OSHI v Municipal Council of Vacoas/Phoenix

2024 IND 66

Cause Number 27/22

In the Industrial Court of Mauritius
(Criminal side)

In the matter of:

OSHI

v.

Municipal Council of Vacoas/Phoenix

Judgment

Accused being an employer is charged under Sections 5(1) & 85(1)(a) and 94(1) (i) (vi) of the Occupational Safety and Health Act – Act No.28 of 2005 coupled with Section 44(2) of the Interpretation and General Clauses Act with unlawfully:

1. failing on or about the 5th day of April 2017 to ensure, so far as is reasonably practicable, the safety and health at work of one of its employees of one Sookraj Lalljee who sustained cervical spine fracture when he slipped and fell down to the ground from waste lorry box bearing registration number 5Z128 at Camp Tickfine, Glen Park, Vacoas.

2. failing on or about the 5th day of April 2017 to forthwith notify the Director, Occupational Safety and Health by the quickest practicable means of an accident arising out of work which occurred at Camp Tickfine, Glen Park,

Vacoas on 5th April 2017 and as a result of which accident one of its employees, one Sookraj Lalljee, sustained cervical spine fracture when he slipped and fell down to the ground from waste lorry box bearing registration number 5 Z128.

The Accused through its representative, Mrs. Meenasha Marooty-Ramma in her capacity as Safety and Health Officer, has pleaded not guilty to both counts and has retained services of Counsel at its trial.

The case for the Prosecution is to the following effect: -

Mrs. Tina Ramsurrun-Baznauth in her capacity as Occupational Safety and Health Officer gave evidence in Court.

She enquired into an accident at work which occurred on 5.4.2017 at Camp Tickfine, Glen Park, Vacoas when one Sookraj Lalljee slipped on a rotten avocado (consisting of its seed and fleshy part) and fell down to the ground from the waste lorry box of a stationary lorry bearing registration number 5Z128. As a result, he sustained a cervical spine fracture (as per the medical certificates produced namely Docs. A, A1 to A3).

On 25.4.2017, she proceeded to the locus of the premises of the Accused and took 3 photographs of the lorry concerned which she bound in a booklet with explanatory notes as per Docs. B1-B3. On 15.12.2017, 11.9.2018 and 26.10.2020, she recorded 3 Defence statements respectively from Mrs. Meenasha Marooty-Ramma, the representative of accused company, as per Docs. C, C1 and C2.

Her observations in line with her report as per Doc. D on 25.4.2017 of the lorry bearing registration number 5Z128 in the yard of the Municipal Council of Vacoas- Phoenix are as follows: -

1. The lorry which was involved in the present accident was found to be in good condition (Doc. B1).
2. The lorry box was at a height of about 5 feet above ground level and it had a two-sided back door (Doc. B2).
3. Handles/support were provided above on the two sides of the lorry box which extended from the back door to the cabin (Doc. B2).

4. A handle was provided as a support to be used when mounting/descending the lorry and it was found near the lorry steps.
5. The steps are accessed by refuse collectors for waste disposal inside the lorry box and for egress by the same refuse collectors to the ground (Doc. B2).

6. The surface of the lorry box was of metal (Doc. B3) and when a person was standing at the edge of the said lorry box, it represented an open side with a foreseeable danger of fall from height especially when there were wastes in the lorry box (Doc. B2).

7. Two steps (ladder type structure) were provided to access/egress the lorry box (Doc. B2).

Her enquiry and the unrebutted testimonies of the injured person (Mr. Sookraj Lalljee) and his colleague (Mr. Gyan Gungabissoon) who remained in the lorry box for the purpose of collecting, emptying and returning back waste bins to other refuse collectors on the ground from a height of about 5 feet revealed the following:

(a) It was a system of work on a roster basis for 2 refuse collectors [who were Mr. Sookraj Lalljee, the injured person and Mr. Gyan Gungabissoon on the material day] to step into the lorry box when the lorry was stationary by using a handle for support and to remain there, while some other 6 refuse collectors would remain on the ground.

(b) That was because the two of them had to collect filled waste bins placed on the edge of the lorry box by those other colleagues in order to have them emptied and returned again while being at a height of about 5 feet above ground level. Both of them had about 8 years' experience at the material time.

(c) They could not hold the handles found on the opposite sides of the lorry box given that waste bins were held with both hands. However, the empty waste bin could be held with one hand and a handle with the other. But it all depended on the worker as in the present case, the waste bin concerned was placed on the edge of the middle part of the lorry box. Those handles/support in the lorry box were used by the workers when the lorry was in motion.

