28/05; [2005] VSCA 219

SUPREME COURT OF VICTORIA — COURT OF APPEAL

DPP v AMCOR PACKAGING PTY LTD

Vincent, Eames and Nettle JJ A

23 June, 6 September 2005

(2005) 11 VR 557; (2005) 153 IR 363; (2005) 155 A Crim R 405

OCCUPATIONAL HEALTH AND SAFETY – UNSAFE WORK PRACTICES RESULTING IN DEATH OF AN EMPLOYEE – COMPANY CHARGED WITH TWO COUNTS OF FAILING TO PROVIDE AND MAINTAIN A SAFE WORKING ENVIRONMENT FOR ITS EMPLOYEES – EMPLOYEE WORKING AT MACHINE WHICH HAD BEEN IN USE SINCE 1966 – MACHINE NEVER FITTED WITH THE RELEVANT GUARD – COMPANY PLEADED GUILTY TO BOTH CHARGES – FINE OF $60,000 IMPOSED ON EACH CHARGE – APPEAL BY DPP ON GROUNDS OF MANIFEST INADEQUACY - MATTERS TO CONSIDER WHEN DETERMINING APPROPRIATE PENALTY – WHETHER PENALTIES IMPOSED WERE GROSSLY INADEQUATE: *OCCUPATIONAL HEALTH AND SAFETY ACT* 1985, S21.

1. Section 21 of the *Occupational Health and Safety Act* 1958 is directed to ensuring that employees are not subject to unnecessary risks to health in their working environment. Responsibility to take reasonable measures to prevent such exposure has been placed squarely on their employers. It must not be forgotten in this context that the risk to the employer is essentially economic whilst those to which the worker is exposed directly concern their physical or mental well being or, as in this case, life. When determining the appropriate penalty in a case of the breach of a statutory duty imposed for the purpose of protecting the lives and well being of those who may be affected by the breach, the foreseeable potential consequences must be taken into account as it is the avoidance of those consequences which, when considering the objective seriousness of the offence, constitutes the *raison d'être* for the establishment of the legislated regime in the first place. To a substantial extent the seriousness of a breach must be assessed by reference to those potential consequences and the measure of evidenced disregard concerning the safety of employees in the circumstances.

2. In the present case, the potential risk, which unfortunately was realised, was that someone would be killed or seriously injured. Little perception is required to appreciate that there would be such a risk where employers were working in close proximity to large, unguarded and rapidly revolving rollers and without anything approaching adequate supervision. General deterrence will normally assume considerable significance in such cases. In all the circumstances and notwithstanding the matters advanced in mitigation of penalty on behalf of the respondent, the sentences which represent less than 25 per cent of the available maximum were grossly inadequate. The sentences imposed by the court are substituted with fines of $180,000 on each count.

VINCENT, EAMES and NETTLE JJ A:

1. This is an appeal by the Director of Public Prosecutions against the sentences imposed upon the respondent in the County Court, at Melbourne, on 28 October 2004, on two counts of failing to provide and maintain, as far as practicable, a safe working environment for its employees, contrary to section 21 of the *Occupational Health and Safety Act* 1985[1].

2. The respondent, a company that has operated in Australia for many years was, on 25 March 2003, engaged in the manufacture of paper products from pulp at premises in Fairfield, Victoria. At about 3.30pm, on that day, one of its employees, Darren Moon, was working, in the ordinary course of his duties, in close proximity to a set of very large unguarded rollers on a paper manufacturing machine, when he was drawn against them and fatally injured. The machine, which was capable of manufacturing a number of different grades of paper, was extremely large and occupied the entire floor of the building. The base material used in the process was passed into it as a liquid pulp, and then taken through a series of supported rollers where it was drained, pressed, dried out and eventually rolled onto a reel and cut according to client specifications. When manufacturing light paper, the machine would process at 470 metres of material per minute. Heavier product would pass through it at between 160 and 200 metres per minute.[2] Mr Moon was working at a part of the machine known as the fourth dryer section. One of his duties was

to ensure that the material being processed, which was described at the particular stage of the operation as a "tail", was positioned so that, guided by felt and ropes, it passed properly between the rollers. Sometimes, in order to achieve this, operators would use an air hose, the nozzle of which would be manually held very close to the rollers. Mr Moon was performing this duty when he was caught and drawn against them.

