

OSHI v Medine Limited

2022 IND 52

Cause Number 199/17

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

In the matter of:

OSHI

v.

Medine Limited

Judgment

Accused stands charged for having on or about the 8th day of January 2016, unlawfully failed to ensure so far as is reasonably practicable, the safety and health at work of its employees whereby one of them namely one Gertry James sustained a fracture of the neck of his fibula and his left distal tibia when he was hit by a pump which got detached from its base on a trailer at its place of work at Yemen.

The representative of the Accused pleaded not guilty and retained the services of Counsel at his trial.

The particulars of the charge are given below:

- (a) A herbicide tank was found on a trailer together with a pump fitted with a feeder pipe and a return pipe at one end. The trailer is usually towed by a tractor to fields where the herbicides spraying is required and workers

concerned are also conveyed on the trailer together with the tank and pump assembly.

- (b) The other ends of the two pipes were placed through two holes in the cover of the tank's opening found at the top so that herbicide can flow to and from the tank to the pump. The pipes were not securely fixed to the cover and there was a risk that they could come out of the cover during transport.
- (c) The cover was also not fixed to the tank's opening so that it can be removed by the workers to fill up water and herbicides into the tank when required.
- (d) On the day of the accident, two workers including Gertry James were travelling on the trailer which was being towed by a tractor, when one of the pipes came out of the hole in the cover and got entangled to one of the rotating wheels of the trailer. This caused the pump, which was connected to the other end of the pipe, to detach from its base and to hit against the leg of Gertry James who sustained injury.
- (e) After the accident, the employer has caused the pipes to be securely fixed to the cover which also has been securely bolted to its opening on the tank. Provision for another opening has been made in the cover to allow the filling up of water and herbicide into the tank such that the cover and pipe assembly need not be removed anymore by the workers.

The case for the Prosecution unfolded as follows:

Mr. M. Faryaz Bhugalee deposed in Court. He enquired into an accident at work which occurred on 8 January 2016 in the premises of Yemen owned by Médine Limited where Louis Gertry James sustained a fracture of the neck of fibula and the left of distal tibia.

He went to the locus of the accident 20 days after, that is, on 28.1.2016 when he took 4 photographs as per Docs. B1-B4. After having convened the Director of the accused company on 17.3.2017 to give a statement in the present matter, a statement was recorded under warning from Accused's representative as per Doc. D. After completion of his enquiry, he drew up a report dated 20.3.2017 as per Doc. F.

When he went on the premises at Yemen on 28.1.2016, he met Mr. Lebon, the Administrative Officer who showed him a trailer as per Doc. B1 which was the trailer involved in the accident of Mr. Gertry James.

The trailer consisted of 2 wheels at the back and at the front there was a platform on which stood two workers one of them being the injured person and it also contained a tank containing herbicide and water. That trailer was towed by a tractor and taken to the field for the spraying of the herbicide.

As per Doc. B2, the 2 workers stood on the platform, that is, at the front side of the trailer and from where they sprayed the herbicides. On the front side of the trailer, the witness, Mr. David Louis Curtis was showing where the injured person was standing at the time of the accident. They were both standing on the platform and the tractor was towing the trailer to go to the field for the spraying of the herbicide.

There were also on the platform in the middle, a pump and an engine. The use of the engine was to have the herbicide pumped from the tank through a pipe and then to be sprayed in the field. There were 2 pipes, one being the feeder pipe which took the herbicide from the tank to the pump and the second one was the return pipe which took the excess herbicide back to the tank from the pump as per Doc. B4.

On the day of the accident viz. the 8.1.2016, the injured person was standing on the platform of the trailer which was being towed by a tractor and was heading towards the field for spraying herbicide therein. At a certain time, the pipe that was in the tank fell down from that tank and it got entangled with the wheel of the trailer, that is, at the back and when the pipe got entangled with the wheel, the force that was created, it removed the pump that was in the middle of the platform and that pump hit Gertry James on his foot which caused him to sustain injury. The pump was not fixed like in Doc. B4. The pipe was not fixed to the top of the tank as that was done after the accident. Also, after the accident, the cover was fixed to the tank and the pipe was secured into another hole on the top of the cover.

