OSHI v Associated Container Services Limited

2023 IND 16

CN143/15

THE INDUSTRIAL COURT OF MAURITIUS
(Criminal Side)

In the matter of:-

Occupational Safety And Health Inspectorate

v/s

Associated Container Services Ltd

JUDGMENT

As per the amended Information, the Accused Company stands charged with **one Count of Failing To Ensure That Persons Not In Its Employment Are Not Exposed To Any Risk To Their Safety, contrary to ss. 5(2)(e) and 94(1)(i)(vi)(3)(b) of the Occupational Safety And Health Act [Act No. 28 of 2005] (hereinafter referred to as OSHA) coupled with s. 44(2) of the Interpretation And General Clauses Act (hereinafter referred to as IGCA)**.

The Accused Company pleaded Not Guilty to the charge and was assisted by Learned Defence Counsel.

The Prosecutor Conducted the case for the Prosecution.

The Proceedings were held partly in English and partly in Creole.

The Prosecution Case

It was the case for the Prosecution that on or about 17-11-12, in the District of Pamplemousses, the Accused Company, whilst being an employer, did unlawfully fail to ensure, so far as was reasonably practicable, that persons not in its employment are not exposed to any risk to their safety, as a result of which one employee of Mr Bagha Mahendranath (hereinafter referred to as W3), to wit: Mr Goinden Seeneevassen (hereinafter referred to as W2) sustained compound fracture, dislocation of his left foot when he was hit by a forklift which was reversing in the compound of the Accused Company situated at New Trunk Road, Riche Terre.

The Defence Case

The Accused Company denied the charge in Court under Oath, and swore as to the correctness of its out-of-Court statement (Doc. C).

Analysis

The Court has duly analysed all the evidence on Record and all the circumstances of the present matter, and the Court has watched the demeanour of all the Prosecution Witnesses and that of the Representative of the Accused Company with the utmost care.

The Court has also given due consideration to the Submissions of, to the Written Submissions of, and to the Authorities submitted by, Learned Defence Counsel.

At the outset, the Court notes that the Information does not bear the signature of the Prosecutor. Applying **s. 73(1) of the District and Intermediate Courts (Criminal Jurisdiction) Act**, no objection shall be allowed to the Information for any alleged defect in its substance or form.
Further, Learned Defence Counsel who assisted the Accused Company throughout the Proceedings, took no objection to the present Information as it stands.
The Court is therefore of the considered view that no prejudice was caused to the Accused Company on the basis of the Information as it stands, and the Court therefore proceeds to determine the present matter on the basis of the Information as it stands.

S. 5 (2)(e) of the OSHA provides as follows:

> **5. General duties of employers**
>
> […]
>
> (2) The employer shall, so far as is reasonably practicable, in particular –
>
> […]
>
> (e) ensure that any person not in his employment is not exposed to any risk to his safety or health.

An employer therefore has a statutory duty to ensure, so far as is reasonably practicable, that any person not in his employment, is not exposed to any risk to his safety or health.

And **s. 96(6) of the OSHA** provides as follows:

> In any proceedings for an offence under any provision of this Act consisting of a failure to comply with a duty or requirement to do something so far as is practicable or so far as reasonably practicable, or to use practicable means or to take practicable steps to do something, it shall be for the accused to prove that it was not practicable or not reasonably practicable to do more than was in fact done to satisfy the duty or requirement, or that there was no better practicable means or step than was in fact used or taken to satisfy the duty or requirement, as the case may be.

<u>Not in dispute</u>

In light of all the evidence on Record, it was not in dispute that:

1) W2 was not in the Accused Company's employment;
2) an accident occurred on 17-11-12 in the compound of the Accused Company, at the New Trunk Road, Riche Terre, involving W2 (Folio 101877 of Doc. C); and
3) W2 sustained compound fracture, dislocation of his left foot (Doc. A) when he was hit by a forklift driven by Mr Dhinraj Nawjee (hereinafter referred to as W5), which forklift was reversing in the compound of the Accused Company situated at New Trunk Road, Riche Terre.

