OSHI v Compagnie Mauricienne de Textile Ltee

2025 IND 8

Cause Number 152/17

In the Industrial Court of Mauritius
(Criminal side)

In the matter of:

OSHI

v.

Compagnie Mauricienne de Textile Ltée

Ruling

Accused stands charged with having on or about 15th of November 2011, unlawfully failed to ensure, so far as is reasonably practicable, the safety and health at work of one of its employees namely one Mohammad Nizam Toorubally who sustained injury to his left foot when he fell in the space between the walking platform and the rollers of a stenter machine at its place of work at La Tour Koenig in breach of Sections 5(1) and 94(1) (i) (vi) of the Occupational Safety and Health Act 2005 – Act No.28 of 2005 coupled with Section 44(2) of the Interpretation and General Clauses Act.

The accused company represented by Mr. Mokshanand Dowarkasing in his capacity as Administrative Manager pleaded not guilty to the information and was assisted by Counsel.

Prior to the case being started, the Prosecution has moved to amend the information on 3.3.23 to add Witness no.5 namely Mr. S.I.A. Rohoman on the list of witnesses to the information and to which there was no objection. On the trial day namely on 14.7.23, learned Counsel for the Defence has drawn the attention of the Court that Witness no.5 was added to the list of witnesses and he was made aware on that very day that he had made a report and he was yet to be favoured with a copy of that report. He gave advance notice to the Prosecution that he was going to object should that report be produced or any of its content thereof is put before the Court, if same has not been put to the representative of the accused company at enquiry stage and if the Prosecution is seeking to rely on it for its case.

Witness no.1, Mr. Premsing Seetohul being the only enquiring officer, gave evidence in Court. In the course of his examination in chief, in relation to the Stenter Machine involved in the present accident at work, he stated that its front part where there was a toe board platform was where the injured person was standing and where there were exposed rollers. His enquiry revealed that the Witness no.2, Mr. Nizam Toorubally was moving from the left side to the right one, when he fell through the open space of the machine in between the rollers and the platform. He drew a report and produced same as per Doc. D. According to him, the accident occurred as the open space was not securely fenced so as to prevent access to the open space between the machine and the platform.

In the course of cross-examination, he admitted that he went to the locus about one year after the accident. It was only after a complaint was made by the injured person that he enquired into the accident. The purpose of the machine was to straighten fabrics. He admitted that he did not verify from Mr. N. Toorubally as part of his enquiry whether it was necessary as part of his job to be able to see those fabrics at all given times while the straightening process was going on. The injured person had to step on the toe board in order to be able to do his job.

According to the operations manual from the representative of the accused company, he admitted that the rollers and the machine were not fenced, they came like that. He further admitted that the machine was delivered and installed in 1998 and there were accepted safety standards for countries like Mauritius as per a letter (Doc. E) from the company Bruckner where the machine was imported so that as stated by him that as per the user manual of that machine, there was no need for the machine to be fenced off. Nevertheless, he maintained that the machine should

have been fenced off, as he enquired into the accident along with Mr. S.I.A. Rohoman who is the Mechanical Engineer and his recommendation was …. and while he was trying to talk about his recommendation, learned Counsel for the Defence objected as he had already put an objection about adducing such evidence from the Mechanical Engineer and his report.

The Accused's unsworn statement was shown to him as per Doc. C, at folio 98042 and it was written:

"Today the officer has informed me that the Employer has failed to secure and fence the six rollers of the Stenter machine of Make Bruckner, in use in the factory which is a breach of Sections 5(1) and 47(1) of Occupational Safety and Health Act 2005.

Firstly, I do not agree that we failed to provide protection in operating this machine on the platform for several reasons: - (…)"

He made a report as per Doc. D and he did not mention therein as admitted by him that the Bruckner machine should have been fenced off and that the rollers had to be fenced off. In Accused's unsworn statement as per Doc. C, its representative did mention the various reasons why there were no hazards while operating the machine but the enquiring officer admitted that he did not make further suggestions that the Accused went wrong therein.

Further, the injured person was heard and he stated in Court that when the accident happened, he had 23 years of experience and had been working as Supervisor for 12 years while being more or less in the same department. It was not a new job that he was doing as Supervisor. He did not make any complaint that the rollers were not fenced off because it was not necessary to do so and they were unfenced for about 23 years.

The case was fixed for arguments in a gist on the basis that the Defence has objected to any evidence being adduced be it in terms of the production of a report, documents or otherwise emanating from Mr. Rohoman who is a Mechanical Engineer and whose evidence was not put to the Accused at enquiry stage when a Defence statement was recorded from the Accused's representative under warning as per Doc. C.

