OSHI v Canaye L.

2022 IND 42

Cause Number 52/19

In the Industrial Court of Mauritius
(Criminal side)

In the matter of:

OSHI

v.

Lutchmansing Canaye

Ruling

Accused being an employer is charged under Section 5(1) and Section 94(1) (i) (vi) of the Occupational Safety and Health Act 2005 – Act No.28 of 2005 with unlawfully failing on or about the first day of July 2014 to ensure so far as is reasonably practicable, the safety, health and welfare at work of its employees namely by having failed to ensure that the sliding gate was properly secured as a result of which the said sliding gate fell on one of its employees namely one Sushdeo Mahadoo at his place of work at Riambel when he sustained a depressed fracture of his skull and subsequently passed away. The Accused pleaded not guilty to the information and was assisted by Counsel.

The case for the Prosecution unfolded as follows:

The Prosecutor has produced - (a) the death certificate of Mr. Sushdeo Mahadoo, witness no.2, aged 47 years, having as occupation Watchman and his date and time of death being 1.7.2014 at 7.10 hours as per Doc. A; (b) the postmortem report of the deceased drawn by Witness no.4, Dr. S.K.Gungadin, wherein the cause or probable cause of death was a depressed fracture of skull as per Doc. B.

Witness no.1, Mr. Pradeep Bhowany in his capacity as Acting Chief Occupational Safety and Health Officer was being examined in chief in Court.

He stated that in the year 2014, he was working as Divisional Occupation Safety and Health Officer at the Ministry of Labour and was posted at the accident unit. His responsibility was to carry out investigations and to enquire into accidents at places of work and he reckoned 20 years of experience then.

In that year, he was in the accident section and he enquired into the death of Mr. Sushdeo Mahadoo as main enquiring officer.

In the course of his investigation, he did the following:

1. He took 2 sets of four photographs on 2 different dates at the place of the accident. The first one was taken by him on 2 July 2014 as per Doc. C (C1-C4) while the other was taken on 23 April 2015 as per Doc. D (D1-D4).

2. He recorded 3 statements from the Accused dated 2 & 4 July 2014 and 25 April 2019 under warning as per Docs. E, E1 & E2.

Following his investigation, he made a report dated 22 February 2018 wherein he put the facts and his conclusion and which he signed and stated that all what he said therein was correct.

When he was at the point of producing his report, learned Counsel for the Defence objected to the reading and production of his report on the grounds given below:

(i) The opinion evidence of this witness cannot be admissible unless he is an expert as he is giving expert evidence.

(ii) The Court is the trier of facts to determine whether any expert evidence or testimony or report is warranted in the present situation.

(iii) The witness is the investigating officer. He can depose as to what he has perceived, seen or observed on the material dates and time.

The matter was fixed for arguments.

The main thrust of the argument of learned Counsel for the Prosecution is that the report as well as the evidence of Mr. Bhowany on this issue is admissible.

He was a Divisional Occupational Safety & Health Officer and now is the Chief Occupational Safety & Health Officer. He gave evidence in chief that he has had considerable number of years of experience in the matter and his scheme of duties include investigating accidents at work and as such he is an expert. The purpose of an expert is to provide the Court with the benefit of his knowledge so that he may assist the Court in reaching a proper conclusion. His practical experience has been established but the weight to be attached is to the discretion of the Court. She relied on the Supreme Court case of **Pointe aux Piments Multipurpose and Agro Mechanical Co-operative Society Ltd v New India Insurance Co. Ltd** [2016 SCJ 20] where it was held that a witness may give opinion evidence on matters which are within his field of expertise.

The main thrust of the argument of learned Counsel for the Defence is that the witness can give admissible evidence of those facts which he has personally perceived and he cannot give evidence as inference which he has drawn from those facts.

Only as an exception, only an expert witness can give evidence as to his opinion or inference which he has drawn on certain facts. A witness cannot give evidence on inference which he has drawn as the Court itself is the trier of facts. It is trite law that if the Court can make its opinion from evidence, then it is not necessary for a witness to give any inference or opinion.

Mr. Bhowany is not an expert witness, he is an investigating officer. What is his opinion or observation is not admissible at all. It would be admissible if he were an expert in the field. It has not been established that he was going to give his observations as to what the enquiry has revealed.

Learned Counsel for the Prosecution replied that the witness is an experienced investigator in the matter and that he observed personally the gate in question which fell on the deceased. He produced the photographs he took to that effect. He examined the mechanical workings of the gate and his knowledge will benefit the Court in terms of the mechanical workings of the gate. He had years of experience in investigating such kinds of accident.

Learned Counsel for the Defence further replied that years of experience does not make someone by this element an expert witness especially in a technical matter of a sliding gate consisting of two flaps and from where the witness has acquired this expertise, has he a study of that issue or he got a training in that field.

I have given due consideration to the arguments of both learned Counsel.

The practical experience of Mr. Bhowany as an investigator for the purposes of his enquiry is questionable in the specific present field of an accident caused by a two-flap sliding gate inasmuch as after having taken a first set of photographs on the following day of the accident, he deemed it proper to take another set of photographs about nine months later which by any stretch of one's own imagination can reflect the state of that gate at the time the accident took place.