3. Surprisingly, the machine, which had been in use since 1966, had never been fitted with a relevant guard and it is, as we understand the position, accepted that there was little, if any, meaningful instruction or supervision of employees designed to address what, to an external viewer, would be regarded as an obvious and long standing risk of injury. The training of operators, such as it was, was predominantly conducted "on the job", with the process of achieving competency being documented in the company's training records. However there was no safety manual for the machine, nor was there any documented standard operating procedure.

4. Two risk assessments had been undertaken covering the fourth dryer section. The first was conducted in 1998 by Paul Moon (the father of the deceased) and Phillip Edwards, both of whom were long term employees of the respondent. That assessment identified entanglement, crushing, shearing, striking and ergonomic risks, amongst others. The second, a plant risk assessment, identified the nip points of the rollers as presenting entanglement risks. An associated work sheet stated that, because operators at one section needed to hand feed paper tail into a nip point, this presented obvious entanglement hazards. It also contained the statement that some operators, in retrieving 'broke' (torn product) attempted to reach into the moving machine. This was recognised as creating an obvious hazard and it was pointed out that if they were to be caught, crushing and/or shearing injuries could result. The next recorded comment was 'History would suggest however that this is a remote possibility, hence the low [risk] rating.' In the 'current risk control' column of the report it was stated that 'it is felt that the entanglement risk is also very prevalent when the machine is on crawl' and recommended that this be incorporated in the calculations. An additional note was made, however, that, 'Justification score card suggests automatic feed for the machine is of doubtful value.'

5. An incident report form relating to an occurrence on 14 July 2002 tendered before the sentencing judge contained the following passage:

> "Mr Steve King was helping feed the tail over No 60 dryer. F6 (*the machine*) was making Stencil Base Board 350 ... . Operators were trying to blow the tail into the ropes or felt nip with air hoses. Steve was standing under the tail feeder when he was pulled toward the machine. His upper body struck the machine frame and he received a friction burn to his right forearm. Steve could not positively say what happened, but feels the air hose he was holding may have been momentarily caught in the ropes. Difficulty feeding the tail at this location on heavy grades is not unusual."

This document was signed by six people including the General Manager of the mill. One of the "corrective actions" to be undertaken, in consequence, was to investigate the possibility of a mechanical feed of the "tail", noting that the difficulty of manual feeding increased with the speed of the machine.

6. In a statement, the contents of which were not disputed, and part of which was read to the sentencing judge, Mr King said:

> "To learn how to do the paper tail feed and break, you just watch others to pick it up. Supervisors make sure you're competent to do it before you're left alone. I remember being told about the air hoses and not to aim it at your body or at anyone else, but I've not been given any written books to tell me how to do the job. I was a trainer before, about two years ago. It was too frustrating for me to try to get people to get rid of their unsafe work habits. I was trying to get things done safely, but was not getting anywhere, so I went back to being a drying operator."

7. It appears that in an earlier incident in about 1999 another employee, Mr Warren Saunders, had his left hand caught while attempting to remove a broken rope from another part of this machine.

8. In the course of the plea, the following explanations were proffered for the continuation of this state of affairs:

(a) although there had been some previous incidents of injury or what were referred to as "near misses", by reason of the fact that little untoward had occurred, the risk of death or serious injury was underestimated;

(b) the cost of the installation of an appropriate guard was substantial and the presence of a guard would have significantly increased the operating costs of the machine. This expenditure was regarded as unjustified in view of the long period of operation of not only the particular machine but a number of similar machines (to none of which relevant guards were fixed) in different locations throughout the country without any such incidents having occurred;

(c) the installation of a guard was perceived as creating a potential problem as it was likely to contribute to the build up of flammable material in the machine and create a risk of fire; and

(d) that there had been no formal request or instruction from any relevant government department or official, indicating that a guard was required. [3]

9. Nevertheless there was recognition within the respondent that there were risks involved in the operation of the machine without a guard, albeit the likelihood of the occurrence of a serious incident was assessed as very low.

