

OSHI v Gamma Civic Construction Ltd

2023 IND 76

Cause Number 99/2009

**In the Industrial Court of Mauritius
(Criminal side)**

In the matter of:

OSHI

v.

Gamma Civic Construction Ltd

Ruling

Accused being an employer is charged under Section 5(1) and Section 74(1)(h)(vi) of the Occupational Safety, Health and Welfare Act – Act No.34 of 1988, coupled with Section 3(b) of the Occupational Safety, Health and Welfare (Amendment) Act – Act No.32 of 2002 with wilfully and unlawfully failing on or about the 24th of June 2004 to ensure so far as is reasonably practicable, the safety, health and welfare at work of its employees as a result of which two of its employees namely late Narajh Hurchand and one Louis Herrisson Matombe respectively sustained injury when they fell from the lorry box of a moving vehicle bearing registration number CB 1212 at Albion and consequently late Narajh Hurchand passed away on 25 June 2004.

The Accused represented by Mr. Feroze Abdool Emamboccus in his capacity as Health & Safety Officer pleaded not guilty to both counts respectively and was assisted by Counsel.

Learned Counsel for the Defence made a motion to the effect that the present matter be permanently stayed forthwith on the ground of abuse of process for unreasonable delay as the offence subject matter of the information has taken place more than 16 years ago and that the present case has been lasting for multiple reasons for more than 11 years and in the meantime witnesses for the representative of the accused company have passed away. The Court cannot condone such an abusive approach on the part of the Prosecution. The matter was fixed for arguments.

It is of paramount importance to note that at the Court sitting of 25.3.2010, learned Counsel for the Defence made a motion for communication of unused materials of witnesses who have been interviewed although their names do not appear on the list of witnesses and also communication of the outcome of the police case against the driver in the present case. The Prosecution undertook to do the needful. On the following Court sitting of 4.10.10, such unused materials had already been communicated to the Defence by then and the matter was fixed for trial to 15.12.10. Then, on that Court sitting, learned Counsel for the Defence stated in Court that he wished to know from the Prosecution as to when the enquiry was completed in the present matter and the Prosecutor replied that it was completed on 5.8.2004.

Then, a similar motion was made on that Court sitting of having the case permanently stayed against the Accused on the ground that continuing the proceedings would be an abuse of process and would be in breach of Accused's Constitutional Right to a fair hearing within a reasonable time. The delay being between the time of the alleged offence and the time the enquiry was completed and the date of lodging the information which was on 17.8.2009. Such motion was not acceded to by the previous Bench.

Subsequently, learned State Counsel appearing for the Prosecution after having amended the list of witnesses in the information to add Mrs. Poomalay Poinen- Sohoraye, in her capacity as Acting Divisional Occupational Safety and Health Officer, that witness gave evidence in Court before the present Bench for the purposes of the arguments. She was not the enquiring officer but only took cognizance of the present Prosecution file as Prosecutor in the year 2019. She was duly authorised to solemnly affirm an affidavit dated 25 February 2022 after having

perused the Court record as regards the facts obtained therefrom and which are not to her personal knowledge as per Doc. AG. 8.

Mr. R.R.M.K. Gokulsing in his capacity as Acting Chief Occupational Safety and Health Officer gave evidence in Court before the present Bench. For the purposes of the motion for abuse of process, he put up an affidavit as per Doc. Arg. 9 dated 16.9.2022. At the time the Ministry of Labour was enquiring into the fatal accident which is the subject matter of the present Prosecution, he had been handling the file with regard to exchanges and correspondences between the Permanent Secretary of the Ministry of Labour and the Officers of the Director of Public Prosecutions. It concerned precisely the dates of such exchanges and correspondences and when they were received as per the affidavit. The contents of such exchanges and correspondences have not been set out because they were privileged exchanges. Seventeen years have passed so that with the passage of time he was not in the best position to assist the Court.

