OSHI v La Moisson Ltee

2021 IND 10

Cause Number 256/17

In the Industrial Court of Mauritius
(Criminal side)

In the matter of:

OSHI

v.

La Moisson Ltée

Judgment

Accused is charged under Section 5(1) and Section 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 with unlawfully failing on or about the 10th day of June 2016 to ensure so far as is reasonably practicable, the safety and health at work of one of its employees namely Philippe Sardouce who sustained crushed injury at his left foot with fracture at his 4th metatarsal when his left foot was crushed under the blade of a sugarcane loader while at work at its place of work at a sugarcane field at Valetta. The Accused represented by Mr. Floyd Fitzgerald pleaded not guilty to the information and was assisted by Counsel.

The particulars of the body of the information read as follows:

"

(a) The employer did not make a risk assessment for the operation of the sugarcane loader which would have indicated the risks associated with the operation.

(b) <u>The risk that any employee in the surrounding is injured with the blade of the grabber of the loader when the loader is in operation would have been identified. The employer would have established a safe working procedure so that</u>

(i) when the mat is to be removed by an employee(helper) from the cabin of the operator and replaced later after cleaning, the blade has to be lowered on the ground by the loader in the cabin.

(ii) the grabber should be put in the off position by the operator who would then remove the start key from the start switch.

(iii) the operator would go out of the cabin and the key would be kept with him.

(iv) the helper would remove the mat to clean it and would replace it in the cabin while the operator would be still out with the key secured with him.

(v) the operator would then enter the cabin after having ensured that the helper is gone.

(c) After having carried out the risk assessment and established a safe working procedure it should be ensured that all concerned employees are provided with the above information."

The case for the prosecution rested on the testimonies of Mr. Premsing Seetohul the Occupational Safety and Health Officer who is the enquiring officer, Mr. Philippe Sardouce who is the victim and Mr. Imran Bava-Saib who is the operator of the loader.

Witness no.1, Mr. Premsing Seetohul, in his capacity as Occupational Safety and Health Officer, gave evidence in Court. He investigated into the present case and recorded a statement viz. Doc. E from the representative of the Accused in his capacity as Human Resource Manager (duly authorised by Accused as per Doc. D) namely Mr. Floyd Fitzgerald after he was duly cautioned.

His enquiry revealed that the Accused had a sugarcane loader to load cut sugarcanes into lorries. The operator of the sugarcane loader was employed by the Accused and there was a helper associated to help the operator during operation for

the refueling and cleaning of the mat. On the day of the accident viz.10 June 2016, the injured person namely Philippe Sardouce employed temporarily by Accused as per Doc. C, was requested to clean the mat of the cabin and after having done so and while he was placing same in the said cabin, the blade lowered down and he sustained injury to his left foot. He called at Valetta sugarcane field on 29 June 2016 where the sugarcane loader involved in the accident was seen as per Doc. B1. There was also a cabin of the sugarcane loader where the operator sat and operated the loader. There was a grabber of the sugarcane loader which was used to load cut sugarcanes in lorries and there was also the blade of the sugarcane loader which moved to soil level and then upwards. The accident occurred, because the blade lowered and the foot of the victim was injured. There was a removable rubber mat as per Doc.B4. He took a set of four photographs on that day which he bound in a booklet form with explanatory notes namely Docs. B(B1-B4). He drew up a report as per Doc. F. He also recorded a statement from the victim and the operator of the cane loader. To prevent the accident, a risk assessment should have been carried out, all risks and hazards identified and a safe work procedure being put in place and then communicated to all employees concerned.

