# OSHI v Dakri Paper And Products Ltd

**2023 IND 42**

**CN12/15**

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

**In the matter of:-**

**Occupational Safety And Health Inspectorate**

**v/s**

**Dakri Paper & Products Ltd**

**JUDGMENT**

As per the amended Information, the Accused Company stands charged with **one Count of Failing To Ensure The Safety, Health And Welfare At Work Of Its Employees, contrary to ss. 5(1) and 94(1)(i)(vi)(3)(b) of the Occupational Safety And Health Act 2005 [Act No. 28 of 2005] (hereinafter referred to as OSHA) coupled with s. 44(2) of the Interpretation And General Clauses Act (hereinafter referred to as IGCA)**.

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 17-09-11, in the District of Black River, the Accused Company did unlawfully fail to ensure so far as was reasonably practicable the safety and health at work of its employees, to wit: one of its employees, to wit: Patrick Pluton

(hereinafter referred to as W4), sustained crushed injury to his left hand when the said left hand got caught in between the inrunning nips of the rotating rollers of a corrugated flexo machine also known as card board making machine, make Han Da machinery Co Ltd, model PS 4282, bearing No. 060523R at its place of work at Geoffrey, Bambous.

**The Defence Case**

The Accused Company denied the charge in its unchallenged out-of-Court statement (Doc. B) 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, including the Authority put in by Learned Defence Counsel.

The applicable Law

Given the present incident occurred on or about 17-09-11, the applicable Law at the relevant time was the **OSHA** as amended as at 2009.

Not in dispute

It was not in dispute that:

1) W4 was employed by the Accused Company at the relevant time;
2) W4 sustained injury to his hand when he was at work at the Accused Company at Geoffroy, Bambous, in the course of his duties when he was working on a flexo machine make Han Da machinery Co Ltd, Model PS 4282F bearing No. 060523R (Doc. B).

The injuries sustained by W4 (Docs. A, A1, and A2) were not put in issue by the Defence.

In light of all the above, it has been established that W4 was employed by the Accused Company and that he was injured at his place of work in the course of his employment on the relevant day.

Did the Accused Company fail, so far as was reasonably practicable, to ensure the safety, health and welfare of its employee, i.e. 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.

The said section therefore places an employer under a statutory duty to ensure, so far as is reasonably practicable, the safety, health and welfare at work of all its employees.

It was the case for the Prosecution that the Accused Company had failed, so far as was reasonably practicable, to ensure the safety, health and welfare of its employee, i.e. W4, as it failed to fence the distance of 30mm between the worktable and the existing guard of the flexo machine, which was the gap through which W4's hand got into contact with the rollers and got injured.

Mr. Shah Abdool Ismet Rohoman (hereinafter referred to as W3) deponed to the effect that a maximum of 03 plies of carton sheets could be processed in the machine at any one time, giving a corresponding height of 18 mm of carton, and that the gap of 30 mm was quite excessive as regards the number of plies which were admitted into the machine, such that the said gap ought to have been guarded to leave a clearance of about 6 mm between the worktable and the lower edge of the guard.

Whilst agreeing that employees did not put their hands in the rollers, W3 explained that the gap of 30 mm allowed for the hand to get into the dangerous part, when an employee was feeding cardboard sheets into the machine.

W3's testimony was not seriously challenged, in particular on the aspect that the standard gap was 6 mm, as a person's finger was about 6 mm, and his testimony as regards the measurements of 30 mm and 18 mm is also supported by the (Docs. C and D).

W4 maintained throughout his testimony that they were not to waste any cardboard sheets, and that they had to flatten the warped cardboard sheets, which was the way the work was usually done.

W4's withstood the test of cross-examination, and struck the Court as a truthful Witness, who deponed in a cogent manner as to how he was meant to do his job.

W1's testimony was of no assistance to the Court, she maintaining in Court not remembering much about the present matter and not having completed the Enquiry in the present matter.

And since W5 said he did not see how the accident occurred, his testimony did not enlighten the Court as to the circumstances of the present matter. That being said, W5, at first stated that any warped cardboard sheet should not be fed into the machine, then that any warped carboard sheet had to be removed and replaced by a flat one, then that the employees should know that they should not remove a cardboard sheet which is warped, and eventually stated that the employees had to struggle with the warped cardboard sheet for it to go through the machine ("fodé comme si dirait zot la guerre ar li pour faire li rentre dans machine"). All these variances leave doubts in the testimony of W5, as to what procedure/s was/were in place at the relevant time, and hence it would be most unsafe for the Court to act on the testimony of W5.

That being said, given the rollers, i.e. the rotating element, were not fenced and hence were exposed, any employee could come into contact with the said rollers.