It was also not put in issue that the Accused Company was an employer for the purposes of the **OSHA**.

Failing to ensure the safety of any person not in its employment so far as was reasonably practicable

The line of Defence adopted by the Accused Company from the outset was that W2 sustained the said injury (Doc. A) through his own fault and negligence as he did not abide by the procedures prevailing at the relevant time (Folio 101878 of Doc. C).

This was also the line of Defence adopted by the Accused Company in the course of the Proceedings, and when cross-examined, W2 admitted that had he followed the instructions given to him by his employer, the accident could have been avoided.

As per the Authority of **DPP v Flacq United Estates Ltd [2001 SCJ 301]**, however, the fault and imprudence of W2 are irrelevant to the determination of the present matter, the test being not the imprudence or negligence of the person not in its employment, but whether the system of work put in place by the employer was safe:

> The primordial issue which the learned Magistrate had to decide was whether the particular system of work adopted by the respondent with regard to the cleaning operation of its steam boiler, including its furnace, 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.

Applying the abovementioned principles to the present matter, the Court will focus its analysis of the evidence on Record on whether the particular system of work adopted at the relevant time by the Accused Company with regards to the loading of containers at the said compound, was safe.

Mr Jean Joseph Fabien De Guardia (hereinafter referred to as the Accused Company's Representative) deponed *inter alia* to the effect that he prepared the Sugar Bag Process (Doc. E) around September 2011, which date remained unchallenged by the Prosecution, when the Accused Company started the new business of producing containers for the Sugar Syndicate.

True it is that the Sugar Bag Process (Doc. E) does specify that:

1) the driver and helper are to stay in the truck whilst waiting for the forklift to arrive;
2) the forklift operator was to give the signal for the helper to get down and check the container status;
3) the helper was to move out of the truck, open the container door, and check and close same;
4) the helper was to move back into the truck until it moved towards the gate; and
5) the helper was to move out of the truck and set the documents for control,

and it was not disputed that the Accused Company communicated the said procedure (Doc. E) to its employees and to its clients who were employers, asking them to cascade down same to their employees, but the Accused Company's duty did not however stop at devising such a procedure and communicating same to its own employees and to the employers whose employees had access to the said compound.

Its duty went further, and it had to ensure adherence to, and implementation of, such working procedure (Doc. E) at the relevant time, as authoritatively set out in **General Construction Company Limited v Occupation, Safety And Health Inspectorate, Ministry Of Labour, Industrial Relations And Employment** [2020 SCJ 40]:

> "The burden imposed on employers by section 5(1) of the OSHA is **not** discharged by simply listing the precautions and communicating these to workers. The duty does not end here as the employer has to ensure the safety, health and welfare of its employees."

The Court is alive to the fact that the said Authority of **General Construction (supra)** was specifically in relation to **s. 5(1) of the OSHA**, but the Court is nevertheless of the considered view that the said principles ought to apply *mutatis mutandis* to **s. 5(2) of the OSHA**, given both subsections are under **s. 5 of the OSHA**, which relates to the general duties of employers, but also because it stands to reason that if an employer has a duty of ensuring the implementation of the system of work it has in place in relation to its own employees, the same goes for persons not in its employment who are on its premises, the more so for work purposes.

In light of all the above, the question to be addressed at this stage, is whether the Accused Company ensured compliance with the said procedure (Doc. E) by W2 at the relevant time.

First, W2 explained that on the relevant day, he came down from his truck, that no one stopped him from coming down from the truck at the relevant time, and that he was not requested to get

back on his truck and wait to be instructed to get down therefrom. This aspect of W2's testimony remained unchallenged.

Mr Christian Brijan Paletemp (hereinafter referred to as W7) *inter alia* deponed along the same lines as W2 to the effect that no one had stopped him from getting down from his truck on the relevant day.

