23/89

COUNTY COURT OF VICTORIA

R v SIMSMETAL LTD

Judge Villeneuve-Smith

9 March 1989

SENTENCING – OCCUPATIONAL HEALTH AND SAFETY – FAILING TO PROVIDE SAFE WORKING ENVIRONMENT – EXPLOSION OF ALUMINIUM SMELTER – SEVERAL EMPLOYEES KILLED/INJURED – ASPECT OF DETERRENCE – WHETHER RELEVANT IN FIXING LEVEL OF PENALTY – PENALTY CONSIDERATIONS: *OCCUPATIONAL HEALTH AND SAFETY ACT* 1985, S21.

1. In dealing with the question of penalty in respect of breaches of s21 of the *Occupational Health and Safety Act* 1985 ('Act'), the sentencing court may take into account the aspect of deterrence.

2. Accordingly, where a Company pleaded guilty to 3 charges alleging breaches of s21 of the Act (where 4 employees were killed and 7 injured when an aluminium smelter exploded) the Company was fined $15,000 in respect of each charge.

JUDGE VILLENEUVE-SMITH: *[After setting out the nature of the charges and the facts, His Honour continued]* … **[5]** The whole background was compendiously summed up by the learned prosecutor when he said at page 11 of the transcript, "Now, put simply, Your Honour, the situation was that those who knew the sodium nitrate was stored on the premises had no knowledge of its dangers and, indeed, made apparently no enquiries as to whether or not it was dangerous, and those who knew the dangers of sodium nitrate and molten aluminium had no knowledge of its presence on the premises". It is in the circumstances outlined, and on a consideration of full and very helpful submissions which I have received from Mr Woinarski and Mr Walker, that the court must proceed to impose penalties prescribed by the legislation.

[6] Both counsel expressly recognised that the court must be seen to give effect to the clear legislative intent set out in section 6 of the Act, and in other relevant sections, namely, that it is a piece of social legislation, designed to promote and, indeed, enforce standards of behaviour by employers which will directly or indirectly secure or conduce to the safety of employees in a given industry by the provision of a safe working environment appropriate to it.

The legislation, it seems to me, seeks to translate questions of the safety of workers beyond the mere provision of a right to sue for damages at common law for a breach by employers of any duty owed to an employee in tort. Its rationale is to eliminate, if it can, or reduce, at the least, the likelihood of the risk of death or injury in the workplace, and it has laid down penalties for failure to observe the requisites of a safe working environment which are severe enough to underline its philosophy.

I have heard admirable submissions from both counsel as to the matters of penalty, and I have endeavoured to bear them in mind conjointly with due observance of the provisions of the legislation as I perceive them to be. I take into account the following matters as bearing relevantly on what might be termed a prosecutorial approach to the question of penalty, although I interpolate that the learned Crown prosecutor in his submissions was scrupulously fair, and drew my attention to matters which were to the credit of the company.

[7] Firstly, I cannot overlook, that as a result of the admitted breaches by the company of the provisions of the Act, four men died and seven suffered injuries of differing severity, including one unfortunate who was seriously and permanently disfigured. I have not been told, but I think I may safely infer, that, in addition, lasting mental and emotional trauma was done to the survivors. Next, that the standard of care demanded by the legislation – that is to say, of paying proper regard to what was reasonably practicable to secure the safety of the company's employees – was significantly breached by the company's officers. For example, Mr Rosignoli knew that there was

in the old copper shed a substance other than potassium chloride. He assumed it was salt, or some other harmless factory material, but he made no enquiry and made no check to find out what it was. Another instance of this default is the failure of those who knew of the presence on the premises of sodium nitrate to make any enquiries as to its properties, and whether or not it was dangerous, and if so, where it best should be stored, and what other precautions should be taken to ensure it could never be mingled with molten aluminium. This would not have been a laborious, time-consuming or expensive process, because at relevant times the company employed four chemists, to whom resort could have been had, and from whom information could have been readily derived of all of these matters. Had that been done, the tragedy would not have occurred.

[8] Next, it would have been prudent, and not a matter of great difficulty or expense, to have identified by testing, and then noted, all chemicals entering the premises, of whatever kind, in some proper register, showing the date received, the type of chemical, its storage site and its ultimate disposition, and at the same time the bag or other container in which the chemicals were could have been marked or labelled appropriately.

That such a course of action almost certainly would have been decisive in averting the explosion seems clear from Mr Walker's remarks at pages 26 to 27 of the transcript. Moreover, I am told that such a system as I have spoken of has since the accident been implemented by the company, and that a repetition of the occurrence could never happen again, so far as this aspect of the matter is concerned.

That, I think, is very commendable – however much it may be the product of hindsight – but it also shows the extent to which the strict standards demanded by the legislation ought to have been complied with, but were not. That system could have been, and should have been, implemented by the company before, not after, the tragedy.

Now, there are other matters – a number of them – to which regard must be had, these being those which operate to mitigate the company's offending. Firstly, the pleas of guilty entered on behalf of the company, which reflect the concern and dismay of those who guide the affairs of the company at the occurrence of the disaster, and which exhibit an appropriate corporate reaction to it. These **[9]** matters are fully amplified by Mr Walker at pages 31 to 32 and at page 40 of the transcript, and I do not need to repeat them here.

