unloading,

as the case may be, who is directly in control of the persons actually engaged in the loading or unloading;"

There is no indication of any contrary intention so that the term "person in charge" has the meaning set out above.

The evidence showed that on the date in question unloading was proceeding from two hatches of the ship. A Mr. Chapman was the foreman stevedore directly in charge of the stevedores in hatch no. 1 in which a fatal injury occurred to the person named in the complaint and it would appear that there was another foreman in charge of the stevedores in another hatch. The respondent held the position of supervisor and there was evidence that he was the supervisor in charge of the unloading of the ship. Other than that, the evidence did not show what were his duties as supervisor. Mr. Chapman said in evidence that if a safety problem arose "I'd consult a supervisor, I suppose", although he did not in fact consult the respondent about safety matters and the respondent did not ask him whether he had any problems with regard to safety. He said that the normal practice if the supervisor considered what he (Chapman) was doing was unsafe would be to withdraw the men from the hatch. He also said that on the day in question he had seen the respondent on the deck

quite often and the respondent was on the deck or very handy nearby.

It is clear that for the purpose of reg. 5 and of reg. 68 the "person in charge" is the person who is directly in control of the persons actually engaged in the loading or unloading of the ship in question. Although Mr. Chapman was the person directly in control of the persons actually engaged in the unloading of hatch no. 1, I would not consider that it could be said that he was the "person in charge" in relation to the unloading of the ship.

In my view, although the evidence on the matter is admittedly somewhat slender, it appears to me that there was evidence that the respondent was the person who was directly in control of the persons actually engaged in the unloading of the ship. He was the supervisor in charge of the persons engaged in the unloading of the ship, albeit that he may have exercised that responsibility through the foremen in the respective hatches in which unloading was proceeding. That he did exercise his responsibility in that way was not spelt out, but I consider that this is an inference reasonably open on the evidence. The respondent was physically present either on the deck or nearby so that it could not properly be said that he was only remotely in control.

The stipendiary magistrate was therefore in error in holding that there was no evidence that the respondent was the person in charge within the meaning of the definition of that term. Whether the evidence is sufficient to enable him to be satisfied beyond reasonable doubt that the respondent was the person in charge for the purpose of reg. 68, when he comes to consider that question, is, of course, not a matter which arises on this appeal.

Counsel for the respondent advanced before us another argument which had been advanced before the stipendiary magistrate but upon which he did not rule. This was that there was no evidence from which an inference might be drawn that the respondent had failed to take appropriate

measures to safeguard the stevedores in question against injury by the displacement of the cargo which was being unloaded.

The cargo which was being unloaded in hatch no. 1 was bulk fertilizer. There was evidence that an endloader which had no protective canopy over it was operating on the steel floor and the cargo, which had been undercut, was about 25 feet high and had an overhanging brow. It appears from the evidence that a solid piece of fertilizer which was thus overhanging was dislodged by the bucket of the endloader which was fully extended in the air, broke off, and fell on the operator of the endloader, who was the person named in the complaint. There was evidence from a marine surveyor that a dangerous situation had been allowed to develop because of the high cargo faces which had been left.

The prosecution gave particulars of the appropriate safety measures which it was alleged the respondent failed to take. Included in those particulars were the following:-

- (a) when unloading the vessel he failed to ensure that the load was levelled off evenly;
- (b) the endloader did not have a protective canopy over it.

In my view there was evidence from which the inference might be drawn that, if the respondent was the person in charge of the unloading of the ship, he had, in the respects which are the subject of the particulars which I have set out, failed to take appropriate measures to safeguard the person named in the complaint against injury by the displacement of the fertilizer. Again, the sufficiency of the evidence to satisfy the stipendiary magistrate beyond reasonable doubt that a breach of reg. 68 had occurred, when he comes to consider that question, does not arise on this appeal.

In my opinion the appeal should be allowed with costs, the orders made by the stipendiary magistrate should be set

aside and it should be ordered that the matter be remitted to the stipendiary magistrate to enter all necessary adjournments and to proceed according to law.