According to him, the accident was foreseeable because had the pipe been fixed in the tank, it would not have fallen down and would not have got entangled with one of the wheels of the trailer. That was the root cause of the accident. As per Doc. B4, the opening of the tank was like a hole at the top of the tank through which the pipe was placed. The dimension of the opening was about 50 centimeters and that of the pipe was about 5 centimeters. The opening was too big for the pipe. So, with the movement of the trailer, it would come out from the opening in the tank. The

pipe was not secured to the tank and it was only after the accident that the Accused did the needful as per Doc. B4.

Before the accident, both pipes entered the tank through the same opening. Both the return and feeding pipes were entering the tank through a hole of 50 cm diameter while the diameter of the pipes was 5 cm but the return pipe was smaller. It was not the case that before the accident, the procedure to be followed by the employees before proceeding on site for the spraying was to tie the feeding and return pipes together using cable ties and binding wire. They were not tied and they were not fixed to the cover and were not secured to the handrail using binding wire.

The accident could have been prevented just like the company did after the accident namely to have fixed the pipe to the tank. That would have been enough to prevent that accident.

As per Doc. B1, there were 2 pipes a feeding pipe and a return pipe tied together and the photo was taken after the accident. As per Doc. B4, there were 2 openings in the cover of the tank namely a new one for the filling of herbicide and water. The cover of the tank was changed as it was fixed to the tank by means of bolts. Previously, before the accident the 2 pipes were placed in the big opening. He agreed that a pipe of dimension 5 cm when placed through a hole of a dimension of 50 cm, it was bound to come out as the opening was too big for the pipe. According to his enquiry the accident happened because the pipe was placed in a hole that was too big. The pipe was not secured to the tank and it was only after the accident that the company did the needful as per Doc. B4. As per the latter, the 2 pipes were secured in the sense that they were tied together by means of plastic tags. He did not mention same in his report.

There was no safe procedure followed and had it been so, the pipe would not have come out from the tank and the accident would not have occurred. After the accident, the pipe was fixed to the cover and the cover in turn was fixed to the tank.

Mr. Louis Gertry James, the injured person, gave evidence in Court. On 8.1.2016, he was working for the accused company and was going to do the herbicide work. He did that type of work for Accused since the year 2000 and he received instructions from Mr. Maurice Koenig. The system of spraying herbicide by using a tank and a tractor was put into place around the year 2005. He had about 11-12 years of experience in that job of working on the tank with the trailer and he

was explained how to do it. On the day of the accident, there was a tank on a trailer which was being towed by the tractor driven by Mr. Richard Lamour. He was on one side of the trailer and on the other, there was Mr. David Curtis.

Prior to that, they told Mr. M. Koenig that the return pipe was short as it was broken and that it had to be changed since December. It was not changed and on the material day, when they resumed work all the three of them, waited for Mr. Koenig to come. He told him that the pipe had to be changed and he asked him to use it like that and to tie it with a metallic wire and to carry on with his work in the meantime.

When he was standing on the trailer where the tank and the pump were, the return pipe which was shorter dropped and fell on the wheel of the trailer, got entangled with the said wheel and caused the pump in front of him to be detached and to hit him at his lower part and caused him to get injured. The pipe was not fixed to the tank which was filled with herbicide and water. It was only fixed to the pump at the bottom and where it got in the tank, it was broken and was shortened. Because it was shortened, when the tractor was in motion, despite the shaking movement, it had to be held in the tank but as it was short it could not be held down in the tank. As the pipe was not available yet they were asked to work in the meantime with the short pipe. Those pipes could be removed easily and placed back in the tank. Each pipe got inside the tank through a hole on the top and the pipes did not move unless touched by someone.

