

State Vs. L.C. Patel

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SooperKanoon Citation : sooperkanoon.com/343479

Court : Mumbai

Decided On : Mar-04-1959

Reported in : (1959)61BOMLR1021

Judge : Shah and ;Mody, JJ.

Acts : [Factories Act, 1948](#) - Sections 21(1)

Appeal No. : Criminal Appeal No. 1247 of 1958

Appellant : State

Respondent : L.C. Patel

Advocate for Def. : M.P. Amin, Adv. for Payne and Co. and ;A.H. Mehta, Adv.

Advocate for Pet/Ap. : Y.V. Chandrachud, Govt. Pleader

Judgement :

Mody, J.

(1) This is an appeal by the State against the order of acquittal passed in Summary Case No. 3712 of 1957 on the file of the Judicial Magistrate, First Class, 8th Court, Ahmedabad, against the respondent who was the accused in that case and was charged under S. 21(1)(iv)(b) of the factories Act, 1948. The case against the accused was that he being the Manager of the Jubilee Mills, a factory as

defined by S. 2(m)(l) of the [Factories Act, 1948](#), failed to securely fence the shaft and pulleys of the carding department of the said factory which formed part of the transmission machinery and thereby contravened the provisions of S. 21(1)(iv)(b) of the Factories Act and committed an offence punishable under S. 92 of the said Act.

(2) In the last week of March 1957 some carding machines in the carding department of the said Mills were being shifted to some other place during the recess time from 11 a.m. to 11-30 a.m. when the machinery was not in motion. The carding machine No. 108 had been stopped working since 29-3-1957 as it was to be shifted on 30-3-1957. The belt of the said machine was lying idle on the hanger which was over 12' above the ground level. The pulley which was to be shifted was also 12' above the ground level. Below the hanger there was a steam pipe which was about 7'-3' from the ground level. Instructions had been issued to do the work of shifting only during the recess when the shaft and pulleys were not in motion. About two or three minutes before the recess on 30-3-1957 one workman named Gulab Punja placed a ladder against the steam pipe, climbed the ladder and sat on the steam pipe when the shaft and pulleys were in motion and in breach of the said instructions he stood up on the steam pipe and attempted to take the belt which was lying idle on the hanger on the other side of the shaft and the pulley and in doing so he was entangled in the belt and the moving shaft. He was taken out from the shaft by cutting the belt and removed to the Civil Hospital where he died within half an hour.

(3) Sub-section (1) of S. 21 of the Factories Act provides as under:

'(1) In every factory the following, namely:

- (i) every moving part of a prime mover and every fly-wheel connected to a prime mover, whether the prime mover or flywheel is in the engine house or not;
- (ii) the headrace and tailrace of every waterwheel and water turbine;
- (iii) any part of a stock-bat which projects beyond the head stock of a lathe; and

(iv) unless they are in such position or of such construction as to be safe to every person employed in the factory as they would be if they were securely fenced, the following namely:

(a) every part of an electric generator, a motor or rotary convertor;

(b) every part of the transmission machinery, and

(c) every dangerous part of any other machinery,

shall be securely fenced by safeguards of substantial construction which shall be kept in position while the parts of machinery they are fencing are in motion or in use:

Provided that for the purpose of determining whether any part of machinery is in such position or is of such construction as to be safe as aforesaid, account shall not be taken of any occasion when, it being necessary to make an examination of the machinery while it is in motion or, as a result of such examination, to carry out any mounting or shipping of belts, lubrication or other adjusting operation while the machinery is in motion, such examination or operation is made or carried out in accordance with the provisions of sub-section (1) of S. 22'. It was not disputed, nor can it be disputed, that the shaft and the pulleys formed part of 'the transmission machinery'. The charge against the accused was that he had failed to securely fence the shaft and the pulleys as required by the said S. 21(1)(iv)(c). It was common ground that the shaft and the pulleys were not fenced at all.

(4) The Respondent pleaded not guilty and his defence was that the said shaft and the pulleys did not require to be fenced because they were in such a position as to be safe to every person employed in the factory as they would be if they were securely fenced.

