OSHI v Avipro Co Ltd

2024 IND 50

Cause Number 137/22

In the Industrial Court of Mauritius
(Criminal side)

In the matter of:

OSHI

v.

Avipro Co Ltd

Judgment

Accused being an employer is charged under Sections 5(1) & 94(1) (i) (vi) of the Occupational Safety and Health Act – Act No.28 of 2005 coupled with Section 44(2) of the Interpretation and General Clauses Act- Act 33 of 1974 with unlawfully failing on or about the 17th day of September 2020 to ensure so far as is reasonably practicable, the safety and health of its employees at work when one Kressoon Lillmond sustained trauma to his neck when boxes fell from a metal trolley on him while he was removing the same metal trolley from the blast room at its place of work at Pont Fer, Phoenix.

The Accused was represented by Mrs. Hibah Golamaully-Abdulrahman in her capacity as Human Resource and Talent Manager who pleaded not guilty to the information and was assisted by Counsel at its trial.

The particulars of the charge which is the case that the Defence has to meet as per the information were provided for by the Prosecution upon request of the Defence viz. Doc. A are as follows:

1. *Two metal sheets were placed on the said floor by the employees as management did not provide any other means to facilitate movement of metal trolleys on the damaged floor.*

2. *The metal trolley when fully loaded weighed around 170 kg.*

3. *The metal sheets so placed were uneven and constituted a tripping hazard.*

4. *The floor of the corridor in the blast section was damaged since 4 years and management was informed of the difficulties encountered by the employees regarding same on several occasions and this matter was also raised during safety and health committees held on 25.6.2020, 5.8.2020 and 29.9.2020 but no action was taken.*

5. *The flooring of the corridor where the blast rooms are located has been repaired after the accident that is on the 12th October 2020.*

Miss M. Rosunee in her capacity as Occupational Safety and Health officer, who gave evidence in Court, enquired into an accident at work which happened on 17 September 2020 at the processing plant of Avipro Co Ltd at Pont Fer, Phoenix, on the floor of the corridor where blast room nos. 1 and 2 are located, whereby Mr. Kressoon Lillmond, Factory Attendant, sustained trauma to his neck as per the medical certificate produced (Doc. B).

She stated that the blast rooms were being used for the storage of food products. There was a metal trolley consisting of shelves which was being used to store the products in different boxes and each box weighed 10 kg. When the trolley was fully loaded, it weighed about 170 kg. The floor of the corridor of the blast room nos. 1 and 2 was damaged and there were metal sheets which were placed on that floor to facilitate the factory worker to be able to pull the trolley out of the blast rooms and the metal sheets which were placed on that floor represented a tripping hazard.

During her enquiry, she took 5 photographs on 1.10.2020 which she bound in a booklet with explanatory notes as per Docs. C1 to C5. A Defence statement was

recorded under warning from Miss. Arunachellum Irisan, Safety and Health Officer, duly authorized by the Director, on behalf of the accused company as per Doc. D on 5.2.2021. She received copies of the minutes of proceedings of the Safety and Health committee meetings dated 25.6. 2020, 5.8.2020 and 29.9.2020 from the Accused employer as per Docs. E, F and G respectively.

As per her enquiry, Mr. Kressoon Lillmond, the Factory Attendant, was required to remove the metal trolleys from the blast rooms and each trolley consisted of 10 boxes giving a total weight of 170 kg. While removing the 5th trolley from blast room no.2, his right foot knocked against the edge of the metal sheet which was placed on the damaged flooring of the corridor. Then, he lost balance and fell on the ground and at the same time the trolley together with all products which were stacked on it also fell on the ground. The flooring of the corridor of the blast rooms had been damaged for four years and as per information obtained, Management was well aware of it. There were no remedial actions which were taken before the accident.

The employee who got injured was removing the trolley alone and it all depended on the products that were being stacked on the trolley. He could pull the trolley by himself alone or he could have the help of another person to remove the trolley. But in any case, when the trolley was being removed, its wheels would have had to pass through the metal sheets on the day of the accident as the floor was already damaged. Without the metal sheets, the wheels of the trolley would not have been able to move on the floor.