10. When Mr Moon was killed, the respondent immediately took a number of steps to rectify the position. Guards were fitted to both the machine and the air hose, and an "industry alert" was sent out to all enterprises with similar equipment. A new regime, governing the operation of the machine, was established to avoid the build up of materials resulting from the presence of the new guards in order to avoid the risk of fire. In other words, the respondent took prompt and appropriate action in an endeavour to ensure that the risk of injury or death arising from the performance of the operation in which the deceased had been engaged was properly addressed.

11. In due course, the respondent pleaded guilty in the County Court to the two counts to which we have earlier referred. They relate to the failure to have an appropriate guard fitted (count 1) and the failure to instruct and supervise employees operating the machine (count 2).

12. The respondent admitted a prior conviction at the Magistrates' Court at Petrie in Queensland, on 27 April 2001, under similar legislation for failing to ensure that the risk of injury or illness in the workplace was properly managed and for which a fine of $3,000 was imposed. A finding of guilt, without conviction, made against the respondent at the Magistrates' Court at Heidelberg in Melbourne, on 22 November 2002, for the commission of an offence under s67AQC of the *Environment Protection Act* 1980, in respect of which a fine was imposed, was also admitted.

13. After hearing a plea in mitigation of penalty, the learned sentencing judge, on 28 October 2004, imposed a fine of $60,000 for each offence.[4]

14. The Director of Public Prosecutions has now appealed against these sentences on two grounds:

"1. The individual and total sentences imposed are manifestly inadequate in the circumstances of the case.

2. In imposing the same fine in relation to counts 1 and 2, his Honour erred in failing to:
(a) differentiate between the respondent's culpability in relation to counts 1 and 2
(b) reflect the greater culpability of the respondent's behaviour in relation to count 1."

15. In support of his contentions Mr McArdle, who appeared for the Crown, placed emphasis upon the following considerations and arguments.

(a) The respondent's prior convictions.

16. He pointed out that the respondent had admitted a prior conviction at a Magistrates' Court in Queensland concerning an offence under similar occupational health and safety legislation and a finding of guilt, on a separate occasion, of an offence under legislation enacted for environmental protection. He submitted that the assessment by the sentencing judge that these matters possessed "minimal" significance was erroneous, as they demonstrated that insufficient importance was attached by the company to matters of great public concern. It was noteworthy, the argument

continued, that the Queensland offence related to a failure to maintain a safe workplace for employees and suggested that specific deterrence was a relevant sentencing consideration in the present case. It was not to the point, he contended, that, when regard is had to the nature and size of its operations, the respondent had accrued only one such conviction. Rather, the inherently dangerous nature of the industry in which the respondent elected to participate required the giving of proper attention to the risks involved and its acknowledgement of clear responsibility for the provision of such a long, established protection as machine guarding. It had failed in both of these respects, he continued.

(b) The disregard over a long period of an obvious risk of serious injury or death.

17. Mr McArdle submitted that the danger presented by the absence of a relevant guard would have been obvious to any moderately intelligent observer from the time of the machine's installation in 1966. In any event, the risk assessment report obtained in about 1998 – 2000, earlier mentioned, contained the passage:

> "Because operators need to hand feed paper towel into nip point of rope this presents obvious entanglement hazard. Some operators in retrieving broke from M/C tend to reach into moving machine presenting obvious hazard."

There is no indication that any serious endeavours were made to respond to this warning. Further, there were, prior to the death of Mr Moon, occasions on which employees of the respondent had reported injuries or near misses when performing work in close proximity to the rollers. Again, nothing appeared to have been done. This was not a case, he submitted, in which a machine operator engaged in prohibited, isolated, unprecedented or totally unanticipated conduct, but one in which the very manner in which the deceased performed his duties was, as a matter of practice, well accepted, if not approved, by the respondent. The commission of the offence encompassed by count 1 must, he argued, be viewed against that background.

