OSHI v Indian Ocean Packaging Ltd

2025 IND 66

Cause Number 100/2022

In the Industrial Court of Mauritius
(Criminal side)

In the matter of:

OSHI

v.

Indian Ocean Packaging Ltd

Judgment

Accused being an employer is charged under Sections 5(1), 85(1)(a), 85(1)(b) and 94(1) (i) (vi) of the Occupational Safety and Health Act 2005 – Act No.28 of 2005 with unlawfully:

1. failing on or about the 27th day of May 2017 to ensure so far as is reasonably practicable, the safety and health of one of its employees at work namely one Vishwamitrasingh Hanzany who sustained traumatic amputation involving his 2nd,3rd and 4th fingers left hand whilst working on Thermal Forming Machine, RDM7 within the factory premises at Tyack, by failing to provide specific training on safe working procedures to be followed for the removal of jammed plastic on the said machine.

2. failing on or about the 27th day of May 2017,[the said accused being an employer], to forthwith notify the Director, Occupational Safety and Health by

the quickest practicable means of an accident arising out of work and as a result of which accident one of its employees namely one Vishwamitrasingh Hanzany sustained traumatic amputation involving 2nd,3rd and 4th fingers left hand whilst working on Thermal Forming Machine, RDM7 within the factory premises at Tyack.

3. failing on or about the 3rd of June 2017, [the said accused, being an employer], to send a report within seven days of an accident arising out of work which occurred on the 27th May 2017 to the Director, Occupational Safety and Health in the form set out in the Thirteenth Schedule to the Occupational Safety and Health Act 2005 – Act No 28 of 2005 and as a result of which accident one of its employees namely one Vishwamitrasingh Hanzany sustained traumatic amputation involving 2nd,3rd and 4th fingers left hand whilst working on Thermal Forming Machine, RDM7 within the factory premises at Tyack.

The Accused representative has pleaded not guilty to all three counts and has retained the services of Counsel at his trial.

The case for the Prosecution

1. Mr. Vasudev Ramnundun gave evidence in Court in his capacity as Occupational Safety and Health Officer.

He enquired into an accident at work which occurred on 27.5.2017 at Indian Ocean Packaging Limited situated at Estate Road, Tyack, when Mr. Vishwamitrasingh Hanzany sustained injuries. During his enquiry he took a set of 3 photographs on 7.6.2017 as per Docs. B1, B2 and B3 respectively with explanatory notes. He received a copy of a document relating to training dated 9.3.2016 and also a copy of the risk assessment from the accused employer as per Docs. C and D respectively. He stated that he recorded a statement under warning from Mr. Zack Jordaan in his capacity as General Manager on 9.2.2018 (Doc. E), as he was duly authorized by the Director of the accused company. After his enquiry, he drew a report which he produced (Doc. F).

When he went to the locus of the accident on 7.6.2017, he saw the Thermal Foaming Machine RDM7 and the blades.

There was a set of blades consisting of an upper and lower part. The upper part blade was in a fixed position. According to information received, it was only the lower part blade which moved up and down for cutting purposes.

Moreover, it was seen that around the machine, there were guards (cages) provided and there were notices affixed as regards the non-placing of hands into the machine.

The said machine operated both electrically and hydraulically. Thus, there were 2 emergency stops on that machine one of which comprised of an electrical emergency stop and the other, of an air valve emergency stop, that used to be opened for hydraulic purposes.

His enquiry revealed the following: -

1. The area where the injured person was working was open and was accessible to the blades.

2. The injured person had operated on the machine for 4 years for production purposes only, as he was not given specific training on the working procedures to be followed in the event of jammed plastic on the machine.

3. Given such type of accident and that the injured person was admitted to hospital for more than 24 hours, it falls under the list of notifiable injuries at work as per the 11th Schedule of the Occupational Safety and Health Act 2005.

4. This accident at work should have been notified immediately to the Director, Occupational Safety and Health, by the quickest practicable means, by fax machine or in person and also that the report of this accident at work was not sent to the Director, Occupational Safety and Health within 7 days. The accident at work was notified by Officers of the Chemin Grenier Labour Office.

5. To prevent this accident, specific training should have been given to the injured person on the safe working procedures to be followed in the event of jammed plastic on the said machine.

Under cross examination, he conceded the following –

(a) He was the enquiring officer and that he properly cautioned the Accused's representative prior to have recorded a statement from him as per Doc. E.

(b) On the photograph (Doc. B2), he has not marked the notices which indicated that hands should not be placed in the machine.

(c) They were marked in Doc. B1 as per the arrows showing A and B (bearing in mind that the arrows are scarcely visible). He did not agree that the markings and legends were not properly done.

(d) He made a report of the accident on 12th of November 2020. He made certain observations in his report as to what could and could not be done on the machine, but he did not record another statement from the Accused's representative in that respect. But he recorded a statement from the injured person viz. Witness no.3.

(e) The procedure for removing jammed plastic on the machine should be to shut down both electronically and hydraulically by closing the air valve system on the said machine to ensure that all air was properly drained off on the said machine and then to proceed to remove the jammed plastic at the place where it was stuck.

(f) The injured person followed the right procedure for which he was trained. <u>The accused version in its Defence statement was that the injured person pressed only the emergency stop, only for the cutter, without closing the airline.</u>

(g) He did not enquire into that aspect, as the injured person had already given his statement on how he sustained injury at work on the said machine.

(h) But he did not enquire about the Accused's version, as that was what the injured person had told him.

(i) He proceeded with the statement of his findings upon information gathered from the injured person and also from a record at training submitted to that Ministry. He did not verify the version the Accused gave him.

