**OSHI v Anahita**

**2023 IND 6**

**CN38/18**

**THE INDUSTRIAL COURT OF MAURITIUS**
**(Criminal Side)**

**In the matter of:-**

**Occupational Safety And Health Inspectorate**

**v/s**

**Anahita Hotel Limited**

**JUDGMENT**

The Accused Company stands charged, as per the amended Information, with one Count of **Failing To Ensure, So Far As Is Reasonably Practicable, The Safety, Health, And Welfare At Work Of All Its Employees, contrary to ss. 5(1) and 94(1)(i)(vi)(3)(b) of the Occupational Safety And Health Act [Act No. 28 of 2005] (hereinafter referred to as OSHA)**.

The Accused Company pleaded Not Guilty to the charge and was assisted by Learned Defence Counsel.

The Prosecutor conducted the case for the Prosecution.

The Proceedings were held partly in English and partly in Creole.

**The Prosecution Case**

It was the case for the Prosecution that on or about 11-07-15, in the District of Flacq, the Accused Company, being an employer, did unlawfully fail, so far as was reasonably practicable, to ensure the safety and health at work of its employees, to wit: 03 of its employees, to wit: Arnaud Marie, Joseph Vicky (hereinafter referred to as W2 and W3 respectively) and Kareemun Mukesh sustained medical problem when they were working in a water reservoir at Four Seasons Hotels & Resorts, Beau Champ.

**The Defence Case**

The Accused Company denied the charge in its unchallenged out-of-Court statement (Doc. G) and in Court.

**Analysis**

The Court has duly analysed all the evidence on Record and all the circumstances of the present matter, and the Court has given due consideration to the Submissions of Learned Defence Counsel, and to the Authorities referred to by Learned Defence Counsel in the course of his Submissions.

The Court has duly considered the documents produced in the course of the Proceedings:

1) 01 Medical Certificate (hereinafter referred to as MC) (Doc. A) in relation to W2;
2) 01 MC (Doc. B) in relation to W3;
3) 01 MC (Doc. C) in relation to Mukesh Kareemun;
4) 01 letter (Doc. D) from the Ministry Of Health And Quality Of Life (hereinafter referred to as MOHQL);
5) 01 booklet of 03 photographs (Doc. E (E1 to E3)) taken by Miss Nabiilah Bibi Bakady (hereinafter referred to as W1);
6) 02 Risk Assessments (Docs. F and J) of the Accused Company;
7) 01 Report Of Accident At Work (Doc. H) signed by W1;
8) 01 document (Doc. K) showing 02 photographs taken by Mr Selven Murden (hereinafter referred to as the Representative of the Accused Company or the Accused Company's Representative).

The Court places it on Record that the name of Mukesh Kareemun is mentioned in the body of the Information, in the MC (Doc. C), in the letter of MOHQL (Doc. D), in the Report Of Accident

At Work (Doc. H), and the Accused Company's statement (Doc. G), whereas the name of Mukesh Kureemun is mentioned as Witness 4 in the List of Witnesses.

Given that Identity of the said person was not put in issue in the course of the Proceedings, the Court acts on the basis that Mukesh Kareemun and Mukesh Kureemun are one and the same person, and is hereinafter referred to as W4.

**S. 5(1) of the OSHA** provides as follows:

> Every employer, shall, so far as is reasonably practicable, ensure the safety, health and welfare of all his employees.

An employer therefore has a statutory duty to ensure, so far as is reasonably practicable, the safety, health and welfare of all its employees.

And "[i]n a criminal case it is normal to assume that the version that is put to an accused party when recording his or her defence is the very complaint that was made by the victim." (**Marday v The State [2000 SCJ 225]**).

Not In Dispute

It was not disputed that W2, W3, W4 were tasked with cleaning the water reservoir at the relevant time and place, and that they subsequently felt unwell, sought medical attention, following which W2, W3, and W4 were admitted to Hospital (Docs. A, B and C).

No Risk Assessment was made prior to start the work inside the water reservoir

W1 explained in her Report (Doc. H), that no sufficient Risk Assessment had been carried out to identify the risks involved for workers working inside the water reservoir, and W1 deponed to the effect that the Risk Assessment (Doc. F) was not sufficient, and did not specifically cover the water tank.

The Accused Company admitted that no formal Risk Assessment was carried out prior to the start of the work, but that verbal instructions were given to the employees (Folio 16/0993 of Doc. G), and also admitted that the reservoir had only one opening.

The Accused Company further explained that following the said incident, it had carried out a Risk Assessment for cleaning work in the tank (Folio 16/0992 of Doc. G).

