

OSHI v Municipal Council Of Quatre-Bornes

2023 IND 17

CN191/16

THE INDUSTRIAL COURT OF MAURITIUS
(Criminal Side)

In the matter of:-

Occupational Safety And Health Inspectorate

v/s

Municipal Council Of Quatre-Bornes

JUDGMENT

As per the amended Information, the Accused Council stands charged with **one Count of Failing To Ensure The Safety, Health And Welfare At Work Of Its Employees, contrary to ss. 5(1) and 94(1)(i)(vi)(3)(b) of the Occupational Safety And Health Act 2005 [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 Council 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 27-01-14, in the District of Plaines Wilhems, the Accused Council did unlawfully fail to ensure so far as was reasonably practicable the safety and health at work of one of its employees, to wit: one Towraj Balgobin (hereinafter referred to as W2) sustained fracture to neck of left femur when he fell down at a height of about 1.4 metres from the lorry box of a waste lorry bearing registration number 4 Z 73 at its place of work at Draper Avenue, Quatre-Bornes.

The Defence Case

The Accused Council denied the charge in its solemnly affirmed out-of-Court statement (Doc. D) and under solemn Affirmation in Court.

Analysis

The Court has duly analysed all the evidence on Record and all the circumstances of the present matter, and the Court has duly considered all the documents produced in the course of the Proceedings.

The Court has also given due consideration to the Submissions of Learned Defence Counsel.

The Court has watched the demeanour of the Prosecution Witnesses and that of Mohammad Arshad Haniff Torap (hereinafter referred to as the Defence Witness) with the utmost care.

S. 5(1) of the OSHA provides as follows:

Every employer, shall, so far as is reasonably practicable, ensure the safety, health and welfare of all his employees.

An employer therefore has a statutory duty to ensure, so far as is reasonably practicable, the safety, health and welfare at work of all its employees.

Not in dispute

It was not in dispute that W2, who was employed as Refuse Collector by the Accused Council at the relevant time, and that on 27-01-14 at about 07h15, whilst working, W2's hand slipped from the hand grip found inside the box of the waste lorry bearing registration number 4 Z 73 at Draper Avenue, Quatre-Bornes, and fell on the asphalt and sustained injury to his hip (Folios 109722/3 of Doc. D).

It was therefore not in dispute that:

- 1) The Accused Council was an employer, and was the employer of W2 at the relevant time;
- 2) The accident occurred on or about 27-01-14; and
- 3) W2 sustained injury to his hip when he fell from the refuse box of the said waste lorry bearing registration number 4 Z 73 at his place of work at Draper Avenue, Quatre-Bornes, in the District of Plaines Wilhems.

Did the Accused Council fail to ensure the safety and health at work of W2?

Driver and Refuse Collectors not aware of safe working procedure

W2 deponed to the effect that it was one of the Refuse Collectors who was on the road who would tell the driver, i.e. W4, to drive on, but that he heard no one tell W4 to drive on at the relevant time.

W3 explained that one of his colleagues would tell W4 to drive on, and in cross-examination stated that it was any colleague who would tell W4 to drive on.

W3 went on to state that it was one of the Refuse Collectors who was on the road who would tell W4 to drive on, and that the Refuse Collectors on the refuse box did not tell W4 to drive on.

W3 conceded that he may have told W4 to drive on, that he also could tell W4 to drive on, and that any colleague could tell W4 to drive on, adding there was no taking turns.

W3 eventually admitted having told W4 to drive on at the relevant time, when his statement was put to him.

W3 agreed that it was the Refuse Collector on the road who was to tell W4 to drive on, and not the Refuse Collectors on the refuse box, and also agreed that he had told W4 to drive on at the

relevant time, explaining that in case W4 did not hear him, the Refuse Collector on the road would tell W4 to drive on, and that there were several persons who would tell W4 to drive on.

In re-examination, W3 explained that W4 would hear him shouting “rouler” (drive on), but that he had to shout same several times, and that the Refuse Collectors on the road would also reply.

W4 deponed to the effect that he was the supervisor who had to delegate the work, and that one Refuse Collector would tell him to drive on, explaining that the Refuse Collectors in the team tell him to drive on.

W4 added that on the relevant day, he saw, when looking in the rear view mirror, who had told him to drive on.

In cross-examination, W4 explained that any of the Refuse Collectors could tell him to drive on, and admitted that the procedure he had learnt was that it was one of the two or both Refuse Collectors in the refuse box who were to tell him to drive on.

W4 went on to add that the Refuse Collectors in the refuse box also tell him to drive on, but that the Refuse Collectors on the road also helped, and eventually stated that it was the Refuse Collectors in the refuse box who were to tell him to drive on.