After having scrutinised carefully the Court record and duly considered the testimonies of the 2 witnesses in relation to the affidavits for the purposes of the present arguments, it has come to light that postponements to a large extent were actuated by the Defence so that the only Prosecution witness who has deposed in chief, Mr. Budhoo in his capacity as Senior Occupational Safety and Health Officer, has not been cross-examined yet by the Defence. As a matter of fact, on three occasions, learned Counsel for the Defence has made the motion for the present proceedings be stayed on the ground of delay albeit before 3 different Benches as it took the Prosecution authorities more than five years to lodge the present information following the completion of the enquiry in the present case as it came to light that the file was untraceable at their level coupled with other delays for multiple reasons after the information was lodged.

At this stage, it is significant to note that the following facts are not disputed during the course of the present arguments:

1. It took the Prosecuting authorities more than 5 years to lodge the present information after the completion of the enquiry.
2. In relation to the present accident which occurred on 24.6.2004, the driver of the lorry bearing registration number CB 1212 had already pleaded guilty to a

charge of Involuntary Homicide wherein Late Narajh Hurchand sustained injury when he fell from the lorry box of that moving vehicle and that case is over meaning that he had already been convicted and sentenced. After the information has been lodged, more postponements have been prayed for by the Defence than by the Prosecution let alone other systemic delays which cannot be laid neither at the door of the Defence nor at the door of the Prosecution.

Now, the main thrust of the arguments of learned Counsel for the Prosecution is that there are 2 witnesses to explain the delay and that the trial has lasted for about 15 years and is not over yet. The subject matter of the charge dates back to 2004. As regards the pre-trial delay, another affidavit was filed and the information was lodged in 2009. It is not disputed that there has been delay and that the file has been misplaced from the office of the D.P.P. for about 5 years. As per Docs. AG 8 and ARG 9, most postponements were sought from and granted at the request of the Defence. The case had to be started anew because the two Magistrates hearing the present matter were posted to the Supreme Court. The Defence has not submitted on a balance of probabilities that there has not been a fair trial as it has adduced no evidence of prejudice. She relied mainly on the Privy Council case of **Boolell v The State of Mauritius [2006] UKPC 46**. There was the same point raised before another Bench where it was held that the length of the delay did not warrant a stay of proceedings. The long delay has been explained so that there is no blame on the administrative and Prosecuting authorities. One Manager of Accused company who has passed away was not a witness for the Prosecution at the stage of enquiry. No evidence has been adduced to the effect that his demise will impede the Court process to deny the accused company of a fair trial. A Prosecution for Involuntary Homicide does not mean that *de facto* the accused company is not responsible for a certain breach of safety measures in its workplace. The public interest is that the proceedings be continued till the final determination on the merits given the nature of the offence to be tried.

The main thrust of the arguments of learned Counsel for the Defence is that the driver of the lorry as per the present information had pleaded guilty to a case of Involuntary Homicide for which he had been sentenced already. The person responsible for the death of the employee as per the present information is thus the driver. Is it the company who is responsible for the death of that person or the driver

which is which? According to him, the Prosecution ought to have withdrawn the information and not gone further than that. Another 19 years for this case to have been dragging on as the date of the offence was in June 2004. It was admitted that the file was untraceable at the level of the Prosecuting authorities and that at the level of the Ministry of Labour, 6 months were taken to complete the enquiry as there was no offence. The information should not have been lodged which was the case for the first 5 years. The information was lodged on 17.8.2009, then there was a first motion of abuse in December 2010. If at that time the motion for abuse did not stand, it should stand now. The previous Bench did not accede to that motion at that time in 2011 and since then, three Magistrates have taken up the case. A fair trial within a reasonable time is a Constitutional Right. He relied on the Supreme Court case of **The State v Wasson SJ & Ors** [\[2008 SCJ 209\]](#):

“In exercising its power to ensure that there should be a fair trial in accordance with these norms, a criminal Court has a general and inherent power to stay proceedings not only to protect its process from abuse but also to secure a fair trial to those persons who are charged with a criminal offence.”