In Court, it was contended on behalf of the Defence that a Risk Assessment (Doc. F) was carried out in relation to working in confined spaces, and that the existing controls for working in confined spaces were that proper lighting was to be provided, and that the employees were not to work alone.

At no stage was it disputed by the Accused Company that it was the first time that such cleaning work was being carried out in the reservoir.

No explanation was forthcoming from the Accused Company as to why no such Risk Assessment was carried out, or could be carried out, prior to the cleaning work starting and/or as why it was not reasonably practicable for the Accused Company to carry out such Risk Assessment prior to the cleaning work starting.

Given it was the first time that such cleaning in the reservoir was being carried out, it logically follows that the Accused Company could not have known the risk/s existing or potentially existing in such an environment for such cleaning work to be carried out, and it was therefore incumbent on the Accused Company to carry out a Risk Assessment prior to the said cleaning work starting.

Further, the very fact that a Risk Assessment (Doc. J) was carried out on 04-11-16 (albeit more than one year after the present incident), in relation specifically to the cleaning of reservoirs clearly shows that it was a reasonably practicable for the Accused Company to carry out a specific Risk Assessment in relation to the cleaning of the reservoir, but that the Accused Company failed to do so.

The Court is of the considered view that the said Risk Assessment (Doc. F) cannot avail the Accused Company, for the reasons given below.

First, the contention of the Accused Company in Court that a Risk Assessment (Doc. F) was carried out in relation to confined spaces is in total contradiction with the version that the Accused Company gave at the time of its statement (Doc. G) to the effect that no Risk Assessment was carried out.

Second, although the existing control as regards the employees not working alone (Doc. F) was implemented, it appears there was no lighting inside the reservoir (Docs. E1 and E2), and there was therefore only partial implementation of the said existing controls.

Third, the said Risk Assessment (Doc. F) in no way establishes that the Accused Company had discharged its burden under **s. 96(6) of the OSHA** for the reasons given below:

1) the said Risk Assessment was carried out on 30-07-14, that is almost one year prior to the present incident, and this time lapse inevitably significantly reduced its relevance and accuracy;
2) the said Risk Assessment related to all locations, and was therefore general in nature, and was not specifically in relation to the cleaning work of the reservoir; and
3) whilst section 8 of the said Risk Assessment relates to confined spaces, no mention is made either of the reservoir itself or of proper ventilation and/or appropriate apparatus if need be, and the existing controls of lighting and not working alone in no way address the issue of ventilation in confined spaces.

In light of all the above, the Court is of the considered view that the Accused Company failed in its statutory duty to ensure, so far as was reasonably practicable, the safety and health of its employees, i.e. W2, W3, and W4, as a result of which W2, W3, and W4 sustained medical problem whilst working in the reservoir at the relevant place and time.

<u>No established safe system of work for cleaning work inside the water reservoir</u>

W2 deponed to the effect that they started to work normally, his breathing the smell of burnt petrol, and it was only after some time that he started feeling dizzy and having a headache, following which he informed Mr Sylvio David, Chief of Maintenance, who then told them to work in rotation of 15 minutes.

In cross-examination, W2 confirmed that the said rotation of 15 minutes was put in place by Mr Sylvio David after he started feeling unwell, and that when they started the cleaning work, all 06 employees were working together in the reservoir, and that at first, there was no rotation system.

W2 added that it was when he was on a break, outside the reservoir, that he started feeling unwell, and agreed that he may have been affected by the light outside, when he had been inside the reservoir, where it was dark, but maintained that the smell of burnt petrol was indisposing him.

W2 added that since they could not carry on, they were taken to the Hospital, where they were admitted and placed under a respiratory mask for oxygen.

W3 deponed along the same lines as W2, but stated that his headache started when he was inside the reservoir, and increased when he went outside.

W4 stated that he was instructed by Mr Sylvio David to work at 15-minute intervals when he started feeling unwell, explaining that at first, they were told to work for 15 minutes, and take a 05-minute break, and then they were instructed to work for 15 minutes and take a 15-minute break.

W4 stated that he smelt petrol inside the reservoir, and then started having a headache and feeling dizzy, that he had never cleaned the reservoir in the past, and that he was given no training in relation to the cleaning of the reservoir.

W4 explained that he started having a headache when he was outside, in open air.

W6 deponed to the effect that he was instructed to work in teams of 04, for 30 minutes, and then to come out, that there was a burnt smell, and that he worked the whole day, and then went to his place, his being in perfect health.