And the fact that W4 had to apply pressure on the warped cardboard sheets for same to go through the rollers clearly shows that W4 was, in the course of his duties, to manipulate the cardboard sheets which were being fed into the rollers, and hence was exposed to the rollers which were not fenced.

Further, the very rotation of the said rollers heightened the risk the said rollers represented to W4.

This risk was further compounded by the fact that the said machine sucked in the cardboard sheets when the employee was feeding same into the machine.

In light of all the factors highlighted above, the Court is of the considered view that risk the said rollers represented to W4 was foreseeable, given the process which was involved in flattening the warped cardboard sheets, the rotating element, and the suction of the cardboard sheets by the said machine.

Given the tenor of the Defence case, it was not in effect disputed that there was a gap of about 30 mm in which the cardboard sheets were fed into the flexo machine and that there was no guard on the said gap.

It was the case for the Accused Company that fencing was not a "plausible solution" (Folio 92484 of Doc. B) and was not economically viable.

It was advanced on behalf of the Accused Company that the cardboard sheets were sometimes warped, but no indication was given as to the tolerance to be provided for same. That being said, even making allowances for the warping of the cardboard sheets, this height of 18 mm leaves a distance of about 10-12 mm extra (30 mm – 18-20 mm = 10-12 mm) in the said gap.

No explanation/s was/were provided as to the need for these additional 10-12 mm in the said gap.

Surely, a guard of 10 mm would have left a gap of about 20 mm for a maximum of 03 cardboard sheets having a corresponding height of 18 mm to go through the gap of the machine, leaving a tolerance of 02 mm.

Whilst it is true that a hand would still go through a gap of 20 mm, given the safe distance for a hand was 6 mm as highlighted above, the extent to which a hand would have gone through would have been reduced.

The Accused Company, through Mr Nazir Dakri (hereinafter referred to as the Accused Company's Representative), explained that the Accused Company had attempted to reduce the gap in the in-feed but that this caused damage to the machine, and would reduce productivity to only 10% of the machine capacity.

The Accused Company adduced no evidence, other than the testimony of its Representative, to show that the productivity of the machine would go down to only 10%. And the very use of the word "would" shows the lack of concrete basis for such an assessment.

It was also the case for the Accused Company that no guard could be placed, otherwise no product would go through, which would render the Machine useless.

This *reductio ad absurdum* reasoning cannot hold. At no stage was it contended by the Prosecution that the gap had to be fenced completely, such that the fence would act as an obstruction. Rather, it was suggested that a guard had to be placed to reduce the gap to 6 mm, so that a hand would not go through the said gap.

It was additionally advanced on behalf of the Accused Company that the accident occurred due to the sole negligence of W4.

The test, however, is an objective one, and the fault and imprudence of W4 are irrelevant to the determination of the present matter, the test being not the imprudence or negligence of the employee, but whether the system of work put in place by the employer was safe, in light of the principles propounded in the Authority of **DPP v Flacq United Estates Ltd [2001 SCJ 301]**:

> The primordial issue which the learned Magistrate had to decide was whether the particular system of work adopted by the respondent with regard to the cleaning operation of its steam boiler, including its furnace, was safe. The issue was not whether the death of Labiche had been caused by the respondent's negligence or imprudence or whether Labiche had himself been imprudent when he entered the ashtray through the small door. Also, it is not because no serious accident had occurred in the past that a system of work is necessarily compliant with the requirements of the Act.

The Court is alive to the fact that the said Authority of **Flacq United Estates (supra)** was decided under the now repealed **Occupational Safety, Health And Welfare Act 1988 [Act 34/1988]** as it originally stood (hereinafter referred to as **OSHWA**), whereas the present matter is under the **OSHA**.

The Court is however of the considered view that the principles set out in the said Authority apply *mutatis mutandis* to the present matter, as the intent of the Occupational Health And Safety Laws generally, and that of the **OSHA**, "is to ensure the safety of workers and OSHA therefore sets out the responsibilities of the employer in that regard. It is surely also for lessons to be learned to improve safety and prevent deaths." [1], and as the wording of **s. 5(1) of the OSHWA** and that of **s. 5(1) of the OSHA** is identical, save for the headings, which read "Duties for employers" and "General duties of employers" respectively.

Applying the abovementioned principles to the present matter, the Court is of the considered view that the negligence of W4, if any, has no bearing on the determination of the present matter, the issue being whether the particular system of work adopted by the Accused Company with regards to the processing of the cardboard sheets was safe **(Flacq United Estates (supra)**).