(5) On behalf of the prosecution one P. T. Shah, the then Senior Inspector of Factories, was examined. He stated that he was an Inspector of Factories for the area in which the Jubilee Mills was situated, that he had visited the said factory on 30-3-1957 to inquire into the case of the fatal accident to worker Gulab Punja employed as a coolie in the Engineering Department of the said factory, that the

worker was entangled in a belt driving the card No. 108 on the moving shaft driving the rows of cards, that the accident occurred at about 10-57 a.m. on 30-3-1957, that on enquiring into the accident, he found that re-arrangement of cards was being done, that for that work every day a few cards were stopped and re-erected in new position, that the pulleys driving those cards were also being shifted on the main shafts, that the said work was being done during the recess period from 11 a.m. to 11-30 a.m., and that a gang of workers was kept ready with the necessary tools and ladders just before the stopping time of the factory. He further stated that on 30-3-1957 the deceased Gulab Punja was assigned that work along with some other fitters, that the deceased had rested a ladder on a steam pipe just below the overhead shaft and the pulley which was to be shifted, that the shafting was in motion, that the deceased went up and sat on the pipe and tried to shift the belt of the card lying on the belt-hanger to the other side of the pulley while the shafting was in motion and that while doing so, he got entangled in the belt and the moving shaft and as a result thereof received the said injury. He stated that no supervisory staff was present at the time of the said work, that the overhead shaft, the pulleys and the belt which formed part of the transmission machinery were not safe to the worker who died and that the said parts of the transmission machinery were not securely fenced. In his cross-examination he stated that he had been a factory Inspector for ten years preceding the date of the said accident, that he had been a Senior Factory Inspector for the last three of the said ten years and that prior to his joining the factory department, he was working as Engineer in a Mill for about seven years. He further stated that the work of shifting cards in the Jubilee Mills was going on for week prior to his visit on 30-3-1957 and that the said work was being done during the recess time. He stated that during his inquiry it transpired that the work of shifting the pulleys was to be done during the recess time when the machinery was not in motion and that he had no evidence to show that the deceased worker was instructed by the accused or anybody else to start the work when the machinery was in motion. He admitted that during his tenure as an Engineer in a Mill and as a factory Inspector he had not come across any fencing having been done of shafts and pulleys in the carding department of any Mill. He further admitted that there was no specific rule providing for the fencing of shafts and pulleys in the carding department of a Mill.

He also admitted that unfenced shafts and pulleys overhead are not ordinarily unsafe or dangerous to the workers doing their ordinary work in the carding department of any Mill in India and that he had never suggested to any Mill to provide such fencing, although there were about 60 or 65 Mills within his jurisdiction in Ahmedabad. He further admitted that by their position the shafts and pulleys overhead were quite safe to the workers working in the carding department. In his cross examination he stated that he had visited the Jubilee Mills ;on 30-3-1957 to inquire into the case of the said fatal accident to Gulab Punja and had entered his 'inquiry' into the Inspection Book, a true copy of which is Exhibit 4 on the record of this case, and that he had thereafter on the 17th of April 1957 made further remarks, a true copy of which has been produced as Exhibit 5. In his said inspection notes, Exhibit 4, he has made no mention about the said breach about fencing having been committed and the same was also admitted by him in his corss-examination. In his said further remarks, Exhibit 5, however he has stated that the overhead shaft and the pulleys of the carding driver were not securely 'fixed' when Gulab Punja approached the same, that the shafting and the pulleys were in motion and ' the same was also not secrely fixed'. The word 'fixed' used at these two places appears to be a mistake for 'fenced' as appearing from what is stated in Exhibit immediately thereafter, viz., that not secrely fencing the overhead shaft and the pulleys which formed part of the transmission machinery was a breach of S. 21(1)(iv)(b) of the said Act. As regards the further remarks Exhibit 5 he stated in his cross-examination that he made them on 17-4-1957 because it struck him on that day that that breach also had been committed and that it was after discussion with his superior officer (The Deputy Chief Inspector) that it struck him that that breach also had been committed. In his cross-examination he further stated that mounting of belts had to be frequently done.

(6) In his statement under S. 342 of the Criminal Procedure Code in addition to stating that the shaft and pulleys were safe by position, the respondent contended that it was not practically feasible to provide guards or fencing to the overhead shafts and pulleys, that in the normal working of the Mills there would ;be several occasions whenthe belts would go out of position and they had to be re-adjusted or mounted, that at the time of mounting, the guards would have to be removed and re-fitted involving great loss of time and that that would naturllly hamper

production and keep the machinery idle.

(7) The learned Magistrate held that, as admitted by the Factory Inspector, by position the shafts and pulleys were quite safe for workers working in the carding department. After considering various authorities cited before him, he held that

'machines are required to be fenced so that the workers working on them may not come in contact with them. If the machinery is accessible to workers carrying on their ordinary work, there is, no doubt, an absolute duty to fence it. But when it is in a wholly inaccessible position the duty to fence it is not absolute for it may be safe by reason of its position and if the workers in the ordinary course of their work are not likely to come in contact with it, it is not required to be fenced'.

