OSHI v Filature de Riche Terre Limitee

2022 IND 53

Cause Number 200/16

In the Industrial Court of Mauritius
(Criminal side)

In the matter of:

OSHI

v.

Filature de Riche Terre Limitée

Judgment

Accused being an employer 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 27 July 2015 to ensure so far as is reasonably practicable, the safety and health at work of one of its employees namely one Premchand Pardassee as a result of which he sustained an electric shock causing burns injuries to his right sole and right hand when the metal irrigation pipe he was handling came into contact with a live high tension electrical conductor passing over the place of work at Riche Terre.

The Accused represented by Mr. Philippe Rivalland in his capacity as Agricultural Manager pleaded not guilty to the charge and was assisted by Counsel.

The case for the Prosecution unfolded as follows.

Mrs. Poumalay Poinen-Sohoraye in her capacity as Principal Occupational Health and Safety Officer gave evidence in Court.

She enquired into an accident at work which occurred on 27 July 2015 at a sugar cane field no.76 situated at Riche Terre where one employee of the Accused company namely Mr. Premchand Pardassee sustained injury.

She went on site and her observations were as follows:

1. It was a sugar-cane field where there was an irrigation equipment installed.
2. There were 3 live bare high-tension electrical conductors passing over the site.
3. She could see traces of burns. She also saw traces of burns on one of the high-tension electrical cables meaning conductors on that site about 5 metres high. That indicated that the metal pipe must have come into contact with one of the high-tension live bare electrical cables.
4. The length of the pipe that was being handled by the worker was 5.46 metres. The bare high- tension electrical cables were about 5 metres high on that site and represented an imminent danger to workers.
5. Those cables should have been either insulated or displaced away, especially for workers handling long objects to perform work on that site as those objects might come into contact with the high tension live bare electrical cables passing over the place.

Her enquiry revealed the following:

(a) The probable cause of the accident would have been that the metal pipe being 5.6 metres long and was much longer than the height of the electrical cables, it had come into contact with one of the cables.

(b) Mr. Pardassee was not aware of those cables and the precautions to be taken. He was erecting the irrigation equipment with the metal pipe and while doing so, the metal pipe came into contact with one of the cables and he sustained electric shock resulting in burn injury to his right foot.

(c) So, he was not informed by his employer viz. the Accused about the dangers namely the presence of those cables and as such he did not take any precautions as he was not aware because he was not informed of the danger present on that site. The worker had a big difficulty to hold the metal pipe in a horizontal position and at that particular moment he had no other option but to raise it.

(d) Before the accident, a risk assessment was not done by the employer particularly for that type of work that had to be carried out and especially about the presence of hazard, that is, the cables. The risk assessment was carried out only after the accident in December 2015.

In her report dated 15.1. 2016, after her enquiry as per Doc. E, she explained that the risk level of that activity was high and so, it represented an imminent danger.

In cross-examination, she conceded that at the material time, the worker had to adopt a horizontal position to connect the irrigation equipment with the metal pipe which was going to bring water to the field as there was a valve on the pipe and the sprinkler had to be fitted on that pipe for irrigation to take place because when the valve would be opened, water would come. She also did not put in her report what were the duties of that worker and why he held that pipe in a vertical position when his duties were to put it in a horizontal position and to fix a sprinkler on it. Furthermore, it was not mentioned therein that there was a duty for that worker to hold that pipe in a horizontal position on that day. She did not agree that if something was heavy and long, it was much easier to hold it in a horizontal than in a vertical position as the worker was alone. In whichever position the worker was holding the pipe, the cables were there and were live. Nothing was done to ensure that they were far away from that site. In such a case, the employee had no other option than to perform the work. Then, she conceded that those cables were installed by the CEB.

She contradicted herself by saying that it was not correct to say that the worker was not aware of the presence of those cables, as the worker had about 5 years of experience or more but it was not mentioned in her report and she did not recall that the worker had more than 20 years of experience in that field. She conceded that she did not put the number of years of service of the worker in her report.

She did not agree that there was a contributory negligence on the part of the worker.

Mrs. Letchmee Thoddy Kotiah in her capacity as electrical engineer gave evidence in Court. She enquired into the said accident at work which occurred on 27 July 2015 by being to the site of the accident at the sugar cane field no.76. She observed that there was an irrigation pipe made of metal which was about 5.67 metres long and there were traces of burns on it. She corroborated the version of the enquiring officer in that the pipe when held in a vertical position from ground level was higher than the 3 overhead uninsulated electrical conductors. So, there was a risk of the pipe coming into contact with the uninsulated overhead electrical conductors. That was what led to the accident. While manipulating the irrigation pipe, the latter came into contact with one of the uninsulated overhead electrical conductors and the person, Mr. Pardassee, sustained electric shock and the CEB line tripped indicating that there was a current flowing to earth on that day at the material time of the accident.

That accident could have been avoided if a proper risk assessment would have been carried out prior to the injured person conducting the work as there was a risk that the said pipe would come into contact with the said electrical cables if it was being handled in the vertical position. Had the pipe been handled horizontally, the accident would not have happened.