Based on those two sets of photographs only, he made a report dated 22 February 2018 which is about 4 years after the accident occurred and which contained his observations and conclusion by certifying that they were correct and thereafter recorded a last statement from the Accused in the year 2019 meaning about 5 years after that accident. He would have been expected on the day he attended to the locus of the accident which was the following day it happened, to have located the spots where the deceased body was found in the presence of the employer and any witness, where the gate fell on the deceased and its distance from where it was supposed to be among others. Thus, he ought to have taken both sets of photographs on the same day and then to record his observations on them in his report.

The long lapse of time between the two sets of photographs taken of the two - flap sliding gate on the basis of which he gave his opinion meaning his conclusion in his report in relation to the charge is devoid of a proper factual background on the

basis of which he can give his opinion as an expert meaning his conclusion on what he has observed and as such is not admissible.

Now, the point that calls for consideration is whether the practical experience of this witness alone can make him an expert so that he can give his opinion in the form of his conclusion as to what he has observed as highlighted in the 2 sets of photographs. Based on his practical experience alone, the Court will be deprived of a proper scientific basis in order to test the accuracy of his conclusion as he is not an expert in the law of Physics or in Engineering as he does not hold an academic qualification in either subject. The witness will not be able to give relevant evidence, for example, as to what could have caused that sliding gate to fall on the deceased in the sense that whether it could be attributed to an amount of force or velocity causing an impact on the possible loosening of the connecting flaps of the gate, mechanical disfunction, very windy conditions and the margin of friction for the flaps to be able to maintain their stability.

Thus, such deficiency in the factual foundation for him to give his opinion as an expert in his report is far from being demonstrable of practical knowledge and skill on the subject at hand on his part.

At this stage, I find it appropriate to quote an extract from the Supreme Court case of **State v Jean Desire Huberto Charles** [2012 SCJ 418] which reads as follows:

"Before a witness can give his opinion as an expert, it must be shown that he has some knowledge over and above the knowledge that an ordinary person may have on the subject at hand. At this stage, two aspects have to be stressed:

[1] The knowledge that we are concerned with must be specifically in the field which is being considered by the Court for the purposes of the particular case that is being dealt with. It is not sufficient that the person has the extra-knowledge required in a general field of study or in a connected field or in a related field.

[2] The extra - knowledge referred to can take the form of academic studies done by the witness as demonstrated by the qualifications that he holds. However, academic study is not the only criterion on which we can base ourselves in determining whether the witness can give his opinion evidence. The witness may have acquired extra knowledge on a subject through practical experience in the

matter over a period of time. At the end of the day, the test is whether the witness can show that he has demonstrable practical knowledge and skill on the subject at hand. If it is shown that the witness does not have such demonstrable knowledge and skill, then his opinion ought not to be received. This is so because he is not to be considered as having the specialisation which would qualify him as an expert. On the other hand, if the witness can show that he does have such demonstrable skill and knowledge, then there is no bar to his opinion being received."

Thus, it is abundantly clear that had the witness given his observations only in his report as regards the photographs taken by him in the course of his investigation, such observations would have been admissible and would have benefited the Court. But by giving his conclusion as to what he has observed, that would be tantamount to giving opinion evidence and for that purpose practical experience alone will not suffice as an academic qualification is also required in that specific field.

As an enquiring officer investigating into the cause of the accident, Mr. Bhowany would have been expected to be accompanied by another Health and Safety Officer who held an academic qualification in engineering entailing a deep knowledge of the law of Physics coupled with practical experience in that specific field of sliding gates. Thus, both being present on the locus of the accident on following day it occurred, he would have been expected to take the two sets of photographs on that day itself in the presence of the other witness and on the basis of which Mr. Bhowany would have made his observations only in his report as regards the photographs taken by him namely by explaining them and that other officer would witness the taking of those photographs and would have then made a report as to his opinion as to what was observed by Mr. Bhowany. In that manner both reports would have been admissible.

Therefore, such opinion evidence in the form of a conclusion in the report of Mr. Bhowany as to what was observed by him in relation to the facts cannot be allowed as it would encroach on the ultimate issue to be determined by the Court namely whether the Accused has failed to ensure so far as is reasonably practicable the safety, health and welfare at work of its employees (see- **State v Jean Desire Huberto Charles** [2012 SCJ 418]). This is because he will not be able to say as to whether the cause of the fall of the sliding gate was because it was not properly secured or there was an alternative scientific explanation in that respect being outside his field of expertise (see- **Pointe aux Piments Multipurpose and Agro**

Mechanical Co-operative Society Ltd v New India Insurance Co. Ltd [2016 SCJ 20]). Demonstrably enough, he cannot be considered as having the specialisation which would qualify him as an expert to give his opinion on these issues.

For all the reasons given above, I uphold the objection taken by learned Counsel for the Defence.

S.D. Bonomally (Mrs.)
(Vice President)
12.8.22