W2 and W3, in their respective cross-examination, confirmed that they were 06 employees performing the said cleaning work at the relevant time, and W3 stated that all 06 of them were taken ill, whereas W3 stated that other than he, W2, and W4, the other employees did not suffer from the same problems.

W2 and W4 stated that they were given instructions by Mr Sylvio David, whereas W3 stated that he was given instructions by Mr Louis Max Opera (hereinafter referred to as W7).

W2, W3, and W4 deponed to the effect that they were given verbal instructions to clean the reservoir.

It was put to the Accused Company that there was no established safe system of work for cleaning work inside the water reservoir.

The Accused Company denied same, and explained that verbal instructions were given to the employees involved in the cleaning work as to the methodology as to how to do the work (Folio 16/0994 of Doc. G).

And the Accused Company stated in Court that on the relevant day, the employees were working under the supervision of Mr Sylvio David, who put in place the system of work whereby the team was divided into 02, and the employees were alternating by  were working inside the reservoir for 15 minutes, and were coming out for 15 minutes.

Further, the Accused Company in Court attempted to explain that the employees were taken to the Nurse of the Accused Company, not because they had a headache, but because they were feeling unwell.

Mr Mervin Orieux (hereinafter referred to as the Defence Witness) explained that they were working in teams of 03, and that he was not sure, but that as far as he remembered, he was under the supervision of Mr Max Opera.

The Defence Witness further explained that they were instructed to work by rotation to clean the reservoir, and that he went to the Hospital as a measure of precaution, and that he had no symptoms.

The Defence Witness added that they were working in rotation of 30-30 minutes, but some employees spent more time inside the reservoir.

The Defence Witness went on to explain that W2, W3, and W3 may have suffered from headache and dizziness, as they may have spent a bit more time inside, considering that it was hot, and that the visibility was reduced ("*un peu flou*" i.e. a bit unclear/blurred/hazy), and the eyes would get tired.

In cross-examination, the Defence Witness confirmed that there was a bit of a burnt smell inside the reservoir.

Whilst it has been established that verbal instructions were given to the employees as to how to do the said cleaning work, the fact remains that since it was the first time such cleaning work was being carried out, there was a duty on the Accused Company to develop a safe system of work, and to properly communicate same to the employees.

Further, although it has been established that a rotation system was put in place, the evidence on Record does not conclusively establish same was put in place from the outset.

Be that as it may, the differing versions, whether from the Prosecution Witnesses or the Defence Witness, as to the time for each rotation, i.e. 15 minutes work for 05 minutes of rest, 15 minutes work for 15 minutes rest, or 30 minutes work for 30 minutes rest, clearly establish that the system of work put in place was not clear, or at least was not clearly communicated to the employees, and that hence, no safe system of work was in place at the relevant time and place.

There is also evidence on Record suggesting that the break time had to be increased from 05 minutes to 15 minutes.

All these factors ought to have sent alarm bells ringing in the ears of the Accused Company as to the fact that the said system of work was not safe.

At no stage was it the case for the Defence that it was not reasonably practicable to do more than was in fact done, i.e. than give the said verbal instructions to the employees, to satisfy its duty under the Law.

A safe system of work consists of a defined method of doing a job in a safe way, and the Court is of the considered view that all the factors highlighted above clearly show that the verbal instructions given to employees did not amount to a defined method of doing a job in a safe way.

The Defence of the Accused Company was to the effect that the risk did not materialise, and that the employees, i.e. W2, W3, and W4, did not suffer from any medical problem.

A medical problem is a "generic term for a condition (e.g., diabetes, hypertension, irritable bowel syndrome) that is managed non-interventionally, in contrast to a condition that requires a procedure (e.g., a large bleeding abdominal aortic aneurysm), which is a surgical problem" [1].

In light of the said definition, the Court is of the considered view that a headache would fall within the definition of a medical problem, which is treated non-interventionally, and that therefore, W2, W3, and W4, did suffer from a medical problem.

It was further advanced that the said employees did not sustain such medical problem when they were working in the said reservoir at the relevant place.

The Court is of the considered view that although the wording of the Information is "when they were working in a water reservoir", it would be adopting a too restrictive interpretation were the Court to conclude that the fact that the said employees started suffering from headache and dizziness when they were outside the said reservoir means that they did not suffer from same when they were working inside the said reservoir.

The fact that the said employees said that they started suffering from headache and dizziness when they were outside the reservoir does not detract from the fact that the said employees started so suffering during the time they were engaged in the cleaning of the reservoir at the relevant time and place, and that hence they sustained such medical problem whilst they were cleaning the said reservoir.

