OSHI v Air Mauritius Limited (under administration)

2024 IND 72

Cause Number 85/17

In the Industrial Court of Mauritius
(Criminal side)

In the matter of:

OSHI

v.

Air Mauritius Limited (under administration)

Ruling

Accused stands charged with having on 17th of June 2015, unlawfully failed – (i) to ensure, so far as is reasonably practicable , the safety and health at work of its employees namely one Anand Seerkissoon who sustained a fracture of his right forearm when he slipped and hit the concrete structure of a wash basin in the toilet located in the Old Terminal Building at its place of work, (ii) to notify the Director, Occupational Safety and Health of an accident by the quickest practicable means and (iii) to send to the Director, Occupational Safety and Health within seven days a report in the form set out in the Thirteenth Schedule in breach of Sections 5(1), 85(1)(a), 85(1)(b) and 94(1) (i) (vi) of the Occupational Safety and Health Act 2005 – Act No.28 of 2005.

The accused company represented by Mr. Jackdeep Jhurry in his capacity as Health and Safety Officer pleaded not guilty to all three counts to the information and was assisted by Counsel.

Learned Counsel for the Defence prior to the trial being taken has put certain questions to the Prosecutor upon leave of the Court which boil down to the following facts –

1. The incident which is the subject matter of the information occurred on 17.6.2015.
2. The statement which was recorded from the representative of Accused's company on 26.11.2015 pertains to the incident which occurred on 17.6.2015.
3. As per the statement recorded, the Prosecutor confirmed that as per the list of witnesses on the information, Mr. Jean Claude Leste, Mr. Enkanah Teeha and Mr. Prakash Goel are not among the list of persons on which the Prosecution intends to call as witnesses.

Subsequently, learned Counsel for the Defence has moved that the Defence statement given by the representative of accused company on 26.11.2015 be edited as from the 8th line of folio 112/618 starting from *"I am aware of a mail"* and ending on the last line of folio 112/619 *"11.30 hours"* inasmuch as the extract just mentioned is irrelevant to the present charges proffered against Accused as it pertains to a mail exchanged in 2013 and the impugned part contains hearsay evidence inasmuch as the recipients and senders are not witnesses for the Prosecution and will not be called to testify in the present matter. Allowing the statement to be produced in its present state will have an adverse effect on the fairness of the proceedings and that it should not be admitted.

The motion was resisted and arguments were heard.

The main thrust of the argument of learned Counsel for the Defence is that part of the Defence statement namely the 8th line of folio 112/618 up to the last line of folio 112/619 contains matter which is hearsay to the maker of the statement and pertains to an exchange of email between Mr. Jean Claude Leste and Mr. Enkanah Teeha and an exchange of email between Mr. Navin Bhobun and Mr. Prakash Goel, and which in turn pertains to certain alleged agreements between those parties. None of those mentioned persons are on the list of witnesses for the Prosecution. Whatever may have been exchanged between those parties are matters of fact not

relevant for the purposes of the present case and are therefore inadmissible. Being hearsay and inadmissible, it has no probative value and that particular part of the Defence statement is highly prejudicial to the Accused and will deny the Accused of a fair trial as the Defence will not be given an opportunity to cross-examine those persons. He relied on the case of **The State v Ruhumatally M J [2015 SCJ 402]**.

The main thrust of the argument of learned Counsel for the Prosecution is that the case of **The State v Ruhumatally M J [2015 SCJ 402]** made reference to five categories whereby editing a Defence statement was desirable. In one sense of course, all relevant evidence adduced by the Prosecution is highly prejudicial to the Accused and the greater is its probative value, the greater is the prejudicial effect. The Accused's representative, when he gave his Defence statement was made aware of his Constitutional Rights including whatever he will state can be used as evidence against him in Court. Everything that was stated by the Accused's representative in the Defence statement was voluntary. After the version of Witness no.1, the main enquiring officer, was put to the Accused's representative, he stated that he was aware of the emails and he gave his version voluntarily. Admissions made in a statement voluntarily by an Accused party is admissible evidence against him. Also, a statement of an Accused party voluntarily given is admissible evidence in its entirety and it is not only because there are parts unfavourable to the Accused that the Defence statement should be edited. During the trial, the Defence will have full latitude to cross-examine the main enquiring officer, that is, Witness no.1, on the relevance of the true contents of the emails and the Court will accordingly attach relevant weight to the evidence given by Witness no.1 if the Court finds that the contents of the emails are indeed relevant to the charges. Given that the Defence has not been able to prove how exactly the Accused's company will be prejudiced by the said extract, she has submitted that the motion of the Defence be set aside. If the Prosecutor finds that those witnesses should be added to the list of witnesses to depone in the present matter, then the Prosecutor at a subsequent stage can amend the list of witnesses to add them.

Learned Counsel for the Defence replied that the enquiring officer is not the maker of the document and has no personal knowledge of the contents and by that time the Defence statement will be produced already and then the Prosecution will decide whether to amend the list of witnesses or not. The part being challenged is hearsay and has nothing to do with being unfavourable and allowing the Defence statement to be produced in its present form will have a prejudicial effect on the

fairness of the proceedings and will outweigh any probative value that the Prosecution may consider. When the relevant parts of the emails were put to the maker of the statement, he replied that he was aware of those emails and his learned Friend considered it to be an admission on the part of the maker of the statement. The fact of being aware of the existence of those emails is certainly not an admission to the veracity of their contents. The Prosecution is trying to adduce evidence through the back door what it cannot adduce through the front door.