He further held that in the case before him the conduct of the deceased worker was not reasonably foreseeable and it had not been established that in reasonably foreseeable circumstances the overhead shaft with the pulleys was not as safe as it would be if securely fenced. As regards the argument of the prosecution that sometimes the belts go off the pulleys and some worker may try to replace them and in so doing may come in contact with the overhead machinery, he held that in such a case a fencing, if provided, would have to be removed for replacing the belts on the pulleys and thus the fencing would be meaningless and that, the only alternative in such cases was to ask the employers to stop their machines while carrying out such work, and if it be held that even the overhead shaft with the pulleys, which was not within the reach of the workers working in the ordinary course of their work was also required to be fenced, the exception provided by the opening words of section 21(1)(iv), viz., unless they are in such position or of such construction as to be safe to every person employed in the factory as they would be if they were securely fenced' would be rendered nugatory. He therefore, held that the offence with which the accused was charged was not proved and ordered the accused to be acquitted under section 245 (1) of the Criminal Procedure Code.

(8) Now, in this case it is not disputed by the respondent that the Jubilee Mill was a factory within the meaning of the [Factories Act, 1948](#) and the shaft and pulleys in question were a part of the transmission machinery within the meaning of the Act. It is, therefore, clear that by reason of the provisions of section 21(1)(iv) the shaft

and pulleys ought to have been securely fenced unless they were in such a position as to be safe to every person employed in the factory as they would be if they were securely fenced. It is not contended that they were safe by construction. What is contended is that they were safe by position. Section 21(1)(iv) in terms provides that the safety ensured by position must be the same which would result from a secure fencing. The degree of safety to be ensured whether by securely fencing or by position or by construction is identical. What the appellant contends is that the safety aimed at by section 21(1)(iv), whether by fencing or by position or by construction, is absolute safety and that the shaft and the pulleys in this case were not, by their position, absolutely safe to every person employed in the factory. It is not disputed on behalf of the respondent that the safety provided for by section 21(1)(iv) is absolute safety. But what is contended is that that safety, though absolute, can be only against foreseeable risks and dangers and not otherwise. In support of their respective contentions both the parties have cited several decided cases. All these cases, however, are of the English Courts but arising under parallel factory legislation in England. No Indian case has been cited, presumably because there is no such reported case.

(9) The first case relied upon by the appellant is that of *Atkinson v. London and North Eastern Ry. Co.* 1926 1 K. B. 313. In that case, in the respondents' factory, there was a tape-cutting machine driven by pulleys fixed on a horizontal shaft about 13 feet above the floor. The belt for driving the machine being off the pulley, one Cresswell a person employed in the factory, attempted to move the belt from the shaft to the pulley while the shaft was running, and in attempting to do so, he was injured. The shaft and pulley were about 13 feet from the floor of the shop and when attempting to put on the belt, Cresswell climbed a ladder and stood on a beam which was about 7 feet from the floor. The shaft and pulley were not in any way fenced or guarded. The respondents were prosecuted on a charge under section 10(1)(c) of the *Factory and Workshop Act, 1901*, the charge being that apart of the mill gearing, namely the said shaft with the pulley on it, was not securely fenced nor in such position or of such construction as to be equally safe to every person employed or working in the factory as if it had been securely fenced. The respondent's defence was that the shaft and pulley were safe by position and, therefore, need not be fenced and that Cresswell had acted contrary

to the regulations of the factory in attempting to move the belt from the shaft to the pulley while the engine was running. The justices came to a decision that they were of the opinion that any fence would have been useless owing to the shaft being 13 feet from the ground and dismissed the case against the respondents. An appeal was filed against that decision and that appeal was heard by Lord Hewart C. J. and Avory and Sankey JJ. It may be noted that the relevant section of the English Factory and Workshop Act, 1901 was section 10(1)(c) which provided as follows:

'With respect to the fencing of machinery in a factory, the following provision shall have effect:-

* * * * * (c) All dangerous parts of the machinery and every part of the mill gearing must either be securely fenced, or be in such position or of such construction as to be equally safe to every person employed or working in the factory as it would be if its were securely fenced.'