The question of whether the employees, i.e. W2, W3, and W4 suffered from headache or felt unwell does not assist the Court in the determination of the present matter, as the fact remains that the said employees were fit to start the cleaning work, and were no longer so, after a while.

Also, the fact that three employees would suffer from similar symptoms, at about the same time, is very telling, and undermines the Defence case that the headache and dizziness could have multiple causes, other than lack of air and/or accumulation of dangerous fumes inside the reservoir.

[1] medical problem. (n.d.) *Segen's Medical Dictionary*. (2011). Retrieved December 16 2022 from https://medical-dictionary.thefreedictionary.com/medical+problem

The Court is of the considered view that the question of whether the other employees (i.e. W6 and the Defence Witness) were taken ill or not, is not relevant to the determination of the present matter.

The Accused Company's failure to have a specific safe system of work, in the circumstances of the present matter, establishes that the Accused had failed to ensure, as far as was reasonably practicable, the safety and health of its employees, i.e. W2, W3, and W4, as a result of which W2, W3, and W4 sustained medical problem whilst working in the reservoir at the relevant place.

<u>No appropriate information, instructions, training and supervision necessary to ensure their safety and health was provided to the employees, as regards the cleaning work which was being carried out for the first time</u>

W1 confirmed that there was a methodology applied in the present matter, inasmuch as the employees were to work on rotation every 15 minutes, but that the said system of rotation was put in place only after the employees had reported that they were smelling a pungent smell.

W2 stated at first that they were instructed before they started the work, to carry out the cleaning work by a rotation every 15 minutes, and then that it was when he reported to Mr Sylvio David that he was feeling dizzy and had headache, that they were told to work in rotation of 15 minutes.

W2 added that he had never cleaned the reservoir in the past and was given no training as to how to clean the reservoir.

W4 stated that he was instructed by Mr Sylvio David to work at 15-minute intervals when he started feeling unwell, and in cross-examination, stated that the said rotation system was in place from the outset.

It was put to the Accused Company that bearing in mind such cleaning work was being carried out for the first time, the employees involved in the cleaning work were not provided with appropriate information, instructions, training and supervision necessary to ensure their safety and health.

The Accused Company explained that instructions were given as regards the confined environment in which the employees would be working in, the employees were instructed to come out of the reservoir at every interval of 15 minutes and to take a break.

The Accused Company further explained that the employees were trained to clean pools and the work methods were the same, the only difference being the environment.

The Court is of the considered view that although W2's and W4's testimony was unclear as to the moment from which the said rotation system was put in place, this does not significantly undermine the Prosecution case, inasmuch as all the evidence on Record clearly establishes that the said employees were instructed to come out of the reservoir and take breaks at every interval of 15 minutes, which was eventually reduced to 05 minutes, which shows that there was supervision.

At no stage was it however disputed that the said employees were given no specific training as to how to clean the reservoir, bearing in mind that it was the first time such cleaning work was being carried out.

Given the cleaning of the reservoir was being carried out for the first time, there was a duty on the Accused Company to give appropriate information, instructions, and training to ensure the safety and health of W2, W3, and W4.

It may be that the said employees were trained to clean pools, but the Court is of the considered view that there was not only one difference, as contended by the Accused Company.

In the present matter, not only was the environment different, but the nature of the work also was different, inasmuch as the employees were meant to clean a reservoir, as opposed to a pool.

The said differences are fundamental and cleaning a pool is by no means similar to cleaning a reservoir, for the following reasons:

1) a pool is usually above ground, in the open, and is by no means a confined space, whereas the reservoir in the present matter is under ground and is a confined space;

2) a pool is cleaned on a regular basis, whereas the reservoir was being cleaned for the first time, thereby meaning that the said reservoir had never been cleaned in the past.

Whilst the Court takes Judicial Notice of the fact that a reservoir having many openings would defeat its very purpose, which is to store water, this difference in environment was the very reason why the Accused Company was under a duty to give appropriate information, instructions, and training to its employees, i.e. W2, W3, and W4, to ensure their safety and health.

At no stage did the Accused Company contend that it was not reasonably practicable for it to provide appropriate information, instructions, and training necessary to ensure the safety and health of its employees, i.e. W2, W3, and W4, as regards the cleaning work of the reservoir which was being carried out for the first time.

Further, whether the employees were working in teams or all at the same time, started suffering from headaches and dizziness or not, whether they so suffered when they were outside, and/or whether it was after 10-20-30 minutes of having started working that they started suffering, in no way detracts from the fact that W2, W3, and W4 were taken ill, with similar symptoms, at a time when they were cleaning the reservoir on the relevant day.