He had to lift the cover a little to allow the water and the herbicide to get inside. He agreed that as per the procedure explained to him, the 2 pipes had to be tied together with cable ties and binding wire but the situation was different as one of them started to break. But, the two pipes were not tied to the railing of the trailer for greater safety. He stated that he could not tie the 2 pipes together as one was short and because of that they had to wait for their superior to come and to inform him about it. He did not agree that the accident happened by his own negligence and imprudence in doing that work. At the time of the accident the pipe was not fixed to the tank. It entered through its tip on top and it held in a hole and it did not go completely down where it could be sealed in the tank. It was a small pipe and that was why it was tied by means of a metallic wire to be sealed in the tank as he was asked to work. The tip that was tied to the metallic wire and while in motion and with the shaking movement, the pipe escaped. The pipe was never tied to the railing as he was not asked by his supervisor to do so.

Mr. David Louis Curtis gave evidence in Court. He was working for Accused on 8.1.2016 at Yemen. He had been working for Accused for 20 years in relation to spraying of herbicides and he was given instructions to work by Mr. Maurice Koenig and at the same time by Mr. Lebon. At the time of the accident on 8.1.2016, he was spraying herbicide and Gertry was together with him doing the same work. They made a complaint that a pipe had shortened and that they could not work with it and that it had to be repaired. But, yet they were asked to carry on with their work.

They did the spraying of herbicide which was the job that they mostly did and they did it as it should have been done. At the time of the accident, he was on the trailer as well as Gertry on the left side and he was on the right side. He was standing on that trailer and when reaching a stage, he meant that there was an engine like a pump which pulled herbicide from a pipe so that the herbicide could be sprayed, and because the return pipe was short, it passed under the wheel and as a result, the engine just escaped and knocked against the foot of Gertry. The latter could not move and remained still and could not remove his boots.

At the time of the accident, the driver, Mr. Richard Lamour, called him and when he looked behind, he saw the engine being dragged on the ground and the pipe passed under the wheel. The short pipe which went into the tank from below into a cover on the top, it was fixed to the tank. Then gradually it became shorter and shorter and that was why they complained about it and yet they were asked to continue with their work. He told his superior that the pipe became smaller and that it needed to be changed and they were asked to proceed with their work when the misfortune happened. On the day of the accident, both Gertry and him filled the tank with herbicide. He had been working for Accused for about 20 years and he knew that the system for spraying herbicide by using a tractor and trailer was put into place since about the year 2005. When that system was put into place, they were explained how to proceed and how to operate. They were explained as regards all the precautions that had to be taken. At the time of the accident in January 2016, he had at least 10 years' experience in that work. Before there was no problem with the system of work. He did not agree that on the day of the accident, both Gertry and him did not tie the 2 pipes together with cable ties and binding wire as they did tie them properly and firmly. He agreed that although one of the pipes was shorter than the other, had they been tied properly, one of the pipes would not have fallen

below the wheel of the trailer. He was not given instructions to tie the pipes to the railing.

Mr. Louis Richard Lamour, the driver of the tractor gave evidence in Court. He was working as tractor driver for the Accused and on the day of the accident namely on 8.1.2016 at Yemen, he was driving a tractor bearing no. 2602 J04. He received instructions from Mr. Michael Lebon. The tractor had a trailer at its rear and it bore the same registration number as the tractor. He did not see how the accident happened as he was in front in the tractor. The two workers namely Gertry James and David Curtis were at the back. He drove for about 2 kilometres when he heard someone shouting. He then stopped and turned at the back and he saw James squeezed by the tank. He alighted from the vehicle and asked James what happened and James said that the pump knocked against his foot. Then, he did the needful for him to be conveyed to hospital in a van for treatment. At the time of the accident, James had to do the work of spraying herbicide while standing on the trailer. The return pipe was checked everywhere, but when in use it got perforated and decreased in length and they made a complaint about it to Mr. Michael Lebon as at some point it could not remain still in the tank. They were told to work for the time being as there was no such pipe and when obtained, it would then be changed.