18. With regard to the claim advanced on behalf of the respondent that the risk of injury was reasonably perceived as to be low, Mr McArdle drew attention to the statement of one of the employee authors of the 1998 risk assessment report that:

> "In hindsight I think the risks outlined in the document were greater than we actually scored them to be as this was early in the days of doing risk assessments, we did not have the expertise we now have to properly assess and score risks."

The failure to have risk assessments undertaken by appropriately qualified persons also indicated some disregard of the responsibility of the respondent to provide and maintain, so far as was practicable, a safe working environment for its employees, he asserted. This failure assumed particular importance in the present case as workers, including those involved in the risk assessment process, had obviously long before become accustomed to working in close proximity to the unguarded rollers.

(c) The respondent was able to attend quickly to the situation after the death of the victim.

19. As guards were designed and installed within a matters of days of the fatality, it was apparent that the situation was not one which presented any special difficulty in order to remove the hazard, he argued.

(d) No serious endeavours taken to mitigate hazard.

20. It is evident, Mr McArdle argued, that not only did the respondent fail to eliminate the danger by the provision of appropriate guard, there were no serious endeavours undertaken to mitigate the hazard by adequate training and supervision.

(e) The principle of general deterrence must assume substantial significance in such cases.

21. The object of the legislative enactment upon which the charges were based is to provide protection to employees in the workplace. The exposure of individuals to risk of death or injury as they earn their living is an extremely serious matter. Not only should this be reflected in the penalties imposed, but the notion that it may be more cost effective to take the chance that nothing will happen rather than incur the expense involved in removal of the danger, must be dispelled. These considerations cannot, Mr McArdle continued, be seen to have been taken into account in the sentences imposed by the sentencing judge in respect of either of the offences.

(f) The sentencing judge made no endeavour to differentiate the degrees of culpability attached to the separate counts.

22. In support of this contention, Mr McArdle placed emphasis on the failure to provide an appropriate guard. Had that been done, he submitted, the risk of injury to Mr Moon would have been almost completely eliminated.

23. Mr Walters, who appeared for the company, responded to each of these assertions.

24. First he submitted that his Honour was correct in referring to the prior appearances of the respondent before the Court as possessing a minimal relevance in the context of this case. It defies common sense and legal principle, he contended, to assert that the size and character of the respondent's operations were of no consequence. He pointed out that the prosecutor in the Court below accepted that the offence under the *Environment Protection Act* could possess little, if any, significance. The other offence, which might appear to be relevant, involved interstate operations, had arisen some time before, resulted in no injury to any employee and was obviously not serious in as much as a relatively small fine was imposed.

25. We agree. Prior convictions (or their absence for that matter) can assume relevance in the sentencing process in a number of different ways upon which it is not necessary to dwell. Clearly the offender's background in this respect can assist (*inter alia*) in the determination of their level of culpability, the weight that can be attributed to the offender's protestations of remorse and whether the need for specific deterrence should be taken into account. Setting to one side the finding of guilt made against the respondent for an offence under the *Environment Protection Act* as possessing minimal, if any, significance in the present context, the company has been proved to have accrued only one conviction during its years of operation, and that for what appears from the "penalty" imposed to have been regarded as an isolated breach. The respondent was a large corporation conducting a wide range of operations in different parts of the country. It had only one relevant breach of the law and there was nothing in the material generally, or arising from the fact of this earlier conviction, that suggests that specific deterrence assumed importance as a sentencing consideration.

26. Mr Walters submitted that it was not disputed before the sentencing judge that none of the machines of the particular kind, in Australia, were equipped with guards prior to the death of Mr Moon. It was accepted that the respondent had breached the Act, but the background of industry practice and the fact that machines, of the type involved, had been operated for many years in this country without any such incident having occurred mitigated the culpability attached to this failure. He rejected any suggestion that the respondent had demonstrated its disregard for the safety and welfare of its employees at any stage. At worst, he said, there was a failure to recognize the degree of risk posed. The level of culpability of the respondent could not properly be viewed as high in those circumstances. With regard to the contention that rectification was relatively simple, Mr Walters drew attention to a number of considerations:

> (a) No guarding of the type sought was available from the manufacturers of the machine;
>
> (b) The rectification involved manufacture and installation of the guarding at a cost of nearly $700,000 for this machine alone;
>
> (c) The new guarding required reworking of the machine's operating regime, including regular "down time" to ensure that no build up of paper particles could give rise to a fire risk;
>
> (d) The extra cost of operating the machine with the guarding is approximately $1 million per annum;
>
> (e) Everyone working on this plant had to be retrained in detail to cope with completely different working conditions which affected almost all aspects of operation of the machine; and
>
> (f) This has been progressively implemented at other plants operated by the defendant company.