Mr François Joseph Guy (hereinafter referred to as W6) did state that he would tell any person he saw walking in the said compound to get back in their truck, but this was clearly a general answer, and did not relate specifically to W2 on the relevant day, and therefore does not contradict W2's testimony.

Second, whilst W2 conceded not having been instructed by his employer to get down from his truck to look for the container he had come to collect, he also explained that on the relevant day, the person who was present at the said compound told him that he would not have the time to go and locate the said container and to do so himself.

W2's testimony on this aspect remained essentially unchallenged and is supported by the testimony of Mr Fuzoollah Muslim (hereinafter referred to as W4) who was driving the truck W2 was travelling in at the relevant time, and W4's testimony remained unchallenged as to the fact that the person at the gate told them to go and look for their container.

It is also worth noting that it was in effect conceded in Submissions that the person at the gate was not free to search for the container, so that W2 searched for the container himself.

W2 stated that he had to get down from his truck to look for his container as he could not see the container whilst remaining in the truck.

W4's testimony as regards the helper having to go and locate his container, the helper himself having to do the needful and then indicate to the forklift operator which container was to be placed on the truck, was not seriously challenged.

W7 deponed *inter alia* to the effect that the procedure at the said compound was for helpers to get down from their truck, to go through the gate, whilst the truck remained outside, to look for their container and then to tell the driver to drive in.

W7's testimony on the above points remained unchallenged and supports the version of W2 and W4.

Third, given the procedure (Doc. E) put in place by the Accused Company itself was that W2 as helper had at some stage to be authorised to come down from his truck by the forklift operator or the supervisor, it was incumbent on the Accused Company to ensure that W2 was informed of the procedure (Doc. E) and that W2 complied with same.

W2 denied having been explained (Doc. E) and stated that the person at the gate on the relevant day told him to go and locate his container and told him nothing else.

W7 explained that he had been explained no safety procedure.

It is to be borne in mind that "[a]lso, 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." (**DPP v Flacq United Estates Ltd (supra)**).

That being said, the Court also notes that the Risk Assessment (page 2 sections entitled "Forklift movement on depot park" and "Forklift/Vehicle movement on depot park" of Doc. F) was carried out on 16-02-11, that is more than one and half years prior to the accident. It is too remote in time to be of any assistance to the Accused Company, bearing in mind that there may have been changes in the types and/or numbers of vehicles entering the said compound (**General Construction (supra)**).

It is further to be noted that the said risk assessment does not specifically identify any risk/s to pedestrians in the said compound, whether the said pedestrians were in the Accused Company's employment or not.

It stands to reason therefore that the said Sugar Bag Process (Doc. E) could not, and in fact did not, specifically identify and address any risk/s to pedestrians in the said compound, whether the said pedestrians were in the Accused Company's employment or not (**General Construction (supra)**).

In order for the Accused Company to identify and mitigate any risk/s to pedestrians in the said compound, whether the said pedestrians were in the Accused Company's employment or not (**General Construction (supra)**), it was incumbent on the Accused Company to carry out a specific risk assessment in relation to same. This is even more so given the testimony of the Accused Company's Representative to the effect that producing containers for the Sugar Syndicate was a new business for the Accused Company, and therefore it could not have known, in the absence of a specific risk assessment in relation thereto, any risk/s to pedestrians in the said compound, whether the said pedestrians were in the Accused Company's employment or

not, and given the fact that the very job done by the helpers entailed their having to come down from their truck to at the very least check the container and affix seal/s.

Had the Accused Company carried out a specific risk assessment as regards any risks to which pedestrians in the compound were exposed to, there would have been a specific procedure put in place to mitigate any such risks.

Fourth, whilst it was advanced on behalf of the Accused Company that the notices present on site (Doc. B4) do convey the message to persons not to get off their truck because of the forklift, the Accused Company's Representative himself confirmed that the said notices (Doc. B4) did not mention that persons should not get off from their vehicle and that persons should not work inside the said compound.