He had been working as driver of the tractor with the trailer and the tank since 2002. He did check that the 2 pipes were well tied with cable ties and binding wire as explained to them but it was only after having driven about 2 km that the problem happened. He did tie them properly but when he drove for a distance, with the shaking movement, the pipe broke. He was not agreeable that the accident happened because of his imprudence. Each time, the pipes were tied but when he drove after sometime, the return pipe broke and fell down.

I have given due consideration to all the evidence put forward before me and the submissions of learned Counsel.

No photo of the pipe involved in the accident was taken by the enquiry officer and nor was it shown to him by the representative of the Accused when the said officer called on the locus of the accident. True it is that it is common ground that the return pipe was the one involved in the accident which is in line with the unsworn statement of the representative of the Accused.

Indeed, all the photos were taken 20 days after the accident which hardly reflect the state of the tank and the pipes at the time of the accident and on the basis of which the report was made by the enquiring officer.

True it is that there have been some disparities in the testimonies of the injured person, co-worker on the trailer and the driver of the tractor be it in one of their statements given at the Labour Office or otherwise which I consider to be minor as they have struck me as being people with a very low level of literacy and thus, I find it fair to disregard those disparities which I consider to be minor and not to affect the root of the case for the Prosecution. The material fact remained that their testimonies in Court have remained unchallenged in the sense that all the three of them had complained to their Superior that the return pipe was damaged in the sense that it was shortened and yet they were instructed to use it on the material day and which was the cause of the accident on the person of Gertry James. Furthermore, I am convinced that when the co-worker said that it was an engine like a pump that hit Gertry James he in fact meant the pump. It has remained unrebutted that Gertry James sustained injuries as per the medical certificate namely Doc. A when the return pipe which was shorter fell out from the tank and got entangled with one of the wheels of the trailer which caused the pump to get detached and to hit him at his foot. I agree that although binding wire among others could be used to tie both pipes tightly together as they were instructed, after having travelled through a distance through the field for spraying purpose, with the shaking vibration movement of the tractor on the trailer, the likelihood of the return pipe to break and fall from the tank could be expected as it was short because it was damaged unlike the unsworn statement given by the representative of the Accused. Had it been as long as the feeder pipe and not damaged, it would have been long enough to be fixed to the tank inside and the accident would have been avoided irrespective of the diameter of the opening of the tank. At this stage, I find it appropriate to quote an extract from the Supreme Court case of **The D.P.P. v Flacq United Estates Ltd** [\[2001 SCJ 301\]](#) which reads as follows:

“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.”

Furthermore, as per the reasoning in **Flacq United Estates Ltd**(supra), the primordial issue that the present Court has to decide is – (i) whether the particular

system of work adopted by the Accused/employer viz. the spraying of herbicide from the same platform where the tank, pipes and the pump assembly were to be found was safe; (ii) The issue was not whether the injuries caused to the worker was because of his own negligence or that of the other worker or driver; (iii) It was not because no serious accident had occurred in the past that a system of work was necessarily compliant with the requirements of the Act.

Thus, I take the view that it cannot be condoned that a safe system of work would be ensured by the use of a damaged equipment viz. a shortened return pipe on the ground that an undamaged one was not available at that particular point in time although instructions were given as to how to use the damaged one. The employer had to keep at least a pair of spare pipes namely a feeder and a return one for the pumping process of the herbicide from the tank among all the other remedial measures taken by the Accused after the accident which remained unrebutted as the photos produced were taken 20 days after the accident.

Hence, I find that the Accused has failed to ensure so far as is reasonably practicable the safety and health at work of its employees so that one Gertry James got injured as a result.

For all the reasons given above, I find that the case for the Prosecution has been proved beyond reasonable doubt. Accordingly, I find Accused guilty as charged.

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

29.9.19