In cross-examination, he conceded that after having listened to the representative of the Accused, he took a statement under warning from him. After having recorded a statement from Mr. Imran Bava-Saib and Mr. Philippe Sardouce and after having been on site and taken the photographs, he made a report. It was then that he came to the conclusion that the employer should have made a risk assessment to identify all risks and hazards and further to which a safe working procedure would have been put in place. It was agreed that following the accident, Mr. Sardouce was injured on his left foot with the blade of the sugarcane loader. Both the blade and the grabber were components of the loader. The grabber was used to pick up cut sugarcanes and the blade was used to level the soil and remove rocks if any. In the report there was a mistake at paragraph 12(b), it was not the blade of the grabber but that of the loader that caused the accident. So, when he stated in his report that *"Had a suitable and appropriate risk assessment been carried out, the risk that any employee is injured with the blade of the grabber …"*, it should have read blade of the loader. The accident had nothing to do with the grabber but with the blade of the loader so that the particulars of the grabber provided were irrelevant to the present matter. When he stated in the particulars that the grabber should have been put in the off position, that was a mistake it should have been the loader. If the employees were aware of the precautions they had to take when

working with the loader to clean the mat or to do any cleaning, the system of work would have been a safe one. He was not aware that Mr. sardouce was aware that he should not have approached the loader when it was on at a distance of about 25 metres away. The operator of the loader said in his statement that he knew that he should have put the blade on the soil. He agreed that when employees had knowledge of the precautions to be taken, when they had it, they should have followed it. When he mentioned the working procedures for the operation of the loader, if it were known to the employees, then it would have been safe meaning it was meant only for the cleaning, removing and replacing of mats.

Witness no.2, Mr. Philippe Sardouce, gave evidence in Court. On 10 June 2016, he was working in a sugarcane field at Valetta. He was picking up sugarcanes behind the machine (Atlas) and it was raining. The mat was given to him to be rinsed and to be remitted back when the accident occurred. His employer was the Accused and he was under a contract of employment for 6 months during harvest season which also involved washing the machine, waxing it and checking the wheels amongst others. He was standing after having rinsed the mat when he felt something on his foot. He shouted and when he looked at his foot, it was crushed. He was told by the operator to take the mat and to wash it. He took it. The machine had a blade which was high, and the operator was also on a high level. He was down on a low level. He was injured by the blade at his left foot as per the medical certificate produced namely Doc. A.

In cross-examination, he conceded that the accident happened in June 2016. On that day he was working for the Accused during harvest season. His job consisted also of the cleaning of the machine and helping the operator for its maintenance. On the day of the accident, Mr. Bava- Saib asked him to clean his mat as it was soiled with mud. He washed it in a nearby canal and then came back. At the time he was to put back the mat that the blade laid on his foot meaning the accident happened. He called the machine Atlas being used to lift the sugarcanes. Mr. Bava- Saib was inside the machine and it was on at that time. He admitted that when the machine was on, he was not supposed to go near, that is. by keeping away for a distance of about 25 metres. When he came back to put the mat back, he knew that the machine was on just like when he went near it to take the mat, the machine was on. When he worked for the Accused, he was told and explained that when the machine was on, he should keep his distance. He admitted that when he came near that machine he committed a mistake. The management of the Accused

told him what were the precautions that needed to be taken when working with that machine meaning Atlas. Mr. Pierre Guy Charoux was the manager who controlled Atlas and he told him that when Atlas was on not to come near it. He admitted that he was imprudent then by not complying with the instructions given to him. He also admitted that he did not take the precautions that he was instructed to take.

Mr. Imran Bava-Saib, the last witness, gave evidence in Court. On the 10 June 2016, he was working as operator on the Atlas meaning the machine at Valetta. On that day there was a helper working with him and he gave him instructions to rinse the mat and after having done so and when he was approaching, the blade lay on him. At that time, the machine was still on and he did not do anything with the grabber. The helper's foot got crushed with the blade. He switched off the ignition key and alighted from the machine. The mat had to be cleaned as there was mud on it as it was raining and the accident happened at about 9.00 -10.00 a.m. Usually the mat was cleaned once a day and he went to the washing place for the cleaning of the machine which he did together with his helper.

In cross-examination, he stated that he had been working for the Accused for about 8 years as operator of that machine. He knew how to work well with the Accused. He knew all the precautions that needed to be taken to work with it. He was given instructions and taught about the precautions that needed to be taken by other superiors in the beginning and among them there was Mr. Charoux. He knew that before the helper approached him, he had to place the blade on the soil. Once on the soil, the blade posed no risks. He had to switch off his ignition key as well.

