THE COURT OF APPEAL

Birmingham J.
Sheehan J.
Mahon J.

Appeal No. 70/13

The People at the Suit of the Director of Public Prosecutions

Prosecutor/Respondent

V

Roadteam Logistic Solutions

(formerly known as Nolan Transport (Oaklands) Limited)

Defendant/Appellant

Judgment of the Court delivered on the 18th day of February 2016, by Mr. Justice Sheehan

1. The appellant company, Roadteam Logistic Solutions (formerly known as Nolan Transport), appeals against the severity of a €1 million fine imposed on it following its plea of guilty on the 18th December, 2012, at Wexford Circuit Court to an offence contrary to ss. 12 and 77(9) of the Safety Health and Welfare at Work Act 2005. The particulars of the offence are that the defendant company failed to conduct an undertaking in such a way that individuals at a place of work are not exposed to risks to their safety, health or welfare.

2. The appellant contends that the fine of €1 million was excessive having regard, in particular, to the following four matters:

1. It was the company's first ever health and safety conviction.

2. There was a plea of guilty.

3. The offence involved a single incident.

4. The *mens rea* of the count to which the company pleaded guilty was one of reasonable care.

3. In the course of written submissions on behalf of the company, it was contended that the trial judge appeared to have sentenced the defendant on foot of a count not actually before the court, namely, one based on gross negligence which was not the subject of any conviction.

4. The appellant also contends that the learned sentencing judge ought not to have characterised the offence as being on a level with the worst that had come before the Circuit Court, arguing that it was difficult to see how an offence based on reasonable care which arose out of a single incident in which a driver did not ensure that his load was properly secured could fairly be placed in the category of the worst to have come before the court.

5. In support of his submissions that the penalty imposed was excessive, counsel for the appellant relied on the annual reports of the Health and Safety Authority for the years 2013 and 2014. These reports contained the outcomes of prosecutions for both years, and counsel helpfully presented the Court with a note of comparators, extracted from these reports, on which it sought to rely. The specific cases referred to in the annual reports for those years were all fatal cases. In relation to the 2013 annual report, the Court was referred to pp. 94, 96 and 99 as well as the following extracts taken directly from the report. The first extract of cases listed is from p.94, and includes the following:

1. *The People (Director of Public Prosecutions) v. HSE* (Unreported, Dublin Circuit Court, 25th October, 2013): A fatal accident repeated an error in a previous accident in which an employee had suffered a very serious injury which disabled him from work. In the 2013 case an employee was killed. The ambulance door swung open, and he fell out of the ambulance. The HSE pleaded guilty to two counts; it was fined €350,000 on Count No. 1 and €150,000 on Count No. 2. In this case, an aspect of relevance was the element of repetition of a past fault.

2. *The People (Director of Public Prosecutions) v. Arkil Limited* (Unreported, Tralee Circuit Court, 27th June, 2013): In this case, the defendant pleaded guilty to two charges in relation to events in which an employee of the company was fatally injured when the loading shovel he was reversing overran an unguarded edge of a pond, and he fell in. The employee was trapped in the cab of the loading shovel and drowned. The company was fined €40,000."

6. The second extract is from p.96, where the following cases are listed:

1. *The People (Director of Public Prosecutions) v. Gibbons Civil Engineering Limited* (Unreported, Dublin Circuit Court, 1st July, 2013): An excavation collapsed on an employee who died. The company was fined €20,000 following a guilty plea.

2. *The People (Director of Public Prosecutions) v. Wicklow County Council* (Unreported, Dublin Circuit Court, 9th June, 2013): A plea of guilty to three charges following the death of two firemen who were members of Bray Fire Brigade, resulted in fines of €50,000 on Count No. 1, €5,000 on Count No. 2 and €300,000 on Count No. 3.

7. Finally, the following case is outlined at p.99 of the report:

1. *DPP v Drummonds Limited* (Unreported, Dundalk Circuit Court, 25th October, 2013): Two employees were fatally injured in a grain elevator pit. Failure on the part of the company to provide a system of work in relation to the working of the

elevator to prevent fumes from developing which had overcome the employees. The defendant company was fined €125,000 in respect of the one count to which the defendant pleaded guilty.