Learned Counsel for the Prosecution further replied that everything mentioned in the Defence statement was stated voluntarily.

I have given due consideration to the arguments of both learned Counsel. It is useful to reproduce the following extract from the case of **The State v Ruhumatally M J [2015 SCJ 402]** at pages 2&3 as follows:

*"Thus, we can read the following in **Blackstone's Criminal Practice at paragraph 17.58***
"Where the confession of an accused person is admitted in evidence against him, the whole confession is admissible, notwithstanding that it includes matter prejudicial to the accused."

*The basic rule when it comes to editing statements is set out in **Archbold, Criminal Pleading, Evidence and Practice 2012 Edition at para 4-352** as follows:*

*"According to current practice, a statement made by a defendant may be 'edited' to avoid prejudicing him and an effort may be made to eliminate matters which are part of the evidence but which it is thought best the jury should not know. The best way for this to be done is for the evidence to appear unvarnished in the committal or transfer papers; then, at the trial, counsel can confer and the judge can, if necessary, take his part in the matter to ensure that any 'editing' is done in the right way and to the right degree: R. v. Weaver and Weaver [1968] 1 Q.B. 353, 51 Cr. App. R. 77, CA" The same principle is reiterated in **Blackstone** (supra) in the following terms: 'a statement by an accused ought to be edited at trial to avoid prejudicing him and to eliminate matters which it would be better that the jury should not know.''*

The situations calling for the editing of the statement of an accused party are varied and it would be quite impossible to elaborate on all of them. However, there

are certain established categories where editing is thought desirable as a matter of practice, unless there are other circumstances to the contrary. These are:

[1] where an accused party has made admissions about his having been previously convicted for offences similar to the one for which he stands charged or for other offences generally, the part concerning his previous convictions may be edited from his statement;

[2] where the accused has said something which reflects on his bad character, especially where he has not put the character of others in issue, the part concerning his bad character may be edited;

[3] where the accused has made confessions about his having committed other offences but which are irrelevant to the charge which is presently pending against him, the part relating to the other offence or offences may be edited and not placed before the jury;

[4] where the statement of an accused contains averments against another person who is standing trial jointly with him; in such cases, the editing is not directed towards protecting the accused himself but the averments made by the accused against the co-accused may be edited for the purpose of avoiding prejudice to the co-accused;

[5] where the material which has been put in issue has a prejudicial effect that exceeds its probative value, such prejudicial material may be edited."

True it is that Accused's representative admitted that he was aware of a mail exchanged in 2013 which comprised of an exchange of email between Mr. Jean Claude Leste and Mr. Enkanah Teeha and an exchange of email between Mr. Navin Bhobun and Mr. Prakash Goel in relation to certain alleged agreements between those parties, when that version of the enquiring officer namely Witness no.1 was put to him. Thus, there is nothing which has come out factually that those names of Mr. Jean Claude Leste, Mr. Enkanah Teeha, Mr. Navin Bhobun and Mr. Prakash Goel came from the Accused but from the enquiring officer bearing in mind that the Accused was aware of the charges proffered against him when it gave its statement through its representative on 26.11.2015 and it was given the usual warning including its right to silence before it gave its statement so that it was given voluntarily as its voluntariness has not been challenged by the Defence. There is nothing so far to show that such impugned part of the Defence statement is incriminating to the Accused akin to an admission on his part as of yet.

Further, the present case is not one where there is a trial with a jury and it will be only at the level of cross-examination of the enquiring officer that it will become apparent whether those aforesaid names purporting to alleged contracts can be linked to the Accused thereby having a bearing on the charges for which the Accused is facing trial. Then only, the Prosecution will be able to take a decision as to whether to amend the list of witnesses in order to add those names, given that the Prosecution has the carriage of proceedings, so that it would be misconceived to invoke at face value the fact that those persons not appearing on the list of witnesses of the Prosecution, would mean that the latter intends to rely on hearsay evidence, as the Prosecution is not barred from amending the list of witnesses after the enquiring officer viz. Witness no.1 has been heard.

Hence, the decision to edit the statement of the Accused *"in the right way and to the right degree" (see-* **Ruhumatally(supra)**) cannot be based on such speculation that hearsay evidence will be relied upon by the Prosecution and as such will deprive the Accused of a fair trial. Given that the Court is in the dark as regards the tenor of the questions and answers contained in the impugned part of the Defence statement at folios 112/618 and 112/619 and the enquiring officer has not been cross-examined as to the relevance of the mail of 2013 concerning the mentioned names, to the present case so that it is premature for the Court to exercise its discretion to assess whether any prejudice as per the fifth category listed in **Ruhumatally (supra)** will be caused to the Accused or the impugned part is irrelevant to the present case [as per **Archbold Digital Edition 2007 at paragraph 15-392**: *"(k) Editing of defendant's statement to exclude prejudicial material*

It has been recognised that it is permissible to edit a defendant's statement to exclude prejudicial or irrelevant material. Any dispute can be adjudicated upon by the trial judge: R. v. Weaver and Weaver [1968] 1 Q.B. 353,51 Cr.App.R. 52, CA; R. v. Knight and Thompson, 31 Cr. App. R. 52, CCA."]. **(emphasis added)**

For all the reasons given above, I do not accede to the motion of learned Counsel for the Defence and which is set aside.

The matter is accordingly fixed *proforma* to 16.12.24 for both learned Counsel to suggest common dates for trial.

S.D. Bonomally (Mrs.)

(Vice President)

6.12.24