The Court is of the considered view that the contradiction in the Prosecution case and in the Defence case as to whether the employees were under the supervision of Mr Max Opera or Mr Sylvio David, is not significant, and does not undermine the Prosecution case or the Defence case in any way, given the Representative of the Accused Company confirmed that the employees were working under the supervision of Mr Sylvio David on the relevant day.

In light of all the above, the Court is of the considered view that the Accused Company failed in its duty to provide appropriate information, instructions, and training necessary as regards the cleaning work of the said reservoir to its employees, i.e. W2, W3, and W4, the more as given the said cleaning work was being carried out for the first time, and thereby failed, as far as was reasonably practicable, to ensure the safety and health of its employees, i.e. W2. W3, and W4, as a result of which W2, W3, and W4 sustained medical problem whilst working in the reservoir at the relevant place.

Reservoir not adequately ventilated and reservoir not tested for dangerous fumes and to check there was adequate supply of air for breathing

*Ventilation*

W1 explained that the reservoir fell within the definition of a confined space for the following reasons:

1) the reservoir was situated in the plant room, which plant room was situated in the basement;
2) the reservoir had one single point of entry/opening, which was rectangular in shape and measured 90 cm x 60 cm, and therefore had limited means of ingress and egress;
3) by the nature and design of the reservoir, there was an insufficient amount of oxygen inside, and it also allowed for easy collection of hazardous gas inside the reservoir.

W1 also explained that a floating pump powered by fuel was used on the eve, which pump had its exhaust on the casing of the pump itself.

W1 went on to explain that the said pump, whether it burnt fuel by complete [2] or incomplete [3] combustion, had consumed the oxygen inside the reservoir, thereby replacing same by other gases, which might reveal the presence of a hazardous gas.

W2 stated that the water pump was operating for about 02-03 hours in the morning on the eve of the day of the cleaning work, and was in the reservoir for about 01 hour on the relevant day, prior to their entering the reservoir, and that the door to the plant room was kept open since the eve.

W2 went on to explain that although he was coming out of the reservoir at 15 minute-intervals, he smelt burnt fuel inside the reservoir, and he felt dizzy and was suffering from headache.

W2 also confirmed that there was only one opening in the reservoir, with no means of ventilation inside the reservoir.

[2] W1 explained that complete combustion occurred when the pump consumed oxygen and released carbon dioxide

[3] W1 explained that incomplete combustion occurred when the pump consumed oxygen and released carbon monoxide, which is a hazardous gas

W2 added that he thought the door to the plant room was kept open on the eve, and confirmed that the door was kept closed, upon his memory being refreshed.

Further, in cross-examination, W2 conceded that he did not remember whether the door was closed or not.

In cross-examination, W2 confirmed that he was used to going into the plant room, as opposed to the reservoir, and that there was a tunnel which gave access to the plant room, which tunnel was opened on both side, and was large enough for club cars to drive through.

W4 stated that there was only one opening to the reservoir, with no means of ventilation, and that the tunnel was big enough for club cars to drive through.

W7 explained that he had used a pump powered by fuel on the eve in the reservoir, to empty the reservoir, and that the said pump let out smoke, the smell of which stayed, and that the door ought to have remained open.

In cross-examination, W7 stated that the door remained open for more than one night, with the pump switched off, that the tunnel was big enough for two club cars to drive through, and that the plant room was not underground that much.

W6 stated that there was only one opening to the reservoir.

W3 and W4 confirmed that the pump was not used on the relevant day.

The Accused Company explained that the door of the plant room was left open for about 21 hours, which the Accused Company believed was adequate ventilation (Folio 16/0995 of Doc. G), and the Representative of the Accused Company confirmed that the door to the plant room remained open during and after the plumbing for about 20 hours.

The Accused Company also conceded that no system of ventilation was placed inside the reservoir on the eve or on the relevant day, and advanced no reason as to why it was not reasonably practicable for it to provide a system of ventilation in the reservoir.

The Defence Witness confirmed that it was a bit hard to breathe inside the reservoir.

The Court has noted that W2 stated that the pump was in the reservoir for about 01 hour, on the relevant day, prior to his entering the reservoir, and that W2 did not state that the pump was in operation for the said hour.

Further, in cross-examination, W2 confirmed that the pump was used only on the eve of the relevant day.

The Court has read with care the reference made to W2's out-of-Court statement by the Prosecutor, and the Court is of the considered view that the Court cannot determine with any precision whether W2 was referring to the day in question, or whether W2 was explaining that in general, the door to the plant room was closed.