From a perusal of the two middle notices (Doc. B4), it is clear that although the said two notices are plainly visible from the entrance of the container park, they are merely warning of the dangers due to the presence of forklift trucks, and in no way indicate, whether in writing and/or in picture/s, that persons are not to get down from their truck unless told to do so by a supervisor or a forklift driver.

These notices (Doc. B4) therefore in no way assist the Court in the determination of the present matter.

There was a contradiction in the Prosecution case as to whether the said notices (Doc. B4) were present at the entrance of the said compound on the relevant day.

From a perusal of photograph (Doc. B4), there is rust around the screws/bolts/nails fixing the first three notices (i.e. the speed limit notice and the two notices showing the forklifts) to the concrete base.

The Court takes Judicial Notice of the fact that rust occurs when iron or steel is oxidised when in prolonged contact with air and moisture, and the only reasonable inference to be drawn from the presence of rust on the said notices (Doc. B4) is that the said notices had been affixed on the said concrete base for some time.

Be that as it may, as highlighted above, given the Accused Company's Representative confirmed that the said notices (Doc. B4) did not mention that persons should not get off from their vehicle

and that persons should not work inside the said compound, these notices (Doc. B4) in no way assist the Court in the determination of the present matter.

And fifth, the instructions (Doc. G) bear no company logo and/or name, and bears only one signature and one name. Be that as it may, given the Prosecution did not challenge the said document emanated from the Accused Company, the Court acts on the basis that it does, but highlights that the said document bears the date of 27-08-14, and was devised as remedial action after the present accident as per the Accused Company's Representative.

Therefore, the said instructions (Doc. G) were not available in 2012 at the time of the present accident, and therefore offer no assistance in the determination of the present matter.

In light of the above, in particular the cogent and consistent testimony of W2 and W4, it is clear that on the relevant day and at the relevant time, there was no compliance with, and implementation of, the Accused Company's own written Sugar Bag Process (Doc. E).

The Court has assessed the testimony of all the Prosecution Witnesses and that of the Representative of the Accused Company, and has watched their demeanour with the utmost care.

There were contradictions in the testimony of W2, W3, W4, W5, W6, and W7 for instance, that W5's memory had to be refreshed but also that inconsistent parts of his statement had to be put to him, and that inconsistent parts were put to W6, on matters such as who W2's employer was, the number of years of experience W5 had, the identification by W5 of the forklift, the period of time W7 had been working for his employer, or who gave instructions to W2 and W7.

There were also contradictions between the testimony of certain of the Witnesses for the Prosecution, for example W2 stated that he took instructions from IKS, whereas W7 stated that he took instructions from the driver of the truck he was working on.

That being said, the Court is of the considered view that the said contradictions related to peripheral issues only, and do not undermine the testimony of the said Witnesses or the Prosecution case, as "[g]iving evidence in Court is not a memory test and failure to recollect with precision all the circumstances and details of an incident is understandable. What is important is for the Court to be satisfied that a witness is speaking the truth in substance." [1] and as "evidence should [not] be treated as a monolithic structure which must be either accepted or rejected en

[1] **Vythilingum v The State of Mauritius [2017 SCJ 379]**

bloc. On the contrary, it is the function of a trained magistrate to weigh and to criticize testimony so as to distinguish what may safely be accepted from what is tainted or doubtful." [2]

The Court is satisfied that Mr Somajee (hereinafter referred to as W1), W2, W3, W4, W5 and W7 were speaking the Truth in substance, and they each, in essence, maintained their respective version as to the central issues in the present matter, and W2 and W4 corroborated each other on the central issues, as highlighted above.

On the other hand, the Court is of the considered that it ought to act with caution in relation to W6's testimony for the reasons given below.

First, W6 conceded being present at the said compound on the relevant day, and that he was the foreman who was to guide W2 to where he had to go.