The Accused representative, Mr. Floyd Fitzgerald, gave evidence in Court. He gave a statement to the Ministry of Labour in relation to the present accident. He mentioned in his statement that all the appropriate health and safety aspects were dispensed to Mr. Sardouce. They were the precautions that needed to be taken in the course of his work. He regretted that the accident had occurred because that employee was injured but the Accused was not responsible but should the investigation show that the Accused was liable then he would review the risk assessment exercise. The employees were aware of the precautionary measures to be taken in the course of their duties because when an employee joined employment with the Accused, either the manager or the supervisor gave the necessary information for the operation and the precautions concerning safety which also included the cleaning of the mat of the loader.

I have given due consideration to all the evidence put forward before me and the submissions of learned Counsel for the Accused. At the outset, I find it appropriate to reproduce below Section 5(1) of the Occupational Safety and Health Act 2005:

> *"**5. General duties of employers***
> *(1) Every employer shall, so far as is reasonably practicable, ensure the safety, health and welfare at work of all its employees."*

Therefore, the elements of the offence are that the Accused unlawfully failed to ensure so far as is reasonably practicable the safety, health and welfare at work of all its employees. That unlawful failure led to the injury sustained by Philippe Sardouce when his left foot was crushed under the blade of a sugarcane loader while at work at its place of work at a sugarcane field at Valetta.

Now in relation to that unlawful failure, the particulars of the information provided by the prosecutor are that the employer did not make a risk assessment for the operation of the sugarcane loader which would have indicated the risks associated with the operation namely the risk that any employee in the surrounding is injured with the blade of the grabber of the loader when the loader is in operation would have been identified and in relation to which further particulars were provided.

It is relevant to note that the enquiring officer, Mr. Premsing Seetohul, himself admitted that he committed a mistake when he mentioned in his report as per Doc. F that the grabber was involved in the accident when it was not involved at all. He admitted that the loader was composed of the grabber and the blade and that the blade did not form part of the grabber and that the grabber was not involved at all in the accident so that to that extent his report was flawed. The inevitable conclusion is that it cannot be reasonably practicable for the Accused to carry out a risk assessment exercise in the admitted mistaken manner described by the enquiring officer and which is the basis of the charge proffered against the Accused as particularized in the body of the information. Hence, such a safe working procedure in that connection where further particulars were provided is not called for let alone that the enquiring officer himself conceded that those particulars of the grabber were irrelevant in relation to the present matter. Furthermore, it is has remained unrebutted that both the injured person, Mr. P. Sardouce, and the operator, Mr. Imran Bava-Saib, were aware of the precautions to be taken when working with the

machine and coming close to it because they had already been told of same by one of the superior officers namely Mr. Charoux. Indeed, the injured person, Mr. P. Sardouce, admitted that he was imprudent as although he was aware of those precautions, he did not comply with them which lends support to the version of the representative of the Accused that the employees were aware of those precautions that needed to be taken right from the beginning when being employed by the Accused. Thus, it is plain enough that there are no shortcomings as regards any health and safety issue at the level of the Accused.

Clearly this shows the levity with which the enquiry has been conducted by the enquiring officer viz. Mr. Premsing Seetohul and following which the information has been drafted and particulars provided. Moreover, this levity as regards the drafting of the information is further reinforced by the fact that the information has not been signed by a Magistrate so that it does not have any probative value. It is significant to quote an extract from the Supreme Court case of **D. Hoonooman v The Queen** [1976 SCJ 77] which is reproduced below:

"In the absence of a duly sworn charge or complaint witnessed by the signature of the Magistrate, upon the form of information as provided in Schedule II to the Intermediate and District Court (Criminal Jurisdiction) Ordinance, Cap 174 the proceedings in Court were tainted with nullity."

Hoonooman (supra) was cited with approval in the Supreme Court case of **Marie and Ors v The Queen** [1979 SCJ 109] which reads as follows:

"In the case of Hoonooman v The Queen (Judgment No. 77 of 1976) the signature of the Magistrate did not appear on the form of the information and the Court held in the absence of a duly sworn charge or complaint witnessed by the signature of the Magistrate the proceedings were tainted with nullity.

We respectfully agree."

For all the reasons given above, I am unable to find that the case for the prosecution has been proved beyond reasonable doubt. I accordingly dismiss the information against the Accused.

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

29.12.21