8. The two cases from the 2014 report are at pp. 82 and 85 of that report, respectively. These cases are detailed as follows:

1. *The People (Director of Public Prosecutions) v. Kelly's of Fantane Concrete Limited* (Unreported, Nenagh Circuit Court, 11th July, 2014): A dump truck reversing in the course of road surfacing collided and fatally injured an employee of the defendant company. A fine of €20,000 was imposed following the guilty plea.

2. *The People (Director of Public Prosecutions) v. B.I.S. Willich Industrial Services Limited* (Unreported, Naas Circuit Court, 15th July, 2014). The defendant was charged with having failed to manage and conduct its work activities to ensure the safety of employees, as a result of which an employee fell while removing sheeting from the roof of premises in Athy, Co. Kildare and was killed. The company pleaded guilty and was fined a €100,000.

9. Counsel on behalf the appellant further contended that, generally speaking, a seven figure fine was only imposed if there was a history of health and safety offences, or if there were particularly aggravating factors. Counsel referred the Court to *The People (Director of Public Prosecutions) v. Smurfit Newspress Limited* (Unreported, Trim Circuit Court, 29th October, 2004), where the accused company had been fined €1 million for health and safety breaches linked to accidents in the workplace in which one worker had lost a leg and another had skin ripped off his hand. At sentence, the judge had stated that the company had displayed a cavalier attitude to safety and had placed the pursuit of profit over the safety of its workers. Nevertheless, the fine was reduced by him from €1.2 million to €1 million to reflect the guilty plea.

10. The next case referred to by the appellant was *The People (Director of Public Prosecutions) v. Bus Éireann* (Unreported, Circuit Court Dublin, 21st May, 2008), where fines totalling €2 million were imposed on the defendant company for breaches of the Health and Safety Code in circumstances where there had been a number of deaths. In that case, as the defendant was an emanation of the State, the appellant contended that the fine was being made to the State and that the position was not the same as regards to a fine imposed on a private company.

11. Counsel then referred to the case of *The People (Director of Public Prosecutions) v. O'Flynn Construction Company Limited* [2007] 4 I.R. 500, where the company in question had pleaded guilty to offences contrary to the Safety Health and Welfare at Work Act 2005, following an incident where a young boy suffered fatal burns on the company's construction site. The company was fined €200,000 and appealed against the severity of the sentence. The Court of Criminal Appeal held that the defaults of the accused were significant contributing factors which led to the fatal incident and that, while there was no recklessness on the part of the company, there was a serious degree of culpability on its part having regard to the evidence and the facts. The Court concluded that, having taken the mitigating circumstances into account, it was entitled and indeed bound to impose a penalty that reflected the seriousness of the offence so that it applied appropriate punitive and deterrent elements.

12. In support of its contention that the fine was excessive, counsel for the appellant relied on *R. v. Balfour BC Rail Infrastructure Services Limited* [2007] 1 Crim.R.(S) 65, in which the Court of Appeal in the United Kingdom noted a distinction between cases involving a systemic failure and those where an individual was primarily at fault for the failure.

13. The appellant argued that in circumstances where a breach of health and safety matters is attributable to the negligence of an individual, rather than to management, a deterrent sentence on the company is not appropriate. In support of this submission, counsel for the appellant maintained that the accident had been caused in part by the driver of the vehicle driving at excessive speed.

14. Finally, the appellant refers to the overspill factor and again relies on the judgment in Balfour BC in support of its position, saying that knowledge that breach of a duty can result in a fine of a sufficient size to impact on shareholders will provide a powerful incentive for management to comply with a duty. This is not to say that the fine must always be large enough to affect dividends or share price. But the fine must reflect both the degree of fault and the consequences so as to raise appropriate concern on the part of shareholders at what has occurred. Such an approach will satisfy the requirement that the sentence should act as a deterrent. It will also satisfy the requirement, which will rightly be reflected by public opinion, that a company should be punished for culpable failure to pay due regard to health and safety, and for the consequences of that failure.

15. In order to consider these grounds of appeal, it is necessary to set out the background to the offence, the particular circumstances of the appellant and the remarks of the sentencing judge prior to the imposition of penalty.