In order to prevent the accident from happening, Management should have ensured that the floor was maintained and was in a good state of repair. She received an accident investigation report dated 18.9.2020 carried out by Miss. Arunachellum Irisan which was communicated to the Ministry (Doc. H). As per that report, the damaged floor was icy. As per that officer's recommendation, the prevention of ice formation on that corridor and the reparation of holes found therein were necessary to prevent a trolley or a box from overturning.

The statement from the injured person was recorded but she could not recall all the elements gathered on that day. Mr. K. Lillmond having worked as Factory Attendant for more than 20 years for Accused, it would be fair to say that he was an experienced employee. He explained to her that he received from Accused all the required safety equipment namely a padded overall jacket with hood, trousers,

gloves and anti-slip safety boots. At the time of her enquiry, she observed that the wheels of the trolley were in good working conditions. The floor was roughly damaged overall and there was the presence of ice. It was damaged completely so that it was rough everywhere and uneven. Because of the damage there was the need to put metal sheets on the floor for the workers to be able to push the trolleys. That Factory Attendant had to pull about 170 kg of products on the trolley. Even in the absence of metal sheets, he would not have been able to push the trolleys as the wheels would have got stuck on the damaged floor so that it was not just a question of slowing down the work of the worker.

When she interviewed Management, she was explained that repairs were scheduled and that they were waiting for a specific product. The said product had to be imported and it was delayed due to the Covid-19 pandemic. Management confirmed in its statement that the repairs had to be completed by 12.10.2020. The said metal sheets were not provided for by Management. It was Mr. Lillmond himself together with his other colleagues who out of their own volition decided to install the metal sheets on the floor and they stated that it was done to facilitate their task while sliding the trolley as there was no alternative provided to them. Had there been no metal sheets on the damaged floor, they would have had to be more cautious and there would have been issues as the wheels might have got stuck on the damaged floor. Even there, it was an unsafe condition for the injured person to pull out the trolley on a damaged surface.

During her enquiry, she did not measure the thickness of the metal sheets, but measured only their lengths and widths. She admitted that the presence of ice had nothing to do with the accident. At the time of the accident, he was working alone and she did not agree that he was supposed to work in pairs. Even if the workers would have worked in that way, she did not think that the accident would have been prevented. Because the workers had to go through the metal sheets, there would have been the probability that the employee was not against the metal sheets while pushing the trolley thoroughly. Even if the workers would have been working in pairs, it was still an unsafe environment. She did not agree that Mr. Lillmond tripped and fell down because he and his colleagues had placed the metal sheets and not the accused company was at fault.

Mr. Kressoon Lillmond, the Factory Attendant, gave evidence in Court. He had been working for the accused company as Factory Attendant for about 26 years.

Although two persons had to get in the blast room, the pulling of the trolley was done by only one person. The accused company instructed him to work in pairs and on the material day, he had a partner working namely one Preetam Burtoo. Both of them were working on the trolley on the day of the present accident. His Supervisor who gave him instructions to work, was Mr. Lindo Perumal and there was a schedule of work in place. On the material day, there were about 200-250 trolleys to remove and it was routine work. In the corridor of the blast room, the presence of ice ceased and the trolley rolled on the floor causing big holes and forming a canal. They had to put a metal sheet to go through that floor. On the material day, while he was pulling the trolley, the metal sheet rose and his foot got entangled and the trolley fell on him. The state of the floor on that corridor where the blast room was found was very bad as there were holes everywhere, caused by ice which eroded the cement floor of that corridor. There were 2-3 canals at several places on the corridor of about 2- 2.5 inches deep. Then, he stated that all over the length of that corridor of about 20-25 meters long, there were canals. There were holes in the middle near the door of the blast room no.2. It was not easy for him to remove that trolley as the floor was damaged. There was a metal sheet that he and his colleagues placed on that corridor and not the accused company. They had to do so as the wheels of the trolley would not have been able to roll on the holes. He informed Management on several occasions that the floor was in a bad state and that it was difficult for the trolley to roll on it. The Accused had to take its time as on ice the cement would not work. The floor had been in that state for months. His Superiors were aware that he put a metal sheet on that floor for the trolley to roll on it. Those Superiors did not tell him that it would have been more dangerous to have put the metal sheet on that damaged floor in order for the trolley to roll on it. Management allowed them to work with that metal sheet on that floor until he got injured. There were other workers in that corridor who skidded but they were not injured. They skidded when they rolled the trolley on that metal sheet but they did not fall down. There were no incidents in relation to that metal sheet having to do with the trolley in that corridor. They did complain that it was difficult for them to work in that corridor given the state of the floor. He conceded that given that he had been working for the Accused for about 26 years, he was an experienced worker and did not do that job for the first time. He agreed that Accused gave him all safety equipment to do his work and he was wearing the safety equipment on the material day, meaning he was wearing a pair of boots, gloves, trousers and jacket with hood. The boots were anti-slip ones. He was given training in terms of health and safety by the accused company. On the day of the accident, he started working in blast room no.1 and he removed trolleys and