Therefore, when W2 said that the person at the gate had told him he had no time and to go and look for his container himself, W2 was in effect referring to W6.

It is to be borne in mind that at no stage W6 stated that there was more than one foreman on duty on the relevant day.

Second, W6 explained in detail the procedure that was in place at the said compound, which was in line with the Sugar Bag Process (Doc. E), and then, unprompted, he volunteered that W2 had been taken to task regularly due to his imprudence, adding that it was not just W2. .

If indeed W2 was repeatedly taken to task for his imprudence, and was therefore repeatedly not abiding by the Accused Company's procedure in place at the relevant time, and yet had access to the said compound on the relevant day, it follows that the Accused Company had not acted on its own procedure of refusing access to the said compound to W2 despite his being a "repeat[…] offender" (Folio 101880 of Doc C).

And third, it is to be noted that W2 had been working as helper for his employer for about 01 and ½ months at the relevant time and hence had not been working in the said compound for a very long period, yet W6 explained that W2 used to go to the said compound every day, and was taken to task regularly due to his imprudence. This seems to be an exaggeration on the part of W6, who was trying to divert attention from himself.

[2] **Ramcharran v The Queen [1977 MR 226]**

From all the above, it appears that W6 was trying to paint W2 in a bad light in an attempt to exonerate himself and that W6's whole testimony was geared towards pointing the finger exclusively at W2.

The Court therefore finds that it would be most unsafe to act on W6's testimony, who appeared to have an axe of his own to grind.

As regards the Representative of the Accused Company, he struck the Court as a truthful Witness, and the Court has no reason to doubt his testimony.

As per its statutory obligation, an employer must do whatever is reasonably practicable to ensure the safety and health of persons not in its employment.

And as per **Halsbury's Laws of England – Health And Safety At Work (Volume 52 (2020)) at paragraph 382**, "reasonably practicable" is explained as follows:

> **382. Qualified statutory obligations.**
>
> Obligations imposed by safety legislation are frequently qualified by the words 'so far as reasonably practicable', or 'so far as practicable'. Each of these phrases affects in a different manner the obligation which it qualifies.
>
> 'Reasonably practicable' is a narrower term than 'physically possible' and implies that a computation must be made, before the breach complained of, in which the quantum of risk is placed in one scale and the sacrifice involved in the measures necessary for averting the risk (whether in money, time or trouble) is placed in the other and that, if it be shown that there is a gross disproportion between them, the risk being insignificant in relation to the sacrifice, the person upon whom the obligation is imposed discharges the onus which is upon him. The unforeseeability of a risk may be relevant in deciding what is reasonably practicable.

The Representative of the Accused Company confirmed that helpers had to work in the said compound but that they had to work around the container when authorised to do so by the supervisor. Given the very nature of the job done by the helpers, and the presence of forklifts

and trucks in the said compound, the Court is of the considered view that it was foreseeable that W2 could be hit by a forklift in the said compound.

As evidenced by the testimony of W2, W4, and W7, as highlighted above, the said procedure (Doc. E) was not implemented on the relevant day, and it was the duty of the Accused Company to ensure that all persons entering the said compound complied with the said procedure (Doc. E).

And W7 explained that two or three weeks after the accident involving W2, the procedure had changed whereby the helper could only enter the said compound when he was in his truck.

It was therefore reasonably practicable for the Accused Company to ensure compliance with the said written procedure (Doc. E), and by failing to ensure same was implemented at the relevant time, the Accused Company had not done all that was reasonably practicable to ensure the safety and health of W2, who was not in its employment, at the relevant time.

Also, the very fact that the Accused Company put in place the instructions (Doc. G) as remedial action after the present accident, shows that it was reasonably practicable for the Accused Company to do so.

In light of the above, and in the absence of any evidence on Record to the contrary, the Court finds that the Accused Company has not proven on the Balance of Probabilities that it was not reasonably practicable to do more than was in fact done to satisfy its duty, pursuant to **s. 96(6) of the OSHA**.