16. The events which gave rise to the prosecution in this case occurred in July, 2007. The appellant, a major road haulage company, was both the owner and operator of a lorry and trailer which was transporting six steel coils weighing 25 tons. The lorry had been loaded with this freight in Wales, and the coils were placed on crates, but they were inadequately secured. The lorry with its load travelled to Rosslare Harbour, where it arrived on the evening of the 18th July, 2007. From there it travelled to New Ross, where it remained overnight at the appellant's transport yard. The following day it resumed its journey to Athy in Co. Kildare. As the lorry was approaching a bend in the road near Thomsatown, Co. Kilkenny, the lorry itself and the trailer began to lean to the wrong side of the road. The straps that were used to secure the metal coils started to break and fly across the road, and the six steel coils then began to slide off the trailer. This resulted in the drivers of two motor cars travelling in the opposite direction being killed. The deceased persons were Mary Lonergan and Vanessa McGarry. Injuries were caused to four other people. A detailed investigation of the collision, and the events proceedings it, showed that the freight being carried had not been properly secured. This failure resulted in the coils breaking free as the lorry was approaching the bend in the road at some speed.

17. The appellant company was charged with several offences arising from this accident and eventually pleaded guilty to one count on the indictment, namely, Count No. 14, which alleged an offence contrary to ss. 12 and 77(9) of the Health and Welfare at Work Act 2005. The particulars of the offence stated that the appellant had failed to mange and conduct its undertaking so as to ensure as far as practicable that persons other than employees were not exposed to risks to their safety, health or welfare, in that a load being carried by an articulated lorry and trailer was not adequately secured thereby causing the deaths and injuries which have already been referred to.

18. The maximum penalty for the offence in question on a company is €3 million.

The Appellant Company

19. The appellant company is a major Irish road haulage company employing over 500 people at the time of the sentence hearing and having a fleet in excess of 300 vehicles at that time. It had no previous convictions for health and safety offences. Since the

accident, it was noted that the company had spent a considerable amount of money improving its health and safety standards, and that it had also built a training facility on its premises in Co. Wexford for the purpose of delivering training to its employees on health and safety matters. The ability to pay a substantial fine such as the one imposed was not an issue before this Court.

20. Counsel for the respondent submitted that the penalty that had been imposed by the sentencing judge, while a high one, was nevertheless a penalty that was proportionate. Counsel further submitted that the harm done was at the high end. Apart from the injuries to the survivors, two young families lost their mothers as a result of the failures to adequately secure the load. The victim impact reports presented to the Court outlined the devastating consequences of this accident, in particular for two families, and the effect of the injuries on the survivors. Counsel also submitted that expenditure on health and safety matters since the accident was a necessary expenditure.

Conclusion

21. In essence, the main ground of appeal advanced by counsel on behalf of the appellant was that the fine imposed was entirely disproportionate given the level of culpability of the appellant as well as by reference to the decided cases. The appellant contended that the sentencing judge had erred in principle when he equated this case with the worst case to come before the Circuit Court and, by implication, compared it to the Smurfit case where the sentencing judge had found the company to have engaged in deliberate breaches of health and safety requirements for commercial gain. Counsel submitted that in this case the culpability of the appellant was significantly lower than what it had been in that case, because the acts complained of were omissions rather than deliberate acts.

22. We have considered the submissions of both parties. The evidence in this case was heard over two days, and the court heard expert evidence which confirmed the following matters relevant to the inadequate securing of the cargo of steel:

1. The webbing straps on the level of load restraint was grossly inadequate.

2. The level of loader strength was grossly inadequate.

3. The knotting of frayed ends was in complete contravention of good practice and should never have happened.

4. The cradles provided no resistance to sideways movement.

5. None of the straps had markings indicating their lashing capacity or breaking load.

23. The court was also told at the time of sentence that there were still health and safety issues surrounding the security of loads at the appellant's premises in Wexford.

24. While we note the cases referred to in the annual reports of the Health and Safety Authority for 2013 and 2014, these references are of limited assistance given that significant details of each of theses cases are not contained in the reports.