when he finished, he decided to go to blast room no.2 and started removing trolleys which were full of products. He agreed that the Accused told him that while doing that job, he needed to do it in pairs. On the day of the accident, the 2 metal sheets were already present on the floor. He admitted that he together with his other colleagues looked for 2 metal sheets and placed them on that floor as the Accused did not give them any means to facilitate their work. He never received any instructions to that effect from the Accused but his Superiors were aware of that fact. With the little damage to the floor, it was a bit more difficult for the trolley to pass and the metal sheets were placed where the holes were found. He probably did his 5th trip prior to the accident. That was a work routine. He used to do that job. The system of work was like that. He was aware that he had to take precautions when reaching the level of the metal sheets. He did say earlier that those metal sheets were put on the floor to facilitate his job. He accepted that had there not been the presence of those 2 metal sheets on the damaged floor, he would not have tripped and the accident would not have happened. He conceded that had he worked in pairs, the accident would not have happened. But he said that the accident did not happen on a 100% basis because of his fault.

The case for the Defence rested on the evidence given in Court by Miss. Arunachellum Irisan in her capacity as Health and Safety Officer. Her responsibilities were regular inspection on the work place, to recommend to Management of improvement to be done in terms of health and safety and to organise and to interpret training programs for the personnel. Mr. K. Lillmond was supposed to move trolleys from the blast rooms in general to the floor for packing section and to be delivered to the clients. It was one of the main jobs that he did. He had been doing that kind of job for many years since he was employed by the Accused.

When removing the trolleys from the blast rooms, instructions given to factory attendants like him, came after the reassessment had been done. The load of the trolley containing the products was quite significant. So, one of the instructions given to the personnel was to move the trolley in a pair meaning two persons always moving the trolleys out of the blast or the cold room. That was because of the significant load and one person could not handle on his own that kind of task. Mr. Lillmond was aware as there were different awareness sessions done to him together with his colleagues who were supposed to be working together and even his Supervisor was aware of the same. On the day of the accident, she presumed that Mr. Lillmond did not work in pairs as when he fell, his colleagues who were supposed

to be working together with him in the corridor, found him lying on the ground. Had he followed the instructions given by the accused company, during the movement itself, when he was pushing the trolley, his colleagues should be on the other hand and if ever, he lost his balance, his colleagues would have controlled the balance on his part. The accident would not have happened if he had followed the instructions. The protective equipment started with a hood for the head protecting against the cold with a jacket and trousers protecting against the cold. Boots were provided and were toe cap boots meaning they were protected at the toe in case of falling objects and they were slip resistant. The worker wore gloves when doing those kinds of job and he was working with all those equipment at the time of the accident and he still did. Health and safety trainings were given to him. The training was given once a year which was a formal one otherwise there were informal ones done once or twice every 2 months or even more at times.

Following the accident, she did an enquiry as regards the metal sheets. Regarding the circumstances of the accident, it was discovered that the door of the blast room was damaged. The floor was damaged at the edge of the corridor and there was ice on the floor during the work. Because metal sheets were found there on that floor, he slipped and fell. She believed that he and his colleagues together put the metal sheets there in order to facilitate the movement of the trolley during that particular hour. Had he not placed the metal sheets, his feet would not have knocked against them and the accident would not have happened.

The blast room concerned was next to the left of the corridor and the damaged part of the floor was to the right, to the edge of the corridor near to the drain. There was the drain there and that was where the damaged floor was namely at the complete edges of the right.

The accused company could not repair the floor immediately with similar cement that was available on the local markets. It was a particular product that the company used because of the cold and they worked as up to negative 40 degrees Celsius in that zone. It would create much more damage to the floor and there were not enough adherents and that was why the company used that particular product named Degadur which it dried in the event and settled in the ground. That product was not a local product and the company needed to import it by a supplier. Because, we were deep in the Covid 19 Pandemic during the lockdown and the border was closed, the Accused had to chase the supplier to bring the product, the cement product to England to be able to use it for the repair and it arrived around October.