(d) At the material time, Mr. Sookraj Lalljee was wearing a pair of rubber boots with grip resistance among other protective equipment like safe uniform given to him by Accused. The latter also provided a free passage in the refuse box while loading wastes to ensure that the refuse box was filled to the maximum safe level. Protruding refuse waste was to be properly covered with a tarpaulin before proceeding to the transfer station, meaning there should not be any waste protruding when the workers were on the lorry. All refuse collectors should comply with the time of work for their own safety. The rotten avocado came from a waste bin which was emptied by the refuse collectors themselves and which had come out from the bin and the employee slipped on it.

(e) The safe working procedure did not include all aspects of the activities which were being carried out. Had there been a sufficient and suitable risk assessment, the employer would have seen and known that the employees when they were holding the waste bin with both hands in the lorry box, could not hold the handles for support. Thus, no matter whether the handles were present or not, it did not make any difference in preventing the slip and fall from the lorry box to the ground which could lead to serious injury like in the present case.

(f) The accident happened when Mr. S. Lalljee was standing in the lorry box and returning an emptied waste bin, when he slipped over a distance of 3 feet in the lorry box on a rotten avocado from the wastes found therein causing him to fall onto the ground together with the empty waste bin resulting in a cervical spine fracture. As he was holding the waste bin with both hands, he could not hold the handles which were provided in the lorry box for support as per Doc.B2.

(g) The risk assessment for refuse collectors as per Doc. E which the enquiring officer received on 26.4.2017 from Accused, was not a sufficient and suitable one, as it did not mention the activity which was carried out at the time of the accident, that is, collecting and emptying of waste bins by the 2 workers in a vertical position in the lorry box at a height of about 5 feet above ground level and returning them to other refuse collectors found on the ground so that the risks associated with safety and health were not assessed by the Accused.

(h) Again, as per a copy of the "safe working procedures for refuse collectors" dated 25.9.2014 as per Doc. F which she received from Accused, no mention was made of the activity which had been carried out at the time of the accident. But same was mentioned in the amended "safe working procedures for refuse collectors" after the accident as per Doc. G.

(i) Had a specific risk assessment been carried out, the risks would have been identified, but they were identified after the accident following which the risk assessment was amended on 8.3.2018 and submitted on 26.10.20 as per Doc. H.

(j) She drew up a report upon completion of her enquiry dated 3.11.20 as per Doc. D.

(k) The accident happened on 5.4.2017 and the employer, the Municipal Council of Vacoas/Phoenix, informed the Director of Occupational Health and Safety about it on the 7.4.2017 namely 2 days after the accident.

(l) The usual driver of the lorry who was the Supervising officer did not turn up on the material day but was replaced by another driver.

As regards the second count to the information, the contention of the enquiring officer is that the Accused ought to have immediately notified the accident to the Director, Occupational Safety and Health by means of fax, phone or by calling in person, because the accident is listed in the 11th Schedule of the aforesaid Act which requires immediate notification. There was no need for the accused employer to complete its investigation into the accident before doing an immediate notification inasmuch as a report had to be submitted in the end as per the 13th Schedule of the Act. The law was not prescribed for a particular type of employer but for every employer to have an established procedure for notification. The law talks of immediate notification, it cannot be after 2 days. When there was an accident at work, the employer should immediately inform the Director of the Occupational Safety and Health as it should at least be aware what the employee sustained and where he was. That could not be after two days. On the other hand, the contention of the Defence is that the Accused not being a person but a Council, the notification being made after 2 days was within the ambit of the law.

Accused for its part, its representative did not depose under oath but admitted that the specific activity carried out by the injured person at the material time was not contained in the risk assessment done by it prior to the present accident as per its unsworn version.

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

It is not disputed that the system of work adopted by the Accused for which a risk assessment was done, did not cover the specific activity carried out by the injured person at the material time.

However, no evidence has been adduced by the Accused that it was not reasonably practicable for it to do so.

Had a risk assessment been done for that specific activity prior to the accident, it would have been apparent that the 2 workers in the lorry box could only effectively use the support handles while the lorry was in motion as they carried the waste bins with both hands in a confined place on a metal platform at a height of about 5 feet from the ground and where rotten food could emanate from the filled waste bins placed on the edge of that lorry box by the other 6 workers on ground level and in the exercise of them being carried, emptied and returned back with both hands to the edge of the lorry box by the said 2 workers in the lorry box, the risks of a slip and a fall from height would have been identified.