W4 explained that in practice, when the Refuse Collectors in the refuse box tell him to drive on, then the Refuse Collectors on the road also signals him to drive on, and that both the Refuse Collectors in the refuse box and on the road tell him to drive on.

W4 denied having driven on without anyone having told him to drive on, and that W2 had not yet held the hand grip when he drove on.

In re-examination, W4 stated he had received no written instructions to the effect that the Refuse Collectors in the refuse box were the ones who were to tell him to drive on.

As to the circumstances of the accident, at first, W2 stated that he slipped due to mud, then that he lost his balance, and then that when the vehicle drove on, he lost his balance, slipped and fell.

In cross-examination, W2 confirmed that he slipped when the truck suddenly drove on, and then explained that just when he was going to get hold of the truck for it to drive on, he slipped.

W3 deponed to the effect that when the vehicle drove on, there was a light rain, and W2 slipped, that W2's hand did not get hold of the truck, and he fell.

In cross-examination, W3 stated that he and W2 were holding the hand grip ("bar camion") when the truck drove on, but that as it was raining, W2 slipped.

W3 then agreed with the contents of his statement to the effect that he and W2 were holding the hand rails, after which he told W4 to drive on, and eventually stated he could not say whether his version was correct or that of W2.

W4 explained that on the relevant day, his colleagues told him to drive on, which he did, when W2 slipped and fell, and in cross-examination, W4 agreed that he drove on following which W2 fell.

The Court has duly considered the testimony of the Defence Witness as to the "established safe system of work", whereby one designated Refuse Collector is responsible to inform W4 when he can move to the next collection point, and that the said designated Refuse Collector is to be designated by the driver.

As per paragraph 3 of the Safe Working Procedures For Refuse Collectors (Doc. H), although it is mentioned that "[o]ne Refuse Collector shall be in communication with the driver of the scavenging vehicle informing whether he can start/drive the scavenging vehicle safely", no mention is made of the procedure for designating the said Refuse Collector.

This is to be contrasted with paragraph 22 of the said Safe Working Procedures For Refuse Collectors (Doc. H), whereby it is specified that "the overseer/DSS/driver is responsible to nominate the refuse collector".

Had it been the intention of the Accused Council for the driver to designate the Refuse Collector who was to be in communication with him, this would surely have been specified in the said Safe Working Procedures For Refuse Collectors (Doc. H), as was the case for paragraph 22.

In the absence of any such specification, it cannot be contended that W2, W3, and W4 were aware of the said working procedures.

Further, no evidence was adduced by the Prosecution as to the fact that the said Safe Working Procedures For Refuse Collectors (Doc. H) had been approved by the Ministry of Labour.

Be that as it may, in light of all the above, true it is that the circumstances of the accident are not clear, and that there were contradictions in the testimony of W2, W3 and W4 in particular as regards who was to tell W4 to drive on to the next collection point, but the Court is of the considered view that far from undermining the Prosecution case, the said contradictions in fact support the Prosecution case that W2, W3, and W4 were not aware of the safe working procedures.

Had W2, W3, and W4 been aware of the said procedure, then W4 would not have driven on unless told to do so by the designated Refuse Collector.

It is precisely because W2, W3, and W4 were not aware of such procedure that the accident occurred, when W4 drove on when told by W3 to drive on, although W3 had not been designated to do so by W4.

And apart from the testimony of the Defence Witness, there is no evidence to establish that W2, W3, and W4 were aware of the procedure whereby W4 was the one who was to designate the Refuse Collector who was to communicate with him as to when he could drive on.

As per its statutory obligation, an employer must do whatever is reasonably practicable to ensure the safety and health at work of its employees.

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.

Whilst it has been established that there were Safe Working Procedures For Refuse Collectors (Doc. H) at the relevant time, and that it was not challenged by the Prosecution that W2, W3, and W4 were given job training on site, “there was no evidence that in this particular case, on this particular day, [...] [the said Safe Working Procedures For Refuse Collectors (Doc. H)] were adhered to or put into practice.”¹

The evidence of W2, W3, and W4, in fact, establishes that “[t]he element, which was missing in this case, was ensuring the enforcement of [...] [the Safe Working Procedures For Refuse Collectors (Doc. H)] found on paper.”²

It is precisely because there was no specific Refuse Collector who was to be in communication with W4 to inform him whether he could drive on(paragraph 3 of the Safe Working Procedures For Refuse Collectors (Doc. H), that the accident occurred.

Further, as found by the Accused Council itself, W2 failed to abide by paragraph 5 of the Safe Working Procedures For Refuse Collectors (Doc. H), given W2 “was grasping the cargo deck riddle” (Doc. G) instead of the hand rail and that “all refuse collectors shall at all times use the hand grip provided instead of grasping the riddle of the scavenging vehicle” (Doc. G).