<u>Miscellaneous</u>

Notice (Doc. B3)

As per photograph (Doc. B3), the notice relates to the entity C.E.L., and the Accused Company's Representative explained that C.E.L. was the previous name of the Accused Company.

No documentary evidence was adduced by the Defence as to the fact that C.E.L. is in fact the Accused Company's previous name.

Be that as it may, the Prosecution did not challenge the fact that C.E.L. was the previous name of the Accused Company, and the Court therefore finds that it can act on the basis of the said notice, but further finds that given the object of the said notice (Doc. B3) is merely to exonerate the Accused Company of all liability, the said notice (Doc. B3) does not assist the Court in

determining whether the Accused Company had ensured the safety and health of W2 in the said compound at the relevant time.

Accident Investigation

In the course of the cross-examination of W2, parts of a Report relating to the forklift being equipped with a reverse buzzer, to the forklift being in good state as per the weekly forklift checklist, and to signages for warnings and for attention being affixed at front main entrance of the said compound (paragraphs 2, 3, and 4 under the heading "Findings" at page 02 of the Accident Report forming part of Doc. F) were put to W1 as forming part of his own Report (Doc. H), but Learned Defence Counsel was in fact referring to the Accident Investigation signed by Mr Sankish Haguthee, Safety & Health Officer dated 20-11-12 carried out on behalf of the Accused Company (Doc. F).

The Court therefore finds that the said observations as contained in the said Accident Investigation (contained in Doc. H) cannot be attributed to W1.

Issues raised for the first time in Court by the Prosecution

It was raised for the first time in Court by W1 that:

1) "there was no separation between movements of vehicles and pedestrians in this container park. Therefore there was no demarcated area for pedestrians to walk in that area.";
2) the helpers were walking in the passageways of the said compound "without wearing their personal protective equipment […] and were allowed access in the container park";
3) lack of supervision; and
4) reverse alarm on the forklift.

The Court is however of the considered that it is not open to the Prosecution to raise the said issues for the first time in Court, when same were not put to the Accused Company in the course of the enquiry as being amongst the reasons it failed in its duty of ensuring the safety and health at work of W2 who was not in its employment, in light of the principles set out in the Authority of **Marday v The State [2000 SCJ 225]**:

> "[i]n a criminal case it is normal to assume that the version that is put to an accused party when recording his or her defence is the very complaint that was made by the victim.".

W2's employer

In the course of W2's cross-examination, whilst his version was put to him, in came out that in the course of the Police enquiry, W2 said that he was working for IKS, to which W2 agreed.

W3 deponed *inter alia* to the effect that W2 worked in his truck on the relevant day and that he paid W2 whenever he worked on his truck, adding that W2 did not work with him permanently, but only on an on and off basis, and as per the present Information, W2 was employed by Mr Bagha. Although W3 agreed that it was IKS that gave instructions to W2, at no stage was it suggested by the Defence that IKS was the one paying W2.

In light of all the above, the Court finds that the said inconsistency in the Prosecution case in no way undermines its case, as the evidence on Record establishes that:

1) W2 was not in the Accused Company's employment;
2) on the relevant day, W2 was working in W3's truck; and
3) W2 was paid by W3 when W2 worked in W3's truck.

On the relevant day therefore, given W2 was working on W3's truck, and given W3 confirmed he would pay Rs300/- per day to W2 whenever he worked on his truck, to all intents and purposes, W2 was employed by W3 on the relevant day.

Conclusion

In light of all the evidence on Record, all the circumstances of the present matter, and all the reasons given above, the Court finds that the Prosecution has proven its case against the Accused Company beyond reasonable doubt, and the Accused Company is therefore found Guilty as charged.

[Delivered by: D Gayan, Ag. President]
[Intermediate Court (Financial Crimes Division)]
[Date: 15 March 2023]