The main thrust of the argument of learned Counsel for the Defence is that we are not concerned with any stay of proceedings for unfairness but rather with the admissibility of the evidence and there is no question of prejudice to be assessed. Any reliance by the Prosecution on the evidence of Witness no.5 including his report, when at no point in time the representative of the Accused was confronted with any such evidence, it is in itself a breach of its constitutional rights and a major flaw in the conduct of the enquiry by the Occupational Safety & Health Inspectorate. Such evidence having never been confronted to the Accused at enquiry stage should be excluded by the Court and he relied mainly on the cases of **The Director of Public Prosecutions v T P J M Lagesse & Ors** [2018 SCJ 257], **Seetahul v The State** [2015 SCJ 328], **The State v P.W. Roberts [Record No. CS:16/15]**, **M.E. Jhootoo v The State** [2013 SCJ 373] and **Kanda v Government of Malaya [1962] AC 322.**

The main thrust of the argument of learned Counsel for the Prosecution is that he was not contesting those authorities cited by learned Counsel for the Defence which are accepted principles. His contention is that the Court is left in the dark as to what the report of Mr. Rohoman, the Mechanical Engineer, contains and cannot make any decision of that, unless the Court is in presence of the report as the submissions are speculative as to what the report actually contains.

I have duly considered the submissions of both learned Counsel for the Prosecution and the Defence and the evidence adduced so far.

First and foremost, it is clear enough that the reason why the enquiring officer maintained that the machine should have been fenced off, was because he admitted that he enquired into the accident along with Mr. Rohoman who is the Mechanical Engineer and who made his recommendation. Thus, it is abundantly clear that fencing off the machine was an expert opinion and that measure would have prevented the accident from happening and which is incriminating evidence against the Accused, because such a measure is not contained in the report of the enquiring officer as per Doc. D nor as per the unrebutted testimony of the injured person. Therefore, the unescapable conclusion is that the unsworn statement of the Accused shows the absence of such incriminating expert evidence of Mr. Rohoman being the Mechanical Engineer, having been put to the Accused's representative at enquiry stage (see- Doc. C).

At this stage, I find it most relevant to quote an extract from the Supreme Court case of **The Director of Public Prosecutions v T P J M Lagesse & Ors [2018 SCJ 257]**:

"The baseline is therefore that the accused must be made aware of the case against him. What effectively does that imply? Quite clearly this will depend on the particular circumstances of each case, but evidently cannot mean the "charges as per the information lodged before the trial court" be put to him at the stage of enquiry.

Where there is a complaint, it would de facto imply that the suspect has to be confronted with that complaint; and if there were additional incriminating evidence gathered during the course of the enquiry those should be put to the suspect. Obviously, if the police as part of their enquiry do have incriminating evidence, the suspect has to be cautioned and informed of his right to be legally assisted, i.e. right against self-incrimination and right to be legally assisted."

Having highlighted why the incriminating evidence of the expert witness ought to have been put to the Accused at enquiry stage let alone that it is crystal clear that it is the most incriminating evidence so far borne out by the record, I find it imperative to reconcile such fact with the following excerpt from the case of **The State v Ruhumatally [2015 SCJ 384]**:

"A distinction must be made between two types of cases. We may have, on the one hand, a case involving only one offence which is obvious to one and all. Even in such a case, there is a duty on the police to inform the person of the nature of the offence he is suspected of having committed because we cannot assume that the person knows what is being reproached of him. The fact that he is being assisted by counsel at that stage does not absolve the police of its duty because counsel must himself know what is being reproached of his client so that he can meaningfully advise the latter. We can, on the other hand, have cases, the facts of which may reveal the commission of several possible offences. The person may have in mind one possible offence but the police may be considering or enquiring into another offence based on more or less the same set of facts. This is where informing the person of the nature of the offence he is suspected of having committed assumes all its importance.

(…)

But there is one important aspect that cannot and should not be overlooked. The caution is not given generally in a void; rather, it is given in relation to an

identifiable offence that the accused is suspected of having committed. The further questioning by the police officer 'relates to the offence which the person is suspected to have committed.' The person 'not being obliged to say anything' once again relates to the offence which he is suspected to have committed. If he has anything else to say which is of a general nature and which can be helpful to the police, he can still do so under his civic duty to help the police in solving crimes.

The above situation begs the question: 'How does a person exercise the rights and privileges afforded to him by the caution if he does not know what offence he is being suspected of having committed?' An effective interpretation of Rule II would require that we read into it the obvious proposition that a person has to be informed of the nature of the offence he is suspected of having committed so that he may exercise his rights and privileges under the caution in an informed way. This does not mean that he has to be informed of one or more offences in legal language, or of the section/s of the law which have been breached, or of the elements of the offence. But the person must be given an idea which is elaborate enough concerning what is reproached of him and which constitutes a breach of the penal laws of Mauritius and to which he is being asked to answer." **(emphasis added)**

In **Seetahul v The State [2015 SCJ 328]**, it was stressed that:

"Section 10(2) of the Constitution provides that every person who is charged with a criminal offence shall be informed as soon as reasonably practicable, in a language that he understands, and, in detail, of the nature of the offence. (…)

It was not incumbent at the stage of the enquiry to put each and every element of the offence to the appellant. It suffices that the version of the complainant was put to him so that he was made aware of the case against him and the evidence on which it is based so as to enable him to prepare his defence." **(emphasis added)**

Indeed, in the case of **The State v P.W. Roberts [Record No. CS:16/15]**, the Defence objected to evidence sought to be adduced by the Prosecution of an incident which was not put to the Accused at enquiry stage.