In that manner, such risk assessment would have enabled management to detect the risks of slipping and an eventual fall from height in a confined space (let alone that rainy weather is a frequent occurrence in Mauritius) while performing such an exercise by the 2 refuse collectors in the sense that the existing safety measures would have proven to be inadequate namely the presence of one support handle on each opposite inner side of the lorry box, a free passage way, protective equipment to be worn, proper stacking of wastes and compliance with time slots and supervision by the driver of the lorry.

Thus, Accused would have assessed then that for the system of work to be safe, the said 2 refuse collectors should have been provided with safety harnesses fixed to anchorage points in the lorry box itself like ,for instance, by using the 2

handles for that purpose, to prevent them from slipping and falling from a height in a restricted slip prone space(meant for wastes collection and stacking) like in the present case on the wastes coming out of the waste bins in the process of them being stacked in the refuse box. This cannot be construed as not being current knowledge or invention in order to justify a total lack of such knowledge on the part of the accused employer (see- **Sinassamy M.A. & Anor v Navitas Holdings Ltd [2021 SCJ 424]**).

Therefore, the accused employer has failed to establish a safe system of work in view of the lack of safe working procedures to enable the specific work to be performed safely by the 2 refuse collectors in the lorry box.

In the same breath, management has also failed to provide training to the employees performing the specific work namely carrying and emptying of waste bins in a vertical position in the lorry box at a height of about 5 feet from the ground level and returning them to other refuse collectors found on the ground. Only then, it would have been apparent that there should be at least 2 Supervisors as the driver then would not have sufficed for supervision. Furthermore, it would have also been apparent that a permit to work would have had to be issued to the second Supervisor in relation to the specific work to be performed in the lorry box to ensure that adequate supervision is exercised.

Hence, there was no safe system of work and working procedure established by the Accused before the accident and which cannot be measured by the fact that *"(…) because no serious accident had occurred in the past that a system of work is necessarily compliant with the requirements of the Act"* (see- **The D.P.P. v Flacq United Estates Ltd [2001 SCJ 301]**).

At this stage, I find it apt to quote the following extract from the Supreme Court case of **Babooram J. v Ministry of Labour [2013 SCJ 6] at pages 3 and 4** which reads as follows:

"In law, the liability of an employer to his employee is not demarcated physically by the area of the ground, floor or surface area where the employee is made to work but by the concept of "at work". The duty is not related to the work-place as such but to the work.

Section 5(1) of the Occupational Safety, Health and Welfare Act (Act No. 34 of 1988) reads as follows:

"Duties of employers

(1) Every employer shall, so far as is reasonably practicable, ensure the safety, health and welfare at work of all his employees." (underlining ours)

The meaning of "at work" is larger than on site. It includes the provision of a working environment that is safe and without risks to health.

(…)

For the duty of an employer is "to ensure" the safety of the worker. Ensuring does mean that he has checked that the place of work is safe and without risks. If he does not know, he has failed to ensure." (**emphasis added**)

The provisions of Section 5(1) of the Occupational Safety, Health and Welfare Act (Act No. 34 of 1988) are similar to those of Section 5(1) of the Occupational Safety and Health Act – Act No.28 of 2005.

Therefore, the risk of injuries being caused by a slip to any of the 2 workers of Accused in the lorry box when handling waste bins on a metal platform with both hands and even leading to serious injury was predictable bearing in mind that no Accused's expert witness nor its representative deposed to the effect that it was not reasonably practicable for the Accused to do more than was in fact done to satisfy the duty or requirement of safety, or that there was no better practicable means or step than was in fact used or taken to satisfy that duty or requirement of safety pursuant to **Section 96(6) of the Occupational Safety and Health Act 2005** and which reads as follows:

*"**96. Special provisions as to evidence***

(6) 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 is 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."(**emphasis added**)

It is relevant to refer to the explanation provided for the term *"reasonably practicable"* in **Halsbury's Laws of England, (5th Edition) (2020), Vol 52**: **Health and Safety at Work** at **paragraph 382** referred to in **Sinassamy M.A. & Anor v Navitas Holdings Ltd [2021 SCJ 424]** as follows -

" "Reasonably practicable" is a narrower term than physically possible and implies that a computation 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 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. (…) Measures may be practicable which are not reasonably practicable but, nonetheless, 'practicable' means something other than physically possible. The measures must be possible in the light of current knowledge and invention; thus it is impracticable to take precautions against a danger which cannot be known to be in existence, or to take precautions which have not yet been invented, so that the concept of practicability introduces at all events some degree of reason and involves at all events some regard for practice. If a precaution can be taken without practical difficulty, then it is a practicable precaution, notwithstanding that it may occasion some risks to those who take it and even though the risk far outweighs the benefit to be achieved." (**emphasis added**)