The Court is therefore of the considered view that the evidence on Record in no way conclusively establishes that on the relevant day, the door to the plant room was closed.

Further, the fact that there was tunnel large enough for club cars to drive through, does not *de facto* mean that this provided sufficient ventilation to the reservoir, which was inside the plant room, and which was, by its very nature and purpose, a confined space.

Also, in light of the contradiction in the Prosecution case as to whether the pump was used on the relevant day or not, in light of the testimony of W2 on the one hand, and that of W3, W4, and W7 on the other, there is no way for the Court to determine with certainty whether the pump was used on the relevant day or not.

Be that as it may, the Accused Company itself admitted that no system of ventilation was placed inside the reservoir on the eve or on the relevant day, bearing in mind the said reservoir was a confined space.

The Court takes Judicial Notice of the fact that complete combustion of fuel occurs when there is a sufficient/good supply of air, whereas incomplete combustion of fuel occurs when the supply of air or oxygen is insufficient/poor.

The Court has noted that the Accused Company did take the following steps to try and ensure that the reservoir was ventilated (Folio16/0990 of Doc. G):

1) the pump was operated on the eve of the day on which the cleaning work was to be carried out;
2) the pump was in operation inside the reservoir for 02-03 hours only in the morning of 10-07-15;
3) the pump exhaust was connected to hoses which led outside the basement;
4) the pump was removed from the reservoir;
5) the door of the plant room was left open for about 21 hours; and
6) the cleaning work were scheduled for the following day, that on 11-07-15.

The said steps were, in the Court's considered view, insufficient and merely leaving the door of the plant room, albeit for 21 hours, was clearly not enough to ensure there was an adequate ventilation of the reservoir, for the reasons given below:

1) the pump was in operation for about 02-03 hours inside the reservoir (Folio 16/0990 of Doc. G);
2) the pump burnt fuel, with the direct consequence that the oxygen inside the reservoir was consumed by the pump;
3) the reservoir itself has only one opening measuring 90 cm x 60 cm (photograph (Doc. E1), and hence, physically, only a limited amount of air can go and in out of the said reservoir;
4) the said reservoir was underground (as confirmed by the Accused Company's Representative), and hence, the movement of air to and from the reservoir is limited, unless mechanical means are used;
5) there is no evidence that any mechanical means, such as fans, were used;
6) the door leading to the reservoir from the plant room is a single panel door, allowing only for a limited movement of air from the plant room to the reservoir and vice versa; and
7) the tunnel leading to the plant room, although it is found at ground level and although it measures 2 m x 2.5 m at the East Direction, and 3mt x 2.5 m at the West Direction (Doc. K), the tunnel is quite long, and the West Direction exit cannot be seen from the entrance from the East Direction, and vice versa, and there does not appear to be any mechanical means in the tunnel to encourage the flow of air in the said corridor (Doc. K), which could

potentially have increased the flow of air to and from the plant room, and to and from the reservoir.

The Defence Witness himself confirmed it was a bit hard to breathe inside the reservoir.

The Court notes that W1 mentioned the absence of cross-ventilation in her Report (Doc. H), and explained therein that because there was no cross-ventilation, due to the number of hours the gasoline pump was operating inside the water reservoir, there would be accumulation of dangerous exhaust gases inside the said area, which would not have been evacuated, despite the door of the plant room remaining open.

Although the issue of cross-ventilation was not specifically put to the Accused Company at the time of the Enquiry (Doc. G), this was canvassed in the course of the cross-examination of W1, and the Court is of the considered view that given W1's own testimony that the Law requires adequate ventilation, there was therefore no legal obligation placed on the Accused Company to ensure there was cross-ventilation in the present matter.

At no stage did the Accused Company advance that it was not reasonably practicable for it to do more than was actually done in the present matter.

In light of all the above, the Court is of the considered view that the Accused Company, by failing to ensure the reservoir was ventilated, failed to ensure, as far as was reasonably practicable, the safety and health of its employees, i.e. W2, W3, and W4, as a result of which W2, W3, and W4 sustained medical problem whilst working in the reservoir at the relevant place.

*Testing for dangerous fumes*

As regards testing for dangerous fumes, W1 explained that no test was carried out and no record was shown to her in relation to any such test.

In cross-examination, W1 conceded having carried out no test personally, explaining that by the time the accident was reported and by the time she called at the locus, the reservoir had already been filled with water, but maintained that there could have been production of carbon monoxide.

The Regional Health Director, Health Hospital represented by Dr Nundoo (hereinafter referred to as W5) produced the MCs (Docs. A, B, and C) and the letter from the MOHQL (Doc. D), and conceded in cross-examination that there was no evidence of carbon monoxide intoxication, which intoxication was only suspected, in the present matter.