27. To argue that this process was simple or easy was, he submitted, "facile".

28. It was also appropriate, Mr Walters argued, for his Honour to have regard to the conduct of the respondent from the time of the incident, contending that the company could be seen to have behaved in an exemplary fashion once the unfortunate death of Mr Moon occurred. Appropriate steps were taken to guard the machine, a plea of guilty was entered at the first opportunity,

and there was full co-operation by the respondent in a Victorian Work Cover investigation. The significance of such mitigatory considerations in cases of this kind is a matter to which we shall return.

29. When regard is had to all of these considerations the penalties imposed by the sentencing judge could not be regarded as falling outside the range available to him, Mr Walters submitted.

30. Those submissions are not persuasive. Indeed, rather than operate in favour of the respondent, the matters identified by Mr Walters significantly increase the sense of unease which arises from the circumstances in which the deceased met his death. Despite the assertions advanced on behalf of the respondent about its concern for the safety of its workforce, and despite the claimed difficulties in fitting a guard, the fact is that a guard was able to be fitted within a very short time of the occurrence of a serious accident. Furthermore, while the cost of installation was plainly substantial, the factor which seems to have been of greatest importance to the respondent was that installation of the guard and the adoption of safe working practices significantly increased the costs of operating the machine and otherwise conducting the respondent's operations.

31. Contrastingly, there is a great deal of force in the Crown contention that each of the sentences imposed upon the respondent was so inadequate as to indicate a serious departure from principle.

32. It would seem clearly beyond dispute that Mr Moon and his fellow employees were so accustomed to performing their duties in an unsafe environment, that they, and presumably their employer, barely saw the danger to which they were exposed. No effective action was taken in response to the limited warning given by the risk assessment report, which in turn was prepared without the engagement of independent properly qualified persons nor was it regarded as necessary to undertake preventative action as a consequence of the earlier incidents. It is equally clear that there was no adequate instruction or supervision of the deceased concerning the performance of the task that he was undertaking at the time that he was drawn against the rollers.

33. In our opinion, the inference is irresistible that the respondent approached the situation from the viewpoint that as little untoward had happened over a long period of operation, it could be assumed that nothing ever would and therefore that the substantial expenditure and increased operating costs involved in the removal of the danger were not regarded as justified. A degree of complacency based upon the acceptance of that assumption can be seen to have contributed to the death of one of its employees.

34. Section 21 of the *Occupational Health and Safety Act* 1985 is directed to ensuring that employees are not subject to unnecessary risks to health in their working environment. Responsibility to take reasonable measures to prevent such exposure has been placed squarely on their employers. It must not be forgotten in this context that the risk to the employer is essentially economic whilst those to which the worker is exposed directly concern their physical or mental well being or, as in this case, life. As Harper J stated in *Holmes v RE Spence & Co Pty Ltd*:

> "The Act does not require employers to ensure that accidents never happen. It requires them to take such steps as are practicable to provide and maintain a safe working environment. The courts will best assist the attainment of this end by looking at the facts of each case as practical people would look at them: not with the benefit of hindsight, or with the wisdom of Solomon, but nevertheless remembering that one of the chief responsibilities of all employers is the safety of those who work for them. Remembering also that, in the main, such a responsibility can only be discharged by taking an active, imaginative and flexible approach to potential dangers in the knowledge that human frailty is an ever-present reality."[5]

A little later in his judgment he pointed out that:

> "The relevant question is not whether the machine ... had been operated without accident for some time before the accident in question. The issue is whether the employer had provided a safe working environment. This he did not do if there were practical steps available to him which, although not taken, could have reduced the risk of foreseeable accident if they had been taken."[6]