Hence, I hold that the burden laid upon the Accused has not been discharged on a balance of probabilities (see- **Talbot Fishing Co Ltd. v OSHI [2006 SCJ 76]**) as the present accident was very predictable or foreseeable and the Accused has failed to show that the time , trouble and expense involved in a risk assessment leading to the precautions to be taken namely the criterion of sacrifice by the Accused to avert the risk of injuries due to a slip leading to a fall from height in relation to the said specific activity, is grossly disproportionate (see - **Jeanneton v Cie Sucrière de Bel Ombre [1993 SCJ 455]**).

Now as regards Count 2, it remained uncontested that the Accused notified the relevant authority of the accident only 2 days after.

It is of pertinence to note that in relation to a civil matter (see- **D'Emmerez de Charmoy v Chenard** [1909 MR 24] and **Lalouette v Lazare** [1869 MR 120]), Section 61 of the then District Court Ordinance, Civil side (now Section 37(1)(b) of the District and Intermediate Courts (Civil Jurisdiction) Act), the issue concerned the binding of a party upon written notice of an intended appeal of a judgment *"immediately"* by recognizance costs awarded, the term *"immediately"* was construed to be within a reasonable delay and for that purpose it was construed not to exceed 24 hours. This is because the terms of the enactment are precise and definite and the Legislator must be intended to mean what it has plainly expressed.

It is significant to note that all statutes whether penal or not are now construed by substantially the same rules meaning that regard must be had to the true meaning and intention of the legislature as expressed in the enactment (see- **Mason v The Queen** [1955 MR 71]). Such interpretation is in line with the golden rule that words of the statute must *prima facie* be given their ordinary meaning (see- **The Plaines Wilhems S.E. Co. Ltd. v The Medine S.E. Co. Ltd** [1943 MR 47]).

It is relevant to quote an extract from the supreme Court case of **D'Emmerez de Charmoy v Chenard** [1909 MR 24] **at page 1**:

"We agree with the interpretation put on the word "immediately" by the Judge who decided the case of Lalouette vs. Lazare (d) and the authorities quoted therein; we agree that "immediately" (…) does not mean "at the very moment" or within the moment or hour next following", but "within a reasonable time" and that 24 hours may be a reasonable time."

Furthermore, in the Supreme Court case of **Lalouette v Lazare** [1869 MR 120] **at page 2**, I deem it equally relevant to quote the following excerpt which reads as follows:

"The strict meaning of the word "immediately" came under consideration of the Court, (…). In fact, that the force of the word "immediately" was not to bind the Judge to certify as soon as the verdict was brought in, but gave him a certain reasonable latitude.

Thompson vs. Gibson 8. M. and W. 281,

Page vs. Pearce 8 M. and W. 677.

In the former case, BARON ALDERSON referred to a Judgment of LORD CHANCELLOR HARDWICK, Rex vs. Francis (cases Temp. Hardwicke 114 (His Lordship, there, said: "It was said that the word "immediately" excluded all intermediate time and action, but it will be found that it has not, necessarily, so strict a signification."

The word "immediately" has almost the same force as the word "instanter"; that term has been held to mean that the act shall be done within twenty four hours. (**emphasis added**)

CHITTY'S practice of the Law III. 82, quoting Price vs. Simpson, 1. Taunt 343.

In the same way, the term "forthwith" has been considered in Nicholls v Chambers (I. Cr. M & W. 385) to import that the requisite act shall be performed as soon as, by reasonable exertion confined to that object, it might be.

We have just seen cases in which the word "immediately" was used and construed in the same manner, and this Court in Dowland v. Jeffreys, construed it so, likewise." (**emphasis added**)

In the circumstances, in the present case, there is nothing to show that the Accused through any of its *préposés* could not have phoned or sent a fax or emailed or even turned up in person in order to inform the Director of the Occupational Safety and Health of the accident encountered by Mr. S. Lalljee at Accused's place of work causing injuries to him namely a cervical spine fracture within a reasonable delay of 24 hours so that he was admitted at hospital for treatment. The Supervisor meaning the driver of the lorry at the material time could have done so himself or informed his Superior for prompt notification.

For all the reasons given above, I find that the case for the Prosecution has been established beyond reasonable doubt as regards both counts and I, accordingly, find the Accused guilty as charged in relation to both counts.

S.D. Bonomally (Mrs.) *(Vice President)*
20.11.24