The provision contained in section 10(1)(c) is for our purposes the same as that contained in section 21(1)(iv)(c) of the Indian Act. The decision of the appeal Court in that case turned mainly upon the interpretation of the said finding of the justice and the appeal Court held that the said finding did not amount to a finding that the particular part of the mill gearing, viz., the shaft and the pulley, was by reason of its position or construction equally safe to every person employed or working in the factory, as it would have been if it had been securely fenced. Lord Hewart C. J. came to the conclusion that the said finding of the justices was not a finding of fact that the particular part of the mill gearing was never approached by any person employed by the respondents except for such an occasional and temporary purpose as this, of moving the belt from the shaft to the pulley, and, secondly, it was not a finding of fact that, if fencing there had been, no ingenuity could have devised a type of fence which on the occasion of such an emergency as arose in that case would not have had to be removed. He further held that there was nothing in the said section or elsewhere in the said Act which granted a dispensation from the obligation to fence because the mill gearing was 13 feet above the ground. Avory J. also came to conclusion that the mere fact that an

unfenced shaft was 13 feet above the ground was not sufficient to show that it was in such a position as to be equally safe to every person employed or working in the factory as it would be if it were securely fenced. From the judgments delivered in the said appeal it appears that as there was no specific finding recorded by the justices that the particular mill gearing, though unfenced, was safe by position, the order of the justice was held to be not correct and was, therefore, reversed.

(10) The next case relied upon by the appellant is that of *Chastency v. Michael Narin and Co.* (1937) 1 All. E. R. 376. In that case the respondents were charged with having failed to have the pinion-wheels of parts of their machinery securely fenced so as to be safe to every person employed or working in their factory, in consequence of which one of their workmen was injured while engaged in greasing the machinery while it was in motion. The respondents had put up a notice in the factory as follows: 'Do not put your hands in the machinery while it is in motion. Persons disregard this notice at their own risk'. The pinion-wheels, although usually stopped, were occasionally allowed to remain in motion, for the purpose of greasing. The Magistrate dismissed the charge, holding that the pinion-wheels were no dangerous parts of the machinery unless in motion, when it was not usual for greasing to be done. The appeal Court consisting of Lord Hewart, L. C. J. Swift and Goddard JJ. held that as the wheels were dangerous part of the machinery, they ought to have been securely fenced, despite the fact that greasing was not usually done while the machinery was in motion, as it cannot be assumed that every person will always exercise the necessary care, and that the offence charged was, therefore, proved. The said case also arose under the provisions of section 10(1)(c) of the Factory and Workshop Act, 1901. The point for decision in that case, however, was whether the machinery in question was dangerous machinery within the meaning of the said section or not. There was no contention in that case that the machinery did not require to be securely fenced on the ground that at the same was safe by position. The only point involved in that case was whether the pinion-wheels were dangerous parts of the machinery or not. That case does not lay down any principle concerning the proposition as to when a machinery can be said to be safe by position.

(11) Another case referred to is that of *Walker v. Bletchey Flettons* (1937) 1 All E. R. 170. That case also involved a determination as to what could be said to be dangerous machinery within the meaning of section 10(1)(c) of the said Factory and Workshop Act 1901. But the test applied by Du Pareq, J in that case for determining the same is useful. The learned Judge has laid down that in considering whether machinery is dangerous, it must not be assumed that everybody will always be careful. A part of a machine is dangerous if it is a possible cause of injury to anybody acting in a way in which a human being may be reasonably expected to act in circumstances which may be reasonably expected to occur. For the purpose of determining what is a dangerous part of a machine Du Parcq, J. has in this case enunciated the principle of reasonable foreseeability of danger resulting from the machine. It was contended in that case that the particular machinery was securely fenced; nor was it contended that it was safe by position or construction and the judgment in that case is, therefore, of no other importance.

(12) The next case relied upon and strongly relied upon, on behalf of the appellant is that of *Findlay v. Newman, Hender and Co.* (1937) 4 All E. R. 58. In that case the respondents were charged with having failed to have certain mill gearing in their factory securely fenced, or in such position or of such construction as to be equally safe to every person employed or working in their factory, in consequence of which one of their workmen was injured. The mill gearing consisted of countershaft 12 1/2 feet from the ground, to which a belt was attached, and the workman was injured in replacing the belt. There was a notice put up by the factory prohibiting the workmen from putting on belts between the main shaft and the countershaft unless the engine was stopped or slowed down, but the workman had acted in disobedience of those instructions. The countershaft and the belt were not fenced in any way, but the respondents contended that the same were safe by position. The justice dismissed the charge. An appeal was preferred against the same which was heard by Lord Hewart, C. J., came to the conclusion that as the same which was heard by Lord Hewart, L. C. J., Duparcq, and Atkinson JJ. That case also was under section 10 of the said Factory and Workshop Act, 1901. Lord Hewart, C. J., came to the conclusion that as the shaft was revolving at 190 revolutions a minute and was accessible to a person who, for example, wished to

replace the belt, not in any sense whatever fenced, it could not be said to be safe by position because the essential purpose of the section was to provide absolute safety was to be ensured. It may be further noted that in that case the very fact that the said notice had been put up by the factory may be exposed to risk if the terms of the notice were not complied with Lord Hewart, C. J., does not, in his judgment, at all take into consideration the aspect whether the risk was foreseeable, but the same has been taken into consideration the aspect whether the risk was foreseeable, but the same has been taken with consideration by Du Parcq, J. as is clear from the following passage of his judgment:

The magistrates may possibly have thought that it was negligence: they may have thought that it was serious negligence and disobedience to orders by the man who was injured. But, even if that be so, if the occupier of the factory could have foreseen that workmen would do what this workman did or if any reasonable person could have foreseen that workmen would do or if any reasonable person could have foreseen such a thing's happening, it is impossible to say that the machinery was safe. Here the injury was undoubtedly suffered; it was suffered by a man doing something which, clearly, from the finding that there had been a thing which, clearly, from the finding that there had been a notice warning the workmen, the employees had understood might happen. The proper way in safeguarding employees is not by putting up notices, is not by saying 'Do not touch'. or 'Keep clear', or 'Keep away', but by so fencing or by so constructing your machinery that the dangerous part ceases to be anything but secure.'

(13) The next case is that of *Carroll v. Andrew Barclay and Sons Ltd.* 1948 A. C. 477 relied upon by Mr Amin, the learned Counsel for the respondent. That case was under section 13(1) of the English Factories Act, 1937, which provides:

'Every part of the transmission machinery shall be securely fenced unless it is in such a position or of such construction as to be as safe to every person employed or working on the premises as it would be if securely fenced'.

In that case the belt connecting the shaft and the motor in the factory broke when it was running and injured a workman who was standing at that time about 61/2

feet away from the motor. The workman sued for damages on the ground that the accident was caused by a failure to fence the belt adequately and securely in breach, inter alia, of section 13 of the said Factories Act, 1937. The case turned on the question as to against what dangers was the fencing mentioned in section 13(1) intended to be a safeguard, whether against the risk arising by reason of a workman making contact with the machinery when in motion or against dangerous material ejected from the machinery and it was held that the requirement of the said section that 'every part of the transmission machinery shall be securely fenced' imposed on occupiers of factories a duty to erect a barricade to prevent any employee from making contact with the machinery, and did not in ordinary cases oblige them to erect an enclosure to prevent broken machinery from flying out and injuring him. Although the point for decision in that case was different from the point for decision in this case, certain observations of Du Parcq, J. from his judgment in that case have been relied upon by Mr. Amin. Du Parcq, J. has observed in his judgment that the words 'securely fenced' may well mean 'so fenced as to give security from such dangers as may be reasonably expected'. These observations reiterate what Du Parcq, J. had already stated in his said two earlier judgments, viz., that fencing was to give security from such dangers as may be reasonably expected, i.e., which may be reasonably foreseen. These remarks are undoubtedly in a slightly different context but they are general and on a point of construction they are equally applicable, not only to the case of a broken part of machinery flying out and hurting a workman, but also to the case of a workman coming in contact with the machinery.

(14) Another case relied upon is that of Carr v. Mercantile Produce Co. Ltd. (1949) 2 K. B. 601. The real point for decision in that case was whether the part of machinery in question was 'a dangerous part of any machinery' within the meaning of section 14 of the said Factories Act, 1937 and it was held that the same was not. That case is, therefore, of no assistance for the decision of the point involved in this case. But what the learned Government Pleader appearing for the appellant relied upon was a passage from the judgment of Stottle J. as appearing at page 608 of the said report which is as follows:

'The Factory Acts are there, not merely to protect the careful, the vigilant and the conscientious workman, but human nature being what it is, the careless, the indolent, the inadvertent, the weary, and ever perhaps in some cases, the disobedient.'

In our opinion, that passage merely reiterates in an amplified form, the principle laid down by Lord Hewart. C. J. that the relevant provision of the Factories Act provides for absolute safety without at the same time lying down, as Du Parcq, J. has earlier laid down. that such absolute safety is to be achieved only against reasonably foreseeable risks or dangers.