The Court has an inherent and general power to protect its process from abuse. This case having been dragging on for almost 15 years is *de facto* an abuse of process and that the Court should exercise its power to grant a stay of proceedings. He also relied on the Supreme Court case of **The State v Bissessur & Ors** [\[2001 SCJ 50\]](#) setting out the four factors which need to be assessed to determine whether a particular Defendant has been deprived of his right, namely:

- (i) Length of the delay;
- (ii) The reasons given by the Prosecution to justify the delay;
- (iii) The responsibility of the Accused for asserting his rights;
- (iv) Prejudice to the Accused.

The pre-trial delay was for about 5 years and then in all there has been almost 19 years delay. The Accused has suffered mental prejudice, time prejudice and not necessarily tangible prejudice.

Learned Counsel for the Prosecution submitted in reply. Difficulties in the information, this was never adumbrated in Court on the issue of delay. Irregularity in the information has no bearing on the issue of delay. As regards the exchanges

between the Ministry and the D.P.P., no motion was not made to that effect. There was an accepted affidavit and the possible true correspondences were exchanged in the affidavit. A delay of 5 years does not warrant a stay of proceedings. There was no financial prejudice and no potential prejudice. As regards the memory failure of a witness, there has been no evidence in what way that would prejudice the accused company and render the proceedings unfair.

Learned Counsel for the Defence submitted in reply that it was 10 years since late Mr. Budhoo, Health and Safety Officer was deponing.

I have duly considered the arguments of both learned Counsel. It is not disputed that there has been delay. I agree with the reasoning of learned Counsel for the Prosecution and the authorities cited by her which go in the same sense as was highlighted in **R v Horseferry Road Magistrates' Court, ex parte Bennett [1994] 1 A.C.42**) where Lord Lowry deemed it important to make it clear that the *"discretion to stay is not a disciplinary jurisdiction and ought not be exercised in order to express the court's disapproval of official conduct."* Besides as per the main authority referred to by learned Counsel for the Prosecution, it was highlighted by the Board of the Privy Council in the case of **Boolell v The State of Mauritius [2006] UKPC 46** – *"The right is to trial without undue delay, it is not a right not to be tried after undue delay."* Thus, the lapse of time does not preclude a trial from taking place in the situation where the accused party can show only apprehended unfairness or prejudice which can be cured by the exercise of the Court's discretion at the trial by, for example, ruling evidence inadmissible.

Now, although a previous motion for a stay of proceedings on the ground of delay was rejected by a previous Bench, it materialized for the first time in the course of the present arguments that it is undisputed that the driver of the lorry bearing registration number CB 1212 of the accused company had already pleaded guilty to a charge of Involuntary Homicide in relation to the present accident and for which he was convicted and sentenced. Therefore, it stands to reason that in relation to the present accident, that driver's unsafe driving of that lorry bearing registration number CB 1212 of the accused company at the material time had necessarily caused late Narajh Hurchand and one Louis Herrisson Matombe to sustain injury when they fell from the lorry box of that moving vehicle and consequently late Narajh Hurchand passed away on 25 June 2005.

Now the driver of that lorry had the responsibility of his passengers (albeit employees of Accused) to drive them safely on the road leading to their destination and which he failed as a reasonable and safe driver as a result of which he was the cause of that accident as a consequence of which one of the passengers died in relation to which he had pleaded guilty and had been convicted before a Court of law. Such fact has remained undisputed by the Prosecution but with the rider that such a Prosecution for Involuntary Homicide is not *de facto* a bar to prosecute the accused company in relation to a health and safety issue.