35. When determining the appropriate penalty in a case of the breach of a statutory duty imposed for the purpose of protecting the lives and well being of those who may be affected

by the breach, the foreseeable potential consequences must be taken into account as it is the avoidance of those consequences which, when considering the objective seriousness of the offence, constitutes the *raison d'être* for the establishment of the legislated regime in the first place. To a substantial extent the seriousness of a breach must be assessed by reference to those potential consequences and the measure of evidenced disregard concerning the safety of employees in the circumstances. We would adopt, with respect, the views expressed by the Industrial Relations Commissions of New South Wales (in court sessions) in *WorkCover Authority of New South Wales v Profab Industries Pty Ltd*[7] which stated:

> "[T]he primary factor to look at in relation to the penalty to be imposed is the objective seriousness of the offence. Particularly in cases involving a serious breach of the OH&S Act, subjective factors, such as a plea of guilty, co-operation with the investigation and subsequent measures taken to improve safety, must play a subsidiary role in the determination of penalty to the gravity of the offence itself. While the court must keep in mind not only facts which establish the seriousness of the offence, but also those which tend to mitigate that seriousness or exculpate the offender (see *Camilleri's Stock Feeds Pty Ltd v Environment Protection Authority* ...), the presence of the subjective factors referred to should not be permitted to produce a sentence which fails to adequately reflect the seriousness of the offence."(citations omitted)

36. In the present case, the potential risk, which unfortunately was realized, was that someone would be killed or seriously injured. Little perception is required to appreciate that there would be such a risk where employers were working in close proximity to large, unguarded and rapidly revolving rollers and without anything approaching adequate supervision. General deterrence will normally assume considerable significance in such cases. These considerations cannot be seen to be reflected in the sentences handed down in the Court below.

37. In all the circumstances and notwithstanding the matters advanced in mitigation of penalty on behalf of the respondent, we consider that the sentences which represent less than 25 per cent of the available maximum were grossly inadequate. We are therefore disposed to allow this appeal and set aside the sentences imposed by his Honour.

38. Save for one aspect, there is no need to recite the principles upon which this Court must act when considering a Crown appeal against sentence. They are well known and are helpfully set out in the judgment of Charles JA in *Clarke*[8]. The particular consideration to which attention must be drawn is expressed by his Honour as follows:

> "When, in response to a Crown appeal, the court decides to re-sentence an offender, it ordinarily gives recognition to the element of double jeopardy involved (in twice standing for sentence) by imposing a sentence that is somewhat less than the sentence it considers should have been imposed at first instance." [9]

39. The rationale underlying this approach was addressed by Kirby J in *Hayes*:

> "In a number of Australian cases it has been said that precisely the same principle applies to Crown Appeals asserting the inadequacy of a sentence as applies in the appeal by a prisoner complaining of an allegedly excessive sentence: see, for example *Tait...*, *Peterson ...*, and *Morley...* . Such has also been said in Canada. However, a number of authorities in Australia suggest that there are special considerations which apply in the case of Crown Appeals: see, for example, *Withers ...* (a decision shortly after the enactment providing for such appeals); and see *Griffiths ...* applied in *Stach ...* per Bowen CJ and Beaumont J.
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> At the heart of the suggested difference between prisoner and Crown Appeals is the notion that, in a Crown Appeal, a prisoner suffers a species of 'double jeopardy' by reason of having twice to face the prospect of sentencing and possible loss of liberty. This is the way it was ultimately put in *Tait ...*, drawing on the remarks of Isaacs J in *Whittaker ...* . Of course, what is involved is not a true 'double jeopardy'. If the sentence was 'wrong' in the first place, it is upon the appeal that the only 'true' sentence according to law is passed. But in a practical sense, there is a species of double jeopardy. The prisoner's liberty, pocket and reputation are put in jeopardy both before the sentencing judge and before the appellate court. ... In addition, the prisoner suffers the anxiety and stress caused by the situation of uncertainty arising from the delay in resolving his or her position." [10] (citations omitted).