Due to the Covid 19 Pandemic, it was difficult to import products as it was taking more time because the border was closed on both sides. Even after the border was opened, there were still delays as the product came from Germany and it was difficult to negotiate with them. The product arrived on 10.10.2020 just one month after.

Remedial actions were taken as now a breaker was no longer used to break the ice in the cold room area. A specific product named Ice Melter which was like a salt was used and spread on the floor manually. The ice would melt and the floor was prepared before the teams entered to remove the product. That type of task was done every 3 hours of the day although there was no one entering the corridor as there was still a checklist in place. The corridor was regularly checked. She then admitted the contention of the Occupational Safety and Health Inspectorate that the accused company has failed to ensure so far as it was reasonably practicable the safety and health of Mr. K.Lillmond.

She had been a health and safety officer at Accused for 3 years. She was well aware of the state of safety and health at that company. She drew a report with her findings and recommendations on 18.9.2020. She could not say for how long the corridor was in a damaged state as at 17.9.2020. It was approximately 3 months. The floor was damaged only at the edge and not in the middle. The edge of the corridor was damaged, the blast door was damaged and there was ice on the floor. It was not a safe condition for the employees. She did inform Management about the same. They tried the maximum to remove the ice during the operation with a breaker and the Supervisor ensured that they did the task in pairs because at the time of the accident, there was a moment when the person was all alone. So, now there was a strict supervision that both workers should be in the corridors. Mr. Lillmond was all alone and his co-worker was outside. If sufficient supervision was provided the accident could have been prevented. At the health and safety committee, the point was already raised about the corridors. She was aware that the metal sheets were placed on the corridor. She did not carry a risk assessment as to whether the metal sheets were safe on the corridor. She did not inform the workers that using the metal sheets could render the corridor unsafe. The corridors could have been safe had there been 2 persons and apart from that there was no other option or means. The metal sheets rendered the work condition unsafe.

I have given due consideration to all the evidence put forward before me and the submissions of learned Counsel for the Prosecution and Defence. The extent of the damage caused to the floor of the corridor of the blast rooms as revealed by both

Prosecution witnesses namely completely damaged everywhere, so that its surface was rough overall with holes even in the middle, are diametrically opposed to the extent of the damage as revealed by the Defence witness which was slight and mainly at the edges at the right. There was no report produced by the enquiring officer on behalf of the Prosecution in relation to the present charge of 17.9.2020 establishing why that system of work was unsafe and what remedial action ought to have been carried out although Mr. Kessoon Lillmond reckoned about 26 years of experience at Accused company in the removal of trolleys from blast rooms through the said corridor. Therefore, she was giving opinion evidence not in her capacity as an expert and on which I am not prepared to act upon.

Further, there was no report from a Mechanical Engineer who has been to the locus proximate enough with the present accident when the photographs were taken by that enquiring officer and which were shown to him so that there were further photographs taken by that expert at the site of the accident, and where in the report of that Mechanical Engineer, it was concluded by him following his reasons given as an expert that a safe system of work was not provided by the Accused and his suggestions for remedial action to be taken.

It is significant to note that the present charge as per the particulars provided by the Prosecution to the Defence as per Doc. A. supported by the unrebutted evidence given by the said two Prosecution witnesses, has nothing to do with the presence of ice which caused the floor to get damaged as per Accused's representative's admission, but it was the presence of 2 metal sheets on the damaged parts of the floor and to which the Accused was privy, instead of having them repaired, which allegedly rendered the metal surface where the fully loaded trolleys were to pass, uneven giving rise to tripping hazards.

Therefore, the case that the Defence has to meet is not that the presence of ice rendered the system of work of Accused unsafe as it caused the floor to get damaged, but the presence of metal sheets on the damaged parts of the floor instead of having the said floor repaired that rendered the system of work to be unsafe. Thus, the Accused's representative's admission in line with Doc. D as regards the damaged state of the floor caused by the presence of ice has no bearing with the present charge.