25. At the time of the accident, the driving speed of the appellant's lorry was deemed to be 53 kms per hour. This is relevant in light of the submission that the fault for the accident lay mainly with the truck driver. While this observation may not be entirely inaccurate, it must be emphasised that the secure strapping of a heavy load on a truck is necessary to ensure the safety of other road users in all kinds of driving conditions and must also take account of the possibility that a driver may at times drive a vehicle in a manner not strictly in accordance with the road traffic laws. In this case, responsibility for the secure strapping of the load lay firmly with the appellant as both the owner of the vehicle and employer of the driver.

26. We are of the view that the omissions in this case were of a high order and all the more serious because they related to a core activity of the appellant's business. We are not persuaded by the submission to the effect that the appellant was not given sufficient credit for the fact that its culpability consisted of omissions rather than a deliberate act. It was argued by counsel on behalf of the appellant that the sentencing judge incorrectly characterised the fault in negligence terms as gross. We hold that the sentencing judge was entitled to conclude that the omissions by the appellant amounted to a gross dereliction of the defendant's statutory duty to road users under s. 12 of the Act of 2005. Indeed the appellant's counsel accepted that the standards in place at the time of the accident were grossly inadequate.

27. It is clear that the appellant had expended considerable sums of money on health and safety matters since this accident and that it had put various systems in place to ensure best practice is now complied with. In the course of his sentencing remarks, the sentencing judge took these improvements into account.

28. There was a suggestion in the concluding oral submissions of counsel for the appellant that, in some way, the owners of the appellant company feel aggrieved by the level of fine imposed. It is of course the case that just because an appellant company is successful and has significant assets this does not mean that it should be treated differently to others in the same position.

29. The appellant in this case is entitled, like every other accused company, to receive a fair hearing and a sentence that is just, proportionate and consistent with the general principles of sentencing. Equally, the appellant is entitled to some assurance that it has not been singled out for special treatment. In the course of written submissions the appellant contended that the sentencing judge focused unnecessarily on the corporate structure of the appellant company and that a reasonable observer could be left with the impression that the defendant company was punished for something other than the count in respect of which it had pleaded guilty. This complaint appears to arise out of the questioning of the managing director about the financial affairs of the company when the auditor was due to give evidence about these matters. Perhaps Ms. Nolan, the Managing director ought not to have been cross-examined about the financial aspects of her company, and this might have been left to the auditor. A simple statement by counsel on behalf of the company at the time to the effect that ability to pay was not an issue might have overcome this, but that was not done. The managing director had begun to give evidence about the company suffering as a result of the recession, thereby giving rise to the implication that a substantial fine might impose hardship.

30. The sentencing judge summarised the facts of the case the legal principles to be applied and identified the aggravating and mitigating factors.

31. He identified the aggravating factors as the two fatalities and the personal injuries to the four other victims. While noting that the risk of death or serious injury are often a matter of chance, he held that in this case the risk of death or serious injury was more than a matter of chance. He further held that given the extent of the fault, the accident was clearly foreseeable with the significant risk of serious injury because of the dangerous manner in which the load was being transported.

32. He identified the principle mitigating factors as:-

1. The plea of guilty.

2. The steps taken by the appellant company since the accident to significantly improve and update its health and safety practices.

3. The fact that the appellant had no previous convictions under the Health and Safety Acts.

4. The apology by the managing director of the appellant company to the families of the deceased and to the injured.

33. Conscious of the possible adverse consequences for innocent employees of the appellant company by it having to pay a fine of €1 million in one go, he directed that the fine be paid over a three year period thereby having proper regard to the "the overspill factor".

34. We note in particular in this case that the sentencing judge did not impose sentence immediately following the sentence hearing, in the course of which he had heard victim impact reports which must have been harrowing. The sentencing judge put the matter back for a further two weeks before delivering his judgment. It was clearly the Smurfit case that the sentencing judge had in mind when he described the present case as being on a level with the worst cases to come before the Circuit Court. We find it difficult to disagree with this assessment, particularly when it comes to a close examination of the facts in each case. While the appellant's culpability may be less than that in the Smurfit case, its omissions were nevertheless extremely serious. There can be no doubt that the harm done in this case was infinitely greater than in the Smurfit case, where the injured workers had both returned to their employment by the time of the sentence hearing.

35. We conclude therefore by holding that while the fine imposed was a significant one for the appellant company, it was a fine that was just and proportionate given the nature of the omissions and the harm caused. Accordingly, the appeal is dismissed.