She did not agree that the worker by holding the pipe in a vertical position put himself at risk because it all depended on what instructions he was given and how to carry out the work. In her report dated 13.11.2015 as per Doc. F, at no point, she mentioned what were the instructions given to the workers and what the injured person had to do on the material day.

The injured person, Mr. Premchand Pardassee, gave evidence in Court. He had been working as field worker for Accused for 28 years doing irrigation work and at times fitted the pipes at the sugar cane field No. 76 at Riche Terre. His Superior, Mr. Lofur Sujeet gave him instructions to perform his work for accused company in that field.

On 27 July 2015, he was fitting an irrigation pipe made of metal and which was 20 feet long in that field as he was not doing irrigation. While he was fitting the pipe

in the field, he noticed that it was blocked by a small rat and straw inside. He put the pipe in a vertical position to unblock it by patting it. In so doing, he sustained an electric shock as he did not notice a high intensity electrical cable on top of him although he knew that it was there, but he did not know its height. At that particular point in time, he had been working for 23 years for Accused all the time in the field no.76 and all the time there were high tension electrical cables on top of him. Usually, a blocked irrigation pipe was unblocked by water, but on that day, there was no water. But he knew that he could be electrocuted and could get injured if the metal pipe got into contact with such a cable. Then, he decided that he did not notice the height of that cable. No one had informed him of the precautions to be taken when working in the presence of high- tension electrical cables. Then, he further decided that he did not know the length of that pipe. He did not use water to unblock the pipe as there was no water and there were no other means to unblock the pipe except by using water.

Mr. Radha Ramdhany gave evidence in Court. He had been working for the accused company in relation to irrigation work for 20 years. On 30.7.2015, Mrs. Poinen-Sohoraye came to the locus of the accident and she took measurements of the pipe concerned in the accident involving Mr. Pardassee which occurred on 27.7.2015 in his presence which was about 5 metres long.

He stated that the injured person should not have raised the pipe and he was working alone on that day. There was no need to put the pipe in a vertical position to unblock it as that could be done with water without changing its position. The high-tension electrical cables were there for more than 20 years and he was aware of that fact. There was a manner to connect pipes. The valve was closed first of all and then the locks opened and the pipe dismantled and its parts were placed aside. Then it was fitted again. If ever there were rats and other debris inside the pipe, he had to go towards the end of the pipe, remove its cover and then open the valve to allow water inside the pipe and the debris would be expelled. Each time there was a valve, there was water inside.

Mr. Pardassee held the pipe in a vertical position to remove the rat and that was not the way to proceed and it was not the way they were taught by the accused company. He did the same work as Mr. Pardassee meaning irrigation work. He was aware that there were high intensity electrical cables on top of him and if one got in touch with them, one could be electrocuted or burnt. To unblock the pipe, the valve

ought to have been opened without lifting the pipe and water would have flowed inside and drained the dirt.

The case for the Defence rested on the evidence given by Mr. Philippe Rivalland in his capacity as Agricultural Manager which is to the following effect. He took cognizance of the accident met by Mr. Premchand Pardassee and as a result of which he was injured in a sugar-cane field belonging to Accused. He was given to understand that there was a rat or mouse inside a pipe and that the said worker wanted to remove the rat before connecting the pipes. When he raised the pipe, it was at that moment that it touched one of the electrical cables of high tension which were above his head. As a matter of principle, the pipe should not have been treated in that manner. If the pipe was blocked, it ought to have been connected like that and the valve opened and with the pressure of water getting inside, the pipe would have been unblocked. According to him the cables were there all the time the injured person had been working in that field as he only became Agricultural Manager in 2014 and the worker was injured in 2015. The manner the worker unblocked the irrigation pipe was not in conformity with what he was asked to do. In his risk assessment report as per Doc. D, no mention was made of the high-tension electrical cables passing above the sugar cane fields as they existed for years and the said worker had 25 years of experience in that section. He knew that there were such cables and he had to be careful and that was all he had to do. In cross-examination, he conceded that had a risk assessment been carried out for such activity, that accident ought to have been avoided.

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

It has remained unrebutted that both Mr. Pardassee and his colleague-worker namely Mr. R. Ramdhany had at least 20 years of experience in the field number 76 dealing with irrigation and that the high-tension electrical cables had always been present. Therefore, both workers were well versed with all the dangers that could be attributed to the handling of metal irrigation pipes. Indeed, it also remained unrebutted that they were taught by the accused company the manner to connect pipes namely the valve was closed first, the locks opened, the pipe dismantled and its parts were to be placed aside. Then it was fitted again.