Next, the company has been conducting the business of smelting for about 25 years, and has not incurred any prior convictions for breaches of any industrial or safety legislation. Indeed, it has a commendable history of introducing and implementing safety procedures at its plants, and of generating, and seeking to constantly generate, an awareness of the need for safety among its employees. I have borne in mind, without repeating them here, the matters submitted by Mr Walker in this context at pages 32 to 36 of the transcript.

Next, the company has, as Mr Woinarski very properly conceded, reacted swiftly and appropriately to the disaster, not only in terms of the fullest co-operation from the outset with the Department of Labour and Industry, but also in the positive remedial steps it has taken to introduce the most modern and efficient foundry system possible to replace the pre-existing plant.

In this jurisdiction, by section 47(2)(a) of the Act, where a body corporate is involved in offences such as these, a maximum penalty of 250 penalty units – that is to say, $25,000 – is prescribed for an offence against the Act where no penalty is set out elsewhere. Section 21 of the Act has already been the subject of judicial interpretation. In *Chugg v Pacific Dunlop Ltd* [1988] VicRp 49; (1988) VR 411, Mr Justice Fullagar held that section 21 and section 47, properly construed, created a number of offences consisting of acts or omissions by **[10]** the employer which constituted breaches of section 21 subsection (1): see page 416 of that case.

Thus, it is conceded on all sides, that there are three separate counts in respect of which penalties are to be imposed. Mr Walker, however, submits that whilst this is so, all the counts here relate to matters and circumstances arising out of one event, namely, the injection into the furnace of quantities of sodium nitrate, and that hence, the sharpness of the penalty should be tempered, at least as to some of the counts, as I follow him, by recognition of the fact that the court is dealing with, in reality, and I quote him, "but one tragic error".

The proposition was attractively and persuasively argued; it only remains for me to say I do not agree with it, for reasons which I have endeavoured to state earlier in these remarks. However, should it become necessary for others to pass upon this aspect, the relevant passages in the transcript are to be found at pages 38 and 39.

Mr Walker, I thought, was on much firmer ground when he argued that maximum penalties were traditionally reserved for the worst offending; that is to say, for those who behave with deliberate, wilful or reckless disregard for the safety of others, and for those whose conduct had in the past attracted prior convictions and punishment, and who were still offending, nonetheless.

In this case, he submitted, the penalties to be imposed should reflect the mitigating aspects upon which be based his plea, and ought therefore be slanted towards the lower end of the scale. Mr Woinarski referred me to considerations germane to penalty, at pages 11 to 14 of the **[11]** transcript. I do not repeat them here. Included in his observations were references to matters previously heard in the Magistrates' Courts, which were cited. Those cases were where the court was obliged to operate within a statutory maximum of $10,000. Lacking any information as to the facts of those cases, or the reasons given by the court for the imposition of the penalties mentioned, I do not think they can afford me much in the way of guidance which bears relevantly on the circumstances of this case. However, I note that penalties of $3,000, $3000 and $2500 were imposed in three of the four cases to which I was referred, all of which involved fatal accidents.

To balance all the foregoing matters of which I have made mention is a task not altogether easy of accomplishment, nor is it made any easier by reason of the fact that it is a corporation with which I must deal. From the time corporations were vested by law with the status of legal personae, difficulties have been experienced in satisfactorily fitting them into the scheme of things, more especially in relation to criminal law and punishment. Anomalies and illogicalities tend to arise and proliferate in the world of the artificial.

Section 47 sub-section (2) itself reflects, as indeed it must, the somewhat uneasy discrimination existing between a corporate defendant, and a natural person defendant, as to penalty. The former is deemed to be appropriately exposed to a penalty five times greater than the latter. Why this should be so is not altogether clear, since natural persons may be guilty, in the context of this **[12]** legislation, of conduct of the most extreme reprehensibility, bringing about death or grievous and permanent injury. Again, how is the concept of deterrence to be logically measured between them, given circumstances of comparable culpability?

Indeed, can the deterrent aspect of punishment operate as it is meant to in respect of an entity which has, as Lord Thurlow expressed it, "neither a body to be kicked, nor a soul to be damned", and may not the punishment being inflicted realistically bear more upon those who are not responsible for the crime, that is to say, the shareholders, than the culpable servants and agents of the corporation? These, and similar considerations and perplexities have attracted the attention of scholars and commentators, see Glanville Williams, *Criminal Law*, the second edition, at paragraph 283, Fox and Freiberg, *Sentencing*, pages 138 to 139. Matters such as these, however thought-provoking to the philosopher and the scholar, offer little of comfort to the journeyman judge alone on the highway of first instance. To him the statute itself, and the legislative purpose behind it, is his staff and map, with which he must tread the road as best he can. It seems to me, in the end, that the aspect of deterrence, even if thought to be in this context somewhat artificial, is the one as likely as any to promote and enhance the *raison d'etre* for the legislation, bearing, however, steadily in mind those considerations which properly point to a reduction from the maximum penalties laid down. In the result, I conclude that in respect of **[13]** each case, the company will be fined $15,000.