W5 also confirmed that it was not certain that the symptoms displayed by W2, W3, and W4 were caused by carbon monoxide intoxication, and that the symptoms could have been caused by other medical problems, such as food poisoning.

W2 stated that no tests were carried out, and that he had no vomiting, only headache and dizziness.

W3 stated that he had no vomiting, and then that he was not vomiting too much, and suffered from headache and dizziness.

W4 stated that he had no vomiting, but suffered from headache and dizziness.

The Accused Company conceded that no test was carried out and also explained that following the said incident, its Health And Safety Officer recommended the installation of a carbon monoxide detector inside the plant room of the reservoir and it had taken the decision to contract out the cleaning work of the reservoir to competent companies (Folios 16/0992 and 16/0996 of Doc. G).

In light of all the above, there is no conclusive evidence that W2, W3, and W4 suffered specifically from carbon monoxide intoxication at the relevant time and place.

Be that as it may, at no stage did the Accused Company contend that such detector was not readily available on the local market, or that it had to import it from abroad, and that it was therefore not reasonably practicable for the Accused Company to install such a monitoring system, to test for dangerous gases/fumes, and thereby ensure the safety and health of its employees.

In fact, the very fact that the Accused Company installed such a carbon monoxide detector following the said incident, clearly establishes that it was reasonably practicable for the Accused Company to take such steps at the relevant time.

In light of all the above, the Court is of the considered view that the Accused Company, by failing to test for dangerous fumes inside the reservoir, failed, as far as was reasonably practicable, to ensure the safety and health of its employees, i.e. W2, W3, and W4, as a result of which W2, W3, and W4 sustained medical problem whilst working in the reservoir at the relevant place.

*Check to see whether there is adequate supply of air for breathing*

In relation to any checks to see whether there was an adequate supply of air for breathing, W1 stated in Court that the oxygen deficiency was a fact, then that this could not be confirmed as no tests were carried out.

The Accused Company explained that it had employees who went to the plant room to monitor the water levels, thrice a day, implying thereby that there was adequate supply of air.

This explanation cannot avail the Accused Company of its statutory duty to ensure the safety and health of its employees for the following reasons.

First, there is no indication that the said employees monitoring the water levels in the reservoir thrice daily spend any extended period of time in the reservoir.

Second, the employees cleaning the reservoir went inside the reservoir itself, as opposed to remaining in the plant room.

Third, the cleaning of the reservoir entails some physical exertion or effort on the part of the employees, whereas the monitoring of the water level in principle entails no physical effort or very limited physical effort.

At no stage did the Accused Company contend that it was not reasonably practicable for it to check there was an adequate supply of air in the reservoir, prior to the cleaning work being carried out.

In light of all the evidence on Record and all the factors highlighted above, the Court is of the considered view that by failing to check there was an adequate supply of air in the reservoir, prior to the cleaning work being carried out, in particular bearing in mind that it was the first time such cleaning work was being carried out, the Accused Company failed, as far as was reasonably practicable, to ensure the safety and health of its employees, i.e. W2, W3, and W4, as a result of which W2, W3, and W4 sustained medical problem whilst working in the reservoir at the relevant place.

Was there a competent person who certified that the water reservoir was safe for entry without any breathing apparatus?

W1 deponed to the effect that no apparatus or personal protective equipment (hereinafter referred to as PPE) was given to the employees prior to entering the reservoir on the relevant day.

In cross-examination, it was put to W1 that masks were provided to the employees.

W1 went on to state that this was not reported to her, but that even if masks were provided, they would have acted as a barrier to the supply of oxygen, and that a breathing apparatus ought to have been supplied to the employees in the present matter.

W2 deponed to the effect that he was given a mask, which was similar to a dust mask.

W3 for his part stated that he was given no PPE prior to cleaning the said reservoir, and in cross-examination stated he may have forgotten.

W4 confirmed that he was given a mask.

It was the case for the Prosecution that there was no evidence that a competent person had certified that the water reservoir was safe for entry without any breathing apparatus.

The Accused Company explained that it believed that since workers accessed the plant room thrice daily to monitor the water level, thus it also believed that the workers would be able to work without any breathing apparatus, and in Court, the Representative of the Accused Company explained that all the employees were provided with a mask used for filtration of air at the start of the cleaning work.