If ever there were rats and other debris inside the pipe, Mr. Pardassee had to go towards the end of the pipe, remove its cover and then open the valve to allow water inside the pipe and the debris would have been expelled. It has remained unchallenged that when there was a valve on a pipe, there was water inside and that the metal pipe involved in the accident had a valve on it meaning that there was water inside that pipe. To unblock the latter, the injured person had to go towards the end of the pipe, remove its cover and then open the valve to allow the water inside the pipe to expel the debris without lifting the pipe in a vertical position. Had there been a cut in the water supply, the worker ought to have carried out the previous exercise first and fitted the pipes and after the water supply would have been restored again, then the valve would have been opened again and any remaining debris found in the pipe would have been expelled by the water running inside it. It is significant to note that such a course of action is in line with the testimony of the Accused's representative in Court and that of the enquiring officer, Mrs. Poinen-Sohoraye, that the pipe should have been held by Mr. Pardassee in a horizontal position as per his duties and as per the instructions given to him to carry out his work and which is also in line with that of the electrical engineer that such a risk of the metal pipe coming into contact with one of the cables found on top of the field when held vertically was relative to the instructions given to the workers as to how to perform that type of work with the metal pipes.

It remained uncontested from the evidence led by the Prosecution and that by the Defence that Mr. Pardassee sustained an electric shock and was injured as a result because he held the metal pipe which was blocked, in a vertical position and because it was longer than the height from ground level of the 3 live high-tension electrical conductors passing over that place of work, the pipe came into contact with one of them. The tenor of the injury was also not contested. Now, such an action would have been expected from a worker who was a newcomer in that field no.76 and it was not something that was expected from someone with the stature of Mr. Pardassee having 23 years of experience in that kind of job and in that same sugar cane field and in the presence of the same high -density electrical cables found above the said field.

A risk assessment as regards the dangers associated with improper handling of the irrigation metal pipe namely in the vertical position would have been helpful to a newcomer to that job so that the accident ought to have been avoided.

But I take the view that in the case of Mr. Pardassee, such a risk assessment would not have avoided the accident in relation to him as he was fully acquainted with the metal irrigation pipes, the site and the dangers present therein and the manner he was taught to handle those pipes and to carry out his duties. The procedure adopted by such a highly experienced worker as Mr. Pardassee who chose an unacceptable manner to do his job which was not in conformity with what he was taught and instructed to do for more than 2 decades, while he was alone, was not a mere act of negligence but an overwhelmingly unexpected gross negligence from his part. True it is that as highlighted in the Supreme Court case of **The D.P.P. v Flacq United Estates Ltd** [2001 SCJ 301] that the primordial issue that the Court has to decide is whether the particular system of work adopted by the Accused/employer was found to be safe and that the issue is not whether the injuries caused to the worker was because of his own negligence.

It is also true that the Accused's representative admitted that had a risk assessment exercise been done prior to the accident, that accident ought to have been avoided and he did so in his capacity as Agricultural manager only as from the year 2014 and the accident happened in 2015.

Now, it is significant to note that the case of **Flacq United Estates Ltd**(supra) is not authority for the situation where the negligence of a worker is of the kind where it is so overwhelmingly gross that its effect is tantamount to having nullified the fault of the Accused, because precisely it has not catered for that type of situation.

Thus, I find that the present case is precisely the type of situation akin to that envisaged in the Supreme Court case of **Sham v The Queen** [1982 MR 224] wherein the principle laid down at note 50 of Article 319 of Garçon Code Pénal Annoté was applied, an extract of which reads as follows:

"We do of course agree that where an accident is caused by the fault of more than one person, "la faute de l'une ne peut excuser la faute de l'autre"(see Garçon C.P.A. Article 319 Note 41, Ramphul v. Q. [1981 SCJ 301].

However, we also read in Garçon (op cit), at note 50, the following –

50. Il ne faudrait pourtant pas croire que la faute de la victime soit indifférente; le juge doit encore rechercher si elle existe et la defense peut la plaider. Il est évident,

en effet, qu'aucune condamnation ne pourrait plus être prononcée s'il était établi que l'imprudence de la victime a été si grossière qu'elle fait disparaître, en réalité, toute faute de la part de l'auteur (…).

*In other words, we are in presence of a victim's imprudence which is so "grossière qu'elle fait disparaître, en réalité, toute faute de la part de l'auteur(…)." (**emphasis added**)*

Thus, I hold that the inappropriate handling of the irrigation metal pipe by Mr. Pardassee namely in the vertical position was of an imprudence which is so *"grossière qu'elle fait disparaître, en réalité, toute faute de la part de l'auteur(…)"* and as such has nullified the fault of the Accused (see – **Sham**(supra)) because he acted like a stupid child when he was alone which is totally unacceptable as he acted against what he had been instructed and taught for 23 years and which cannot be expected from someone of his calibre with more than 2 decades of experience in irrigation work in that specific field no.76 where those 3 live high tension electrical conductors passing over the place had always been present. A risk assessment exercise would obviously not have prevented the accident from happening as the victim acted in a manner as if he was incapable of following any instructions concerning his duties or any measures whatsoever taught to him so far by management. Clearly, someone with more than two decades of experience, could not be expected to be taught now, what were the risks associated with the handling of metal irrigation pipes but would have on the contrary been expected to have supervised the newcomer-workers and briefed them as regards safety measures to be taken when unblocking an irrigation metal pipe where bare live high-tension electrical conductors were to be found above that site.

For all the reasons given above, the case for the Prosecution should fail. I accordingly dismiss the information against the Accused.

S.D. Bonomally (Mrs.) *(Vice President)*
3.10.22