Now, this important undisputed fact canvassed for the first time in the course of the present arguments boils down to the fact that the Accused has been prejudiced by the delay in the sense that the circumstances are shown that it would be seriously unjust and unfair for it to be prosecuted under the present information for having failed to ensure so far as is reasonably practicable the safety and health of its employees at work whereby one of them passed away as a result of that accident in the course of his duty and another one injured for the following reasons:

- (a) Such conviction of the driver of the Accused in his individual capacity following his guilty plea will cause serious prejudice to the Accused in the present case if the trial is allowed to proceed as its effect would be to undermine faith in the conviction of the driver of the lorry concerned in relation to the same accident whose unsafe driving had a direct result on the state of health of its said passengers who are the accused company's employees.
- (b) Therefore, another trial in relation to the same accident before the Industrial Court whereby the representative of the Accused had already pleaded guilty in his individual capacity as driver of that moving vehicle in relation to a case of Involuntary Homicide and had been convicted for that purpose before another Court of law in itself is illegitimate and constitutes an abuse of the process of the Court because it amounts to a collateral challenge to a decision of a Court of law which is direct, patent and cannot be condoned. This is because if it is allowed to proceed would be to imperil the future administration of justice as was highlighted in **Hurnam v Bholah [2010] UKPC 12**. That would be "*an impermissible tactic*" as clearly pointed out in **Hurnam(supra)** and cannot be condoned as it constitutes an abuse of process in the hope of achieving the result of undermining faith in the Accused's representative's conviction namely that of its driver in his individual

or personal capacity by calling into question the adverse verdict in the other proceeding.

- (c) It is most relevant to note that the power to stay proceedings for abuse of process has been interpreted to include a power to protect the Accused from oppression or prejudice (vide – **Connelly v D.P.P. (1964) A.C 1254 H.L.**). It is apposite to note that in **Hui Chi- Ming v R (1992)1A.C. 34, PC**, abuse of process was defined as “*something so unfair and wrong that the court should not allow a prosecutor to proceed with what is in all other respects a regular proceeding.*”

Therefore, I hold that a fair trial would be impossible and that it would be contrary to the public interest and integrity of the criminal justice system that such a trial should take place (see- **R v Horseferry Road Magistrates’ Court, Ex p Bennett [1994] 1A.C.42**) which enjoins the reasoning in the case of **Attorney General’s Reference (No.2 of 2001) [2003] UKHL 68** setting out the parameters for a stay of proceedings on account of an infringement of the reasonable time guarantee-

- (a) A fair trial is no longer possible.
- (b) It is, for any compelling reason unfair to try the Accused.

The delay of about 5 years in lodging the present information coupled with the fact that postponements have been prayed for by the Prosecution after the information has been lodged although more postponements were prayed for by the Defence than by the Prosecution coupled with other systemic delays, the material fact remained undisputed that an information for Involuntary Homicide had already been lodged and tried in the meantime in relation to the present accident and for which the Accused’s representative as driver had already been convicted upon his guilty plea as a result of his lack of safety in his driving which led to significant health issues namely the injuries caused to his said two passengers whereby one passed away.

Such a course, because of delay would in the present context mean that it would imperil the future administration of justice because it would compellingly undermine faith in the conviction of Accused’s representative in his individual capacity as driver. Furthermore, it would amount to a collateral challenge to the judgment of the Criminal Court and which is “*an impermissible tactic*” undermining faith in the Criminal Justice System.

Thus, the Defence has discharged the burden on a balance of probabilities in establishing that in continuing with the present trial as per the present information because of the delay will be so oppressive or prejudicial to the Accused so that a fair trial is no longer possible although unjustified delay *per se* cannot of itself be a sufficient reason for a stay (see **-The State v Rudolf Derek Jean Jacques & Anor** [\[2022 SCJ 408\]](#)).

For all the reasons given above, I am in duty bound to permanently stay the present proceedings against the accused company. Thus, the motion of learned Counsel appearing for the Defence is acceded to and the present proceedings are permanently stayed against the Accused.

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

31.10.23