“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.”³

¹ **General Construction Company Limited v Occupation, Safety And Health Inspectorate, Ministry Of Labour, Industrial Relations And Employment [2020 SCJ 40].**

² Ibid

³ **General Construction (supra)**

By failing to ensure that the Safe Working Procedures For Refuse Collectors (Doc. H) were communicated to W2, W3, and W4 and by failing to ensure the Safe Working Procedures For Refuse Collectors (Doc. H) were implemented at the relevant time, the Accused Council had not done all that was reasonably practicable to ensure the safety and health at work of its employee, i.e. W2, and has placed no evidence on Record to prove 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**.

Refuse collectors inside the refuse box whilst the refuse vehicle is moving

It was not disputed that the Accused Council allowed only a maximum number of two Refuse Collectors inside the refuse box during refuse collection (Folio 109724 of Doc. D), i.e. when the vehicle is being driven. This was deponed to also by the Defence Witness.

As per the Private (B) Carrier's Licence (Doc. F), however, it was specifically mentioned not only that only 02 persons (excluding the driver) could be carried in the said vehicle, but also that no person was allowed in the box, and that “[n]o person in excess of the authorised number shall be carried unless a permit to that effect is obtained (Doc. F).

The Court has noted paragraphs 4 and 5 of the Safe Working Procedures for Refuse Collectors (Doc. H) but is of the considered view that unless the Accused Council had obtained from the relevant Authority a permit specifically allowing for persons to be carried in the box of the said lorry, no one was to be present in the box of the said lorry when it was moving.

The Court has duly considered the testimony of the Defence Witness as to the system of work for Refuse collection, and the reasons the Refuse Collectors remain in the refuse box whilst the refuse vehicle is being drive, and the Court is of the considered view that despite the hand rails in the refuse box, it was foreseeable by the Accused Council that one of its employees, in the present matter, W2, could slip from the refuse box when the refuse vehicle was being driven.

As per its statutory obligation, an employer must do whatever is reasonably practicable to ensure the safety and health at work of its employees.

Given the Accused Council had obtained no permit from the relevant Authorities to allow persons to be carried in the refuse box of the said lorry, as per **Halsbury's Laws of England – Health**

And Safety At Work (Volume 52 (2020)) at paragraph 382 (supra), none of its employees ought to have remained in the refuse box whilst the refuse vehicle was being driven.

No reason has been advanced by the Accused Council as to why it had not obtained such a permit.

In the circumstances, it was reasonably practicable for the Accused Council to ensure that all the Refuse Collectors working in the refuse box got down from the refuse box before the refuse vehicle was driven, the more so as the Refuse Collectors only had to walk “a few metres it is just the next neighbour”.

The Accused Council had therefore not done all that was reasonably practicable to ensure the safety and health at work of its employee, i.e. W2, and has placed no evidence on Record to prove 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**.

The Court is of the considered view that given its above Findings, there is no need for it to consider the issue of the barrier provided in the lorry so as to prevent fall from height during refuse collection and when the vehicle is moving to the following collection point when the refuse collectors are inside the refuse box (Folio 109727 of Doc. D)

Miscellaneous

Registration number

The Court has noted that W2 deponed to the effect that the vehicle he was travelling on bore registration number 4 Z 72, whereas as per the amended Information, the registration number of the vehicle was 4 Z 73.

Be that as it may, at no stage was it disputed by the Defence that W2 was travelling on vehicle bearing registration number 4 Z 73 (Folio 109723 of Doc. D), and the Court therefore acts on the basis that the vehicle involved in the present matter bore registration number 4 Z 73.

Other issues

The following issues were raised in the course of the Proceedings, by the Prosecution:

- 1) Fixed ladder with uneven rungs;
- 2) Two doors removed at the rear of the lorry box;
- 3) Floor of lorry box is metal and slippery;
- 4) Hand grip inside the refuse box unsafe as the refuse collector wears gloves to collect all types of waste, and hence the gloves become slippery, so it is difficult to hold the hand grip;
- 5) Rotation of personnel;
- 6) Uneven road;
- 7) Proper means of communication between the driver and the Refuse Collector; and
- 8) Protective Personal Equipment.

At no stage were the abovementioned issued made a live issue in the course of the enquiry, and it was therefore not open to the Prosecution to raise the said issues for the first time in Court, in support of its case, as has been authoritatively set out in **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.”.

Conclusion

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

[Delivered by: D. Gayan, Ag. President]

[Intermediate Court (Financial Crimes Division)]

[Date: 15 March 2023]