(15) The last case relied upon by Mr. Amin is that of *Burns v. Joseph Terry and Sons Ltd.* (1950) 2 All. ER. 987. In that case the facts were that the plaintiff, who was seventeen years old at the time of the accident, claimed damages for breach by the defendants of the statutory duty under the Factories Act, 1937. The plaintiff alleged inter alia that his injury was due to a breach of section 13(1) of the Factories Act, 1937, on the basis that the machinery by which the plaintiff was injured was transmission machinery and that it had not been securely fenced. The machinery being transmission machinery had to be securely fenced unless it was in a safe position or construction. The machinery had in fact been fenced, but the plaintiff's contention was that the fencing was not adequate. Hilbery, J. who tried the case in the first instance held that it was securely fenced and that there was, therefore, no breach of the defendants' duty under the Act. In considering whether the machinery was securely fenced, Hilbery, J. applied what may be described as the test of reasonable foreseeability, viz., was the machinery securely fenced having regard to the circumstance which could reasonably be foreseen. The plaintiff appealed and the appeal was heard by Somervell, Cohen and Denning, L. JJ., and it was held (Denning, L. J., dissenting) that the test whether machinery was 'securely fenced' within the meaning of S. 13(1) of the said Act was whether it was so fenced as to give security from such dangers as might reasonably be expected and that in the said case the machinery was securely fenced according to that test. The appeal was consequently dismissed. This case appears to be the latest case on the subject in England. Numerous previous decisions of the English Courts on the subject were cited and discussed in the judgments of the appeal

Court. The following passage from the judgment of Somervell, L. J. is extremely useful:

'I do not think there is any decision on the point binding on this court. I think the balance of dicta is slightly against the plaintiff. On the face of them the words used by Lord Hewart, C. J., are in his favour, but Lord Hewart C. J., did not, I think, have in mind the issue whether the absolute safety was to be against foreseeable risks. Lord Du Parcq and Lord Normand were clearly addressing their minds to the point in issue, and *Vowles v. Armstrong Siddeley Motors, Ltd.* 1938 4 All ER 796, is very nearly a direct authority against the argument. I will, however, consider the question of construction on principle. In the first place, I think that in this group of sections the same test should be applied in deciding whether machinery is 'securely fenced' as is applied in deciding whether it is 'dangerous'. To an allegation that machinery which has, in fact caused injury is dangerous it is admittedly a good answer to prove that it was not dangerous in any reasonably foreseeable circumstances. I see no difficulty in applying the same test to the question whether machinery is securely fenced, and would respectfully adopt the form in which the question is formulated on this basis by Lord Du Parcq and Lord Normand. I think also that this construction fits in with the later words of subsection (1) of S. 13 of the Factories Act, 1937. They contemplate that the position of the transmission machinery may be such that there is no necessity to fence at all. If, no accident having happened, one imagines a prosecution based on these words, I would have thought the prosecution would have to establish that in reasonably foreseeable circumstances the machinery was not as safe as it would be securely fenced. If one has to consider unforeseeable circumstances the legislature should and would, in my opinion, have provided that all transmission machinery must be completely encased. It also fits in with the later words from another angle. The later words contemplate that the position may make any fencing unnecessary. That being so, the 'position' might well be such as to make fencing, for example, on one side only necessary'. Then again:

'The question was not whether what the plaintiff actually did was reasonably foreseeable, but whether the occupier should have reasonably foreseen the possibility of an accident. The question is whether a prosecution would have

succeeded before the accident which leads to the claim has happened. On the other hand, if, an accident having happened, no one can suggest, other circumstances which would have led to an accident, the issue may, in fact, narrow itself to the question whether the circumstances which led to the accident were reasonably foreseeable..

I do not think Hilbery, J., confined himself to considering the foreseeability of the plaintiff's conduct. He referred to the fact that the factory inspector had seen this fencing many times, and that there was evidence of no previous accident over the twenty years or so of its life. He considered the possibility of someone putting a hand up underneath the mesh. He said:

'I personally cannot see, if you test the question by what was reasonably forecseeable, that it can be said that the lack of a return guard over it from the face guard rendered this insecure fencing'.

It is only after this that he proceeds to considerf whether the employers could have foreseen what the plaintiff asctually did'.

In our opinion, this latest case explainst the test, as laid down by Lord Hewart, C. J., about absolute safety and approves the earlier dicta of Lord Du Parcwq, J. that such absolute sdafety was to be against foreseeable risks.