The real evidence namely the photographs taken by the enquiring officer, Miss M. Rosunee, on 1.10.2020 as per Docs. C (C1 to C5) does not reflect the extent of the damage to the floor of that corridor proximate enough with the accident as the 2 metal sheets have not been uncovered to expose same.

Further, the enquiring officer, did not measure the thickness of the metal sheets whereby one of which knocked against the right foot of Mr. K. Lillmond with the passing of the trolley on one of them.

It is not contested that Mr. Lillmond was an experienced Factory Attendant doing that kind of job *ad nauseam* for about the past 26 years at the Accused company which abundantly show that he did not need supervision. Indeed, he admitted that he together with his other colleagues provided for the 2 metal sheets to facilitate their work at Accused and for which he was not questioned by his Superiors when brought to their knowledge. But the workers were provided with protective equipment like anti slip boots, gloves, jacket with hood and trousers and Mr. Lillmond was wearing all the protective equipment at the material time.

Now, none of the Prosecution Witnesses produced a report in his or her capacity as expert, to the effect that –

1. because of the extent and place of the damage to that floor, the placing of the 2 metal sheets of thickness unknown on it for the easy movement of fully loaded trolleys of weight of about 170 kg each, rendered the system of work of Accused unsafe by reason of the surface of the 2 metal sheets becoming uneven leading to tripping hazards;
2. working in pairs would have prevented the accident from happening;
3. the wheels of the trolley would have got stuck on the damaged parts of the floor should the metal sheets not been placed on them;
4. to conclude that such a system of work was unsafe and was the cause of the present accident let alone that there was no expert Report emanating from a Mechanical Engineer for that purpose.

Thus, I find that the Prosecution has fallen short of discharging its burden of establishing its case beyond reasonable doubt that the system of work adopted by Accused was unsafe in the context of the present particularized charge that the Accused has to meet as exemplified in the case of **The DPP v Flacq United Estates**

Ltd [2001 SCJ 301] where the Supreme Court had this to say in relation to a breach of Section 5(1) of the Occupational Safety, Health & Welfare Act 1998 (similar to the above Section 5(1) of the Occupational Safety and Health Act):

"(…) Section 5 of the Act indeed provides for the duties and responsibilities of an employer towards his employees. One of the primordial duties expressly set down in the law is that of ensuring the safety, health and welfare at work of the employees.

The primordial issue which the learned Magistrate had to decide was whether the particular system of work adopted by the respondent (…) 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." (**emphasis added**)

Likewise, in **Talbot Fishing Co Ltd. v Ministry of Labour & Industrial Relations (Occupational Safety and Health Inspectorate)** [2006 SCJ 76], the Supreme Court held that it was for the Prosecution to show that the Accused employer *"had failed in its duty under the Act"* meaning imposed upon it by section 5 which is a failure to ensure the health and safety of its employees at its workplace as provided by its system of work and not whether the worker was in some manner also liable.

The Prosecution has not been successful in establishing that the trauma injury sustained by Mr. K. Lillmond at the material time (in line with the medical certificate produced viz. Doc. B) was the result of an unsafe system of work adopted by Accused in the absence of conclusive evidence in relation to the degree and place of the damage to the said floor because of the contradictory versions of the 2 Prosecution witnesses when gauged with the version of the Defence witness and the unrevealed damage *ex facie* the photographs produced which lend support to the version of the Defence that the floor was only damaged at the edges on the right and the absence of expert evidence to establish that the placing of 2 metal sheets on such damaged parts would have caused the surface of the metal to become uneven when a fully loaded trolley of about 170 kg would have passed on it causing the worker's foot to trip or to knock against the edge of the metal sheets or to get entangled with them in spite of the fact that Mr. Lillmond, the injured worker, was

wearing a pair of anti-slip boots covering his toes at the material time let alone that the thickness of the metal sheets and the amount of damage underneath them if any, have remained unknown (*vide*- **The DPP v Flacq United Estates Ltd [2001 SCJ 301]**).

For all the reasons given above, I am unable to find that the Prosecution has discharged its burden laid upon it beyond reasonable doubt so that the Accused would then have been expected to be exempted from liability, should it then have established on a balance of probabilities that it was not reasonably practicable for it to comply with such *"duty under the Act"* (see - **Talbot Fishing(supra)**).

The information is accordingly dismissed against the Accused.

S.D. Bonomally (Mrs.) *(Vice President)*
30.9.24