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[1] **General Construction Company Limited v Occupation, Safety And Health Inspectorate, Ministry Of Labour, Industrial Relations And Employment [2020 SCJ 40]**

That being said, it is worth noting that W4 had worked on the said machine for many years without any issues, and that other than the version of the Accused Company, it has not been shown in what way W4 was negligent.

Whilst it is clear that the nature of the operation meant that the gap could not be fenced completely, as cardboard sheets had to be fed into the machine, the gap could have been reduced, and a fence would have reduced, if not prevented, the risk to W4.

Further, the fact that there has been no accident before or since does not mean that the system of work in place was safe (**Flacq United Estates (supra)**), and that hence the Accused Company had ensured the safety of its employee, in the present matter W4.

In light of all the above, it is clear that the said gap of 30 mm leading to the rollers, which gap was left unfenced, represented a risk to any employee, including W4, and that hence there was a duty on the Accused Company to ensure the safety of W4, by putting in place an appropriate system preventing W4 from coming into contact with the rollers when the machine was being operated, such as a fence.

As per its statutory obligation, an employer must do whatever is reasonably practicable to ensure the safety and health at work of its employees, and as per **Halsbury's Laws of England – Health And Safety At Work (Volume 52 (2020)) at paragraph 382**, "reasonably practicable" is explained as follows:

> **382. Qualified statutory obligations.**
>
> Obligations imposed by safety legislation are frequently qualified by the words 'so far as reasonably practicable', or 'so far as practicable'. Each of these phrases affects in a different manner the obligation which it qualifies.
>
> 'Reasonably practicable' is a narrower term than 'physically possible' and implies that a computation must be made, before the breach complained of, in which the quantum of risk is placed in one scale and the sacrifice involved in the measures necessary for averting the risk (whether in money, time or trouble) is placed in the other and that, if it be shown that there is a gross disproportion between them, the risk being insignificant in relation to the sacrifice, the person upon whom the obligation is imposed

> discharges the onus which is upon him. The unforeseeability of a risk may be relevant in deciding what is reasonably practicable.

**S. 96(6) of the OSHA** provides as follows:

> In any proceedings for an offence under any provision of this Act consisting of a failure to comply with a duty or requirement to do something so far as is practicable or so far as reasonably practicable, or to use practicable means or to take practicable steps to do something, it shall be for the accused to prove that it was not practicable or not reasonably practicable to do more than was in fact done to satisfy the duty or requirement, or that there was no better practicable means or step than was in fact used or taken to satisfy the duty or requirement, as the case may be.

In light of all the evidence on Record, the Court is of the considered view that the accident was a foreseeable one, and that whilst it is clear that the Accused Company did try to take remedial actions following the said accident, given the circumstances of the present matter and all the factors highlighted above, the Court is further of the considered view that the Accused Company has not shown that it had done all that was reasonably practicable to ensure the safety and health at work of its employee, i.e. W4, has placed no evidence on Record to prove that it was not reasonably practicable to do more than was in fact done to satisfy its duty, and hence has not proven on the Balance of Probabilities that it was not reasonably practicable to do more than was in fact done to satisfy its duty, pursuant to **s. 96(6) of the OSHA**.

In light of all the evidence on Record, all the circumstances of the present matter, and all the reasons given above, the Court is of the considered view that it has been established that the Accused Company failed to ensure the safety at work of W4, and hence failed to comply with its statutory duty pursuant to **s. 5(1) of the OSHA**.

<u>Miscellaneous</u>

*Wilfully*

It was put to the Accused Company that the Prosecution case was that the Accused Company had wilfully and unlawfully failed to ensure so far as was reasonably practicable, the safety and health of W4, but the Information was amended *inter alia* to delete “wilfully” on 11-08-2020.

Be that as it may, no prejudice was caused to the Accused Company thereby.

*Machine model*

As per the amended Information, the Model mentioned is “PS4282” whereas the model mentioned in the out-of-Court statement of the Accused Company (Folio 92484 of Doc. B) and the Report (paragraphs 3, 6, and Annex I of Doc. D) is “PS 4282 F”.

Be that as it may, the model of the machine was not made a live issue in the course of the Proceedings, and this variance has no bearing on the determination of the present matter.

*Machine still in use?*

As per Mr. Mohammad Ryan Joomun (hereinafter referred to as W2)’s Report (paragraph 5 of Doc. C) and testimony, the said machine was no longer being used by the Accused Company since 30-10-13.

This was disputed by the Accused Company, which maintained that the said machine was still in use, and that there had been no accident on the said machine before or after the said accident.

This has little, if any, bearing on the determination of the present matter.

The mere fact that no other accident has occurred does not necessarily mean that the system of work is a safe one, as highlighted above (**Flacq United Estates (supra)**).

**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 finds 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: 12 July 2023]