A difference is to be drawn between the plant room and the reservoir, in the first instance, and between the nature of the tasks performed in the second instance:

1) the plant room has a proper door leading to it, whereas the reservoir is an enclosed space, with only one opening (Doc. E); and
2) monitoring of the water level from the plant room entails little physical exertion, if any, whereas cleaning a reservoir entails physical exertion.

It can hardly be said therefore, that the conditions in which the employees monitoring the water level worked, were the same as the employees cleaning the reservoir.

At no stage was it advanced by the Accused Company that it was not reasonably practicable for it to have a competent person certify that the water reservoir was safe for entry without any breathing apparatus on the relevant day and/or give a breathing apparatus to its employees, i.e. W2, W3, and W4.

In light of all the above, by failing to have a competent person certify that the water reservoir was safe for entry without any breathing apparatus on the relevant day, and/or by failing to give a breathing apparatus to its employees, i.e. W2, W3, and W4, the Accused Company failed to ensure, so far as was reasonably practicable, the safety and health of its employees, i.e. W2, W3, and W4, resulting in W2, W3, and W4 sustaining medical problem whilst working in the said reservoir at the relevant place.

<u>The risk did not materialise/S. 74 of the OSHA/reasonably practicable</u>

Learned Defence Counsel submitted that in the present matter, there was no charge put to the Accused Company as regards **s. 74 of the OSHA**, which was hence foreign to the present matter.

The Court notes that **s. 74 of the OSHA** relates to the prevention of fire.

Be that as it may, **s. 70 of the OSHA** relates to dangerous fumes and lack of oxygen inter alia in confined spaces, and the Court is of the considered view that although the said section does not set out an offence, it sets out a duty of the employer, and is therefore not foreign to the present matter.

Further, **s. 70 of the OSHA** whilst providing for more specific duties placed on the employer as regards dangerous fumes and lack of oxygen, falls under **Part VI of the OSHA** which relates to the general provisions in relation to safety.

And **s. 5 of the OSHA** relates to the general duties of employers, and **s. 94(1)(i)(vi) of the OSHA** provides that any person who contravenes any other provision of the **OSHA** [4], shall commit an offence.

The Court is therefore of the considered view that **ss. 5 and 94 of the OSHA** bring **s. 70 of the OSHA** under their purview, which is therefore not foreign to the present matter.

Miscellaneous

*Date*

In the course of the Proceedings, the Prosecution referred to the date of 10-07-15 as the date of the incident.

Given the Information mentions that the incident occurred on or about 11-07-15, and as the date of the incident was never put in issue (Folio 16/0989 of Doc. G), the Court is of the considered view that no prejudice was caused to the Defence.

*MCs (Docs. A, B, and C) and the letter from the MOHQL (Doc. D) produced by W5*

The Court has noted that the MCs (Docs. A, B, and C) and the letter from the MOHQL (Doc. D) were all produced by W5.

W5 at no stage stated that he had been deputed to produce the said documents.

Be that as it may, no objection was taken by the Defence to the said Officer producing the said documents, and no objection was taken by the Defence to the said documents themselves, and given the presumption of regularity principle, the Court acts on the basis that the said Officer had been duly deputed to produce the said documents.

[4] i.e. other than the ones listed in **s. 94(1)(a)(b)(c)(d)(e)(f)(g)(h) of the OSHA**

*Temperature inside the reservoir/Intensity of the lighting*

The Accused Company explained that the temperature in the plant room was normal when there was no light, but that because extra lighting was provided, it was a little bit hot inside.

The Accused Company mentioned extra lighting, thereby implying that there was already some lighting in the plant room.

The Defence Witness confirmed that it was hot inside the reservoir, the more so as fog lights were placed inside, and that it was a bit hard to breathe.

It was put to the Accused Company that because lighting was provided inside the reservoir, there was an increase in the temperature inside the reservoir, and that no measurement of the temperature was taken before allowing the employees to work inside the reservoir.

The Court is of the considered view that, although the Defence case was that fog lights were placed inside the reservoir itself, as opposed to the plant room, it is not open to the Prosecution to put the issues of increased temperature and intensity of the lighting to the Accused Company in Court for the first time, as these issues were not invoked by the Prosecution at the time of the Enquiry as to why the Accused Company had failed to ensure the safety and health of its employees, i.e. W2, W3, and W4.

**Conclusion**

In light of all the evidence on Record, all the circumstances of the present matter, and for all the reasons given above, the Court is of the considered view that the Prosecution has proven its case against the Accused Company beyond reasonable doubt, and the Accused Company is therefore found Guilty as charged.

[Delivered by: D. Gayan, Ag. President]
[Intermediate Court (Financial Crimes Division)]
[Date: 24 January 2023]