40. Mr McArdle submitted that the notion of double jeopardy was directed essentially to the situation confronted by individuals exposed to the possibility of the imposition of a heavier

sentence on appeal. More specifically, he asserted that there is recognition by the courts of the personal impact of the protraction of proceedings, and the revival of understandable apprehensions concerning the outcome, upon those who are subject to the prospect of increased punishment. The feelings of mental anguish, personal distress and possible loss of reputation which lie at the core of this approach could not, he contended, be sensibly attributed to a corporation. Accordingly, the principle of restraint which has been developed in order to take such considerations into account could have no application to an entity of that kind.

41. Obviously, as Mr McArdle asserted, the position of a corporation cannot be equated with that of a human offender. But as a matter of principle we see no good reason, allowing for necessary modification, for the total rejection of the notion of double jeopardy in the case of a corporate offender. Presumably, the notion of double jeopardy would ordinarily assume less significance in the case of a corporate offender than in the case of a human offender and, sometimes, it might reasonably be regarded as inconsequential when determining whether any and what measure of intervention would be justified in the circumstances. But the very institution of an appeal could well impact adversely upon the standing of a corporate offender and those associated with it. Corporations can and do develop reputations, and on occasion the damage to an corporation's capacity to trade and to the value of its shares sustained in consequence of the successful prosecution of an appeal could be very severe. While therefore the matter is not free from doubt, we consider that such considerations are factors to which an appellate court should have regard and can appropriately be viewed as constituting additional adverse consequences to which mitigatory effect should be given.

42. In the present case, however, there is nothing in the material before the Court that suggests that the respondent has incurred or may incur any significant damage to its business or general standing as a corporation as a consequence of the institution of this appeal or that, save for the additional penalty imposed, is likely to incur any other adverse consequences. Consequently, in our view, the weight to be attributed to the principle of double jeopardy in the present case would have to be regarded as very limited.

43. Whilst, as Mr McArdle submitted, the presence of a guard even in the absence of instruction or supervision would have prevented Mr Moon being caught by the rollers, the failure to provide that instruction and supervision also constituted a serious breach by the respondent of its statutory obligation. There is no need to discriminate between the offences on this basis. We propose to substitute a fine of $180,000 for each of them.

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[1] Section 21 of the Act provides:

> "(1) An employer shall provide and maintain so far as is practicable for employees a working environment that is safe and without risks to health.
> (2) Without in any way limiting the generality of subs-section (1), an employer contravenes that sub-section if the employer fails—
> (a) to provide and maintain plant and systems of work that are so far as is practicable safe and without risks to health; ...
> (e) to provide such information, instruction, training and supervision to employees as are necessary to enable the employees to perform their work in a manner that is safe and without risks to health."

[2] This description has been prepared from the Statement of Material Facts with which the Court was provided.
[3] There was however no evidence that any inspection of the machine was ever carried out by or on behalf of a relevant government department.
[4] The maximum penalty for an offence under section 21, at that time, was 2500 penalty units or $250,000.
[5] *Holmes v RE Spence & Co Pty Ltd* (1992) 5 VIR 119 at 123. This approach was approved by the Court in *R v Australian Char Pty Ltd* [1999] 3 VR 834 at 847 per Phillips CJ, Smith and Ashley, JJ.
[6] *Holmes v RE Spence & Co Pty Ltd* (1992) 5 VIR 119 at 126 – 127.
[7] [2000] NSWIRComm 142; (2000) 100 IR 64; (2000) 49 NSWLR 700 at 714.
[8] *R v Clarke* [1996] VICSC 30; [1996] VicRp 83; [1996] 2 VR 520; (1996) 85 A Crim R 114.
[9] At 522.
[10] *R v Michael John Hayes* (1987) 29 A Crim R 452 at 468-469.

APPEARANCES: For the DPP: Mr JD McArdle QC and Ms KT Armstrong, counsel. Mr S Carisbrooke, Acting Solicitor for Public Prosecutions. For the respondent Amcor Packaging Pty Ltd: Mr BE Walters SC and Mr TE Waight, counsel. Freehills, solicitors.