(16) On a construction of the provisions of S. 21(1)(iv), there is no doubt that transmission machinery must be securely fenced unless the same, by reason of its position or construction, is safe to every person employed in the factory as it would be if it were securely fenced. The transmission machinery can be said to be secure by position only if the safety afforded by the position is the same as would be provided if it were securely enced. The degree of safety either by securely fencing it or by positiopn or by construction of the machinery is the same. There can be no doubt that the safety aimed at is absolute safety. The aim is to provide absolute safety to every person employed in the factory from the risk and danger of coming into contact with the transmission machinery but that risk or danger as contemplated by this section must reasonably be foreseeable. The legislature could not have intended that the occupier was to provide safety for the persons

employed in the factory against risks which could not even be reasonably foreseen. The risks and dangers resulting from a person coming into contact with machinery can be so complex and varied that all possible risks or dangers cannot be reasonably foreseen or anticipated. Section 92 of the Factories Act imposes a penalty if the requirements of s. 21(1)(iv)(c) are not complied with. Surely, the legislature could not have contemplated to penalise an occupier of a factory for not providing for safety against a risk or danger which he could not reasonably foresee or anticipate. Section 21 is undoubtedly for giving protection, to use the words of Staveley J., not merely to the careful, the vigilant and the conscientious workman, but human nature being what it is, to the careless, the indolent, the inadvertent the weary and even perhaps in some cases, the disobedient. But the carelessness, the indolence, the inadvertence, the weariness and even the disobedience of a workman are things which an occupier of a factory can and is expected to reasonably foresee and should, therefore, provide against. Such risks and dangers are foreseeable and must under the provisions of S. 21 be provided against. But S. 21 cannot be given the meaning that it imposes a duty upon an occupier of a factory to provide for safety against even unforeseeable risks and dangers and much more so, because his omission to do so would expose him to a penalty. The provisions of s. 21(1)(iv)(c) are, so far as the same are relevant to this case, substantially the same as, if not identical with the parallel provisions in the said two English Acts. We are in respectful agreement with the observations of Lord Somervell, J. in the said case in 1950-2 All ER 987 and in our opinion the same are equally applicable to the consideration of our S. 21(1)(iv)(c).

(17) Applying the same test which has been contemplated by Lord Somervell J. in 1950 2 All ER 987 we have to ascertain whether the prosecution in the case before us would have succeeded before the accident to Gulab Punja occurred. What is the foreseeable risk or danger which could have emanated from the shaft and pulleys in this case against which the respondent has failed to provide secure fencing? The prosecution has been able to point out only one witness examined on behalf of the prosecution, has admitted that unfenced shafts and pulleys overhead are not ordinarily unsafe or dangerous to the workers doing their ordinary work in the carding department. He pointed out that the witness has not stated that the shaft and the pulleys overhead were not ordinarily unsafe or dangerous to the

workers in the carding department sdoing other than their ordinary work or to persons employed in the factory otherwise than in the carding department. On the contrary, the Factory Inspector Shah has stated that he had never heard of any fencing of the overhead shafts and pulleys in the carding department in any of the Mills in India. He has worked in a Textile mill as an Engineer for seven years and he has been a Factory Inspector for ten years. Moreover, he has stated that he had about 60 or 65 mills within his jurisdiction in Ahmedabad. Ahmedabad is known to have large and varied types of textile Mills. The Factory Inspector has admitted that he had never suggested to any Mill to provide fencing for the overhead shafts and pulleys. He stated that by position the shafts and pulleys obverhead were quite safe to the workers working in the carding department. If with his long and varied experience the Factory Inspector had never suggested to any mill to provide fencing for the overhead shafts and pulleys, the only conclusion to be drawn is that the overhead shafts and pulleys are safe by position and no risk or danger can be reasonably foreseen to ensure to a person employed in the mill not obly while doing his ordinary work.....in the carding department but even otherwise.

(18) The learned Government Pleader argued that it is possible to foresee some risk or danger from the overhead shafts and pulleys to persons employed in the factory who may be assigned the work of repairing the shafts or pulleys or other machinery in the carding department connected with the shafts or pulleys. In the first place, as already pointed out, there is no evidence to show that such risk or danger can be reasonably foreseen or anticipated. But what is more, in our opinion, S. 21 does not contemplate a provision being made for the safety of an employee who is assigned the work of repairing machinery or of shifting machinery or of installing new machinery. In this connection the proviso to S. 21 and the provisions of S. 22 of the said Act which are co-related are very pertinent. The proviso enacts that for the purpose of determining whether any part of machinery is in such position or is of such construction as to be safe as aforesaid, account shall not be taken of any occasion when, it being necessary to make an examination of the machinery while it is in motion or, as a result of such examination, to carry out any mounting or shipping of belts, lubrication or other adjusting operation while the machinery is in motion, such examination or