The Supreme Court reaffirmed the principle that the Accused is entitled to know the nature of the offence(s) with which he is being charged and reference was made to the cases of **Seetahul v The State [2015 SCJ 328]**, **D. I. Easton v The State & Anor [2013 SCJ 33]**, **M.E. Jhootoo v The State [2013 SCJ 373]** and **Kanda v Government of Malaya [1962] AC 322,337**.

It is useful to quote an extract from the latter case where Lord Denning had the following to say:

"If the right to be heard is to be a real right which is worth anything, it must carry with it a right in the accused man to know the case which is made against him. He must know what evidence has been given and what statements have been made affecting him: and then he must be given fair opportunity to correct or contradict them."

It was further highlighted in **Roberts**(supra) that it was not shown to the satisfaction of the Court that the Accused was confronted with the *"incident sought to be elicited in evidence at the stage of enquiry"* and thus, the Accused was deprived in presenting any defence to the allegations against him contained therein. Accordingly, the Supreme Court held that *"the failure to confront the accused with the evidence or case against him at enquiry stage constitutes a breach of his imperative constitutional rights to be informed of the case against him and to be given an opportunity to respond to what lies against him;"* and the objection of the Defence was upheld and such evidence sought to be elicited by the Prosecution was excluded.

In the present case, the enquiring officer admitted that his enquiry was also based on the evidence of the Mechanical Engineer, namely Mr. Rohoman. It is relevant to note that there was no formal charge proffered against the Accused under Section 64(2) of the Occupational Safety and Health Act 2005, for example, which reads as follows:

"Where any person is to work at a place from which he will be liable to fall a distance more than 2 metres, then unless the place is one which affords secure foothold and, where necessary, secure handhold, means shall be provided, so far as is reasonably practicable, by fencing or otherwise, for ensuring his safety."

Again, it is plain enough that the enquiring officer at enquiry stage relied on the version of the injured person, the photographs he took when he went to the locus of the accident and his report as regards his observations, and more importantly on the incriminating evidence emanating from an expert witness in his capacity as Mechanical Engineer namely Mr. Rohoman to explain the cause of the accident(viz. the machine being unfenced) and the remedial action that should have been taken to prevent the accident from occurring, for example, the methodology for working

practices for the purpose of safeguarding the health and safety of workers. Therefore, the Prosecution sought to adduce evidence from that Expert witness at the trial when such evidence was not put to the Accused during the enquiry. In such manner, the Accused has not been made aware of the nature of the offence (meaning on the basis of the incriminating evidence of that Expert witness) with which he would be eventually charged, as well as a denial of an opportunity to present a defence in relation to the charge (at enquiry stage) and which was subsequently levelled against it under the present information. When I said the charge, I meant all incriminating evidence warranting a caution under Rule II of the Judges Rules in order to be elaborate enough (see- **Lagesse**(supra) and **Ruhumatally**(supra)) prior to a statement being taken from the Accused, and not in the sense of the precise legal definition but suffice it to say "*which constitutes a breach of the penal laws of Mauritius and to which Accused is being asked to answer" (see-* **Ruhumatally**(supra)).

In the same breath, in **Grandcourt J.G. v The State [2018 SCJ 56]**, the Supreme Court had the following to say:

"In fact as stated in the case of ***Seetahul v The State*** *[2015 SCJ 328], the suspect needs to be made aware of the version of the complainant, the facts and evidence of the case and he should be aware what the Police and ultimately the prosecution will rely upon. This is to enable a suspect to prepare his defence and have "an opportunity to correct or contradict" the case against him as stated by Lord Denning in* ***Kanda v Government of Malaya [1962] AC 322,337****."*

For all the reasons given above, I uphold the objection raised by learned Counsel for the Defence, because the failure of the Prosecution to confront the Accused with the incriminating evidence emanating from that expert witness viz. Mr. S.I.A. Rohoman at enquiry stage "*constitutes a breach of his imperative constitutional rights to be informed of the case against him and to be given an opportunity to respond to what lies against him"* (see- **Roberts**(supra)). Accordingly, I hold that any incriminating evidence quoad the Accused emanating from Witness no.5 namely the expert witness be excluded in the course of the proceedings.

This matter is fixed *proforma* to 21st February 2025 for both learned Counsel to suggest common dates for continuation.

S.D. Bonomally (Mrs.)

(Vice President)

14.2.2025