operation is made or carried out in accordance with the provisions of sub-section (1) of S. 22. The occasions excluded by the proviso are the occasions when it becomes necessary to make an examination of the machinery while it is in motion or to carry out any mounting or shifting of belts, lubrication or other adjusting operation while the machinery is in motion. Such occasions must arise in the ordinary working of the machinery and may arise frequently. But in spite of the same, the said occasions have been excepted from the operation of the said sub-section (1). Occasions for shifting the machinery itself or for repairing the same cannot be said to be normal operations in the working of the machinery. The occasions of shifting or repairing the machinery while in motion have not been provided for in the said proviso. It cannot be said that such occasions were not at all contemplated by the legislature; nor can it reasonably be said that the legislature having in the said proviso excepted the occasions mentioned in the said proviso did not want to except the occasions a shifting or repairing the machinery from the operation of the said sub-section (1). The only conclusion to be drawn is, therefore that sub-section (1) was never intended to provide for safety as mentioned therein against risks and dangers in connection with the shifting or repairing of machinery. As already observed, the prosecution can succeed in this case if it could possibly have succeeded before the accident to Gulab Punja occurred. But it is possible to argue although it has not in fact been argued by the learned Government Pleader, that from the very fact that the management of the factory had issued instructions to shift the card No. 108 and the relative pulleys during recess time when the machinery was not in motion the same must of necessity indicate that a possibility of danger was foreseen if the card and the pulleys were shifted when the machinery was in motion. But even if such a danger could reasonably be foreseen, in our opinion, S. 21(1) does not contemplate that the occupier of the factory should provide against danger arising by reason of the shifting or repairing of machinery.

(19) Another argument of the learned government Pleader was that even if S. 21(1)(iv)(c) be construed to provide for safety only against foreseeable risks and dangers, there was a foreseeable risk in the present case inasmuch as belts may have to be mounted on the pulleys when the shaft and the pulleys were in motion. So far as his aspect of the case is concerned, it has to be borne in mind that the

charge against the respondent is for not securely fencing only the shaft and pulleys and does not extend to not securely fencing the belts. It is, therefore, quite clear that the respondent cannot, in this case, be held responsible for not securely fencing the belts. The charge is confined to 'not securely fencing of the shaft and pulleys'. There is, however, no evidence in this case whether any risk could be reasonably foreseen to result from the operation of mounting the belt while the shaft and the pulleys were in motion only by reason of the non-fencing of the shaft and the pulleys without taking into consideration the risk or danger resulting from the non-fencing of the belt itself. Whether any risk or danger would result by the non-fencing of the shaft and the pulleys, irrespective of the non-fencing of the belt, is not a matter which we feel we are competent to decide in the absence of the necessary evidence. The relevant evidence on this point is only one sentence in the evidence of the Factory Inspector which reads: 'Mounting of belts has to be frequently done.' What the consequence of such mounting of belts would be and what danger or risk would entail have not been deposed to by him. He has not deposed whether by reason of such mounting of belts any risk or danger can be foreseen to result from the shaft and the pulleys irrespective of the belt. Accepting this part of his evidence, it must be inferred that the mounting of belts must be a frequent operation not only in this particular mill, viz., the Jubilee Mill, but in all the other mills in Ahmedabad, which were within his jurisdiction, and in other parts of India. In spite of the same, the Factory Inspector has deposed that he had never suggested to any mill to provide fencing for the overhead shafts and the pulleys. What is more, he inspected the shaft and the pulleys on 30-3-1957 immediately or shortly after the accident to Gulab Punjab occurred. He thereafter wrote out his report, Exhibit 4. But even in that report he has never envisaged any danger or risk resulting from the unfenced shaft and the pulleys. As admitted by him, it was only after some discussion he had with his superior officer (the Deputy Chief Inspector) that it occurred to him that there may possibly be some risk from the unfenced shaft and the pulleys. If a Factory Inspector with the experience of seven years as an Engineer in a textile mill and ten years as a Factory Inspector could not foresee any risk from an unfenced overhead shaft and pulleys, we think we are safe in concluding that such risk or danger could not be reasonably foreseen. Therefore, even apart from the fact that there is no evidence in this case in this behalf, we

are further of opinion that the risk from the unfenced overhead shaft and pulleys was not a foreseeable risk and that, therefore, there was no breach of the provisions of S. 21(1)(iv)(c) committed by the respondent.

(20) Under the circumstances, in our judgment, the respondent is not guilty of the offence with which he has been charged and he has been rightly acquitted of that offence by the learned Magistrate. We, therefore, confirm the order of acquittal and dismiss the appeal.

(21) Appeal dismissed.

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