(j) On the material day, the injured person was training another new machine Operator namely one Nilesh to operate it for production purposes only. When the accident happened, Nilesh was present. But he confirmed that no statement was recorded from him. He inspected the machine after the accident.

(k) He did not proceed on verifying that machine, that is, the switching off of the two emergency stops so that the air valve is closed. He agreed that if the proper procedure was followed for switching off the machine (namely stopping the blades and the air valve), the lower blade would not have moved up and down.

(l) The injured person said that the right procedure was followed by him. From his statement, he never stated what injury or injuries he suffered. He did not enquire whether the injured person informed the HR about his injuries.

(m) At the material time, the injured person was only a machine Operator. When there was a jam, the Operator had to call the Maintenance Officer which the injured person did not do, as he was alone at the material time and he did not mention same in his statement. However, he said so during the enquiry.

(n) It was correct to say that as regards the dates found in his report, he made mistakes.

2. Mr. Vishwamitrasingh Hanzany (the injured person) gave evidence in Court.

He did all kinds of job at the accused company. On the material day, the Maintenance Officer was not present and that was why he had to look after the machine. The latter was on and the plastic was finished in it. There were 2 persons to be trained by him and who had just joined. He was instructed to train them as regards the work. When the plastic was finished, he fed plastic in the machine and the plastic was transferred in front and it got blocked by causing the machine to

vibrate. That was why, he pressed the emergency button, closed the air valves in order to pull the plastic. He had no right to switch off the machine electrically as the Tupperware they did, would have been spoiled as the temperature would not have remained exact. He meant that because the temperature would not have remained stable, he was instructed not to switch off the machine electrically as the temperature was already set. The guarding fence was placed down outside the machine and not next to him. Therefore, as per the instruction he was given, when plastic was blocked in the machine, he had to press the hydraulic emergency button and then close the air valves. That was what he did and he did not expect to be injured inside the machine at his left hand.

In fact, the blade descended and his hand was inside and when he hesitated, the blade passed on his fingers and he removed his hand and his three fingers were cut and he lost them. He asked the other persons present to tie his hand and they were not drivers so that he would have had to drive his car himself to the hospital. They told him not to do so and he was injured at 9.05 hours. There was a lady who swept the floor who was there and given that the 2 trainees did not know how to drive, he asked them to tie his hand. Then one of them told him that he knew how to drive and drove his car with him inside at 10.00 hours to the hospital where he received treatment. There was no one from Management to convey him to hospital.

He admitted that it was for the first time while deponing in Court that he said that he did all types of work at the Accused's factory. Nobody in charge from the Maintenance side was present on the material day. He maintained that he said so to the recording officer who recorded his statement but he was not aware that such fact was not found therein. He admitted that he did not say in his statement that one Reena and Faheel gave him instructions to train two workers. He further admitted that the procedure when there was a jam on the machine was to switch off the two emergency stops and to close the air valves. But that was what he did he said. He admitted that when the machine was jammed, he tried to facilitate the work as there was no Maintenance Officer, but admitted that he was not mandated to do so meaning to put his hand there where it was jammed as he was not the Maintenance Officer.

He conceded that he said that it was someone else who conveyed him to hospital in his own car which is not found in his statement.

In the latter, he said that immediately after he was injured, he informed *"la Direction de l'usine."* Then, he decided that when he was injured, he was on the floor and the first woman who came and saw him was the one who was doing the sweeping and she informed the Floor Manager, Reena, to come and see them. Then, they all surrounded him. He was not asked by the recording officer to give those facts in detail. His statement was read over to him by the recording officer and he was asked to say what happened globally.

No evidence was adduced in Court in relation to the Defence.

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

First and foremost, it is imperative to note that in **Seetahul v The State** [2015 SCJ 328], it was emphasised 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)**

The case referred to by learned Counsel for the Defence in the course of his submissions namely **A.S. Mamode v The Queen** [1991 SCJ 126] was in relation to drug offences, whereby it was stated:

"The concept of fair trial guaranteed by section 10 of the Constitution implies fair and impartial inquiries into the allegations of accused parties, the more so when, as in the present case, the accused is detained pending his trial".

In the case at hand, there is only one accused party concerned with a health and safety matter and there is nothing to suggest that the Accused was prejudiced in the preparation of its Defence to the extent of having suffered a violation of Section 10(2) of the Constitution.

Now, the injured person candidly admitted that he was not mandated to remove the jammed plastic from the machine and that it was the Maintenance officer who was the one to do so. It means that he was not trained to deal with that type of situation as it was the job of the Maintenance officer.

Had there been a problem with the machine, he ought to have informed his Superior should the Maintenance Officer not be present. The most he could do, was to switch off the two emergency buttons and close the air valves as the safety of the workers were at stake as he himself stated that the plastic was blocked in the machine and the latter was vibrating. But he switched off only the hydraulic button and not the electrical one under the guise of maintaining the temperature and not spoiling the shape of the Tupperware being made and used his hand to remove the jammed plastic although it was written near the machine not to put fingers in the machine. Obviously, that was not what he was trained to do, he was trained to switch off both the electrical and hydraulic switches as further candidly admitted by him for the simple reason which is common sense that his safety superseded the shape of the Tupperware being distorted. It further stands to reason that he ought to have contacted the Maintenance Officer over the phone as he was not at the material place then, in order to have the jammed plastic removed which he did not, but instead he started removing the jammed plastic himself for which he was not specifically trained as regards the safe working procedures to be followed for the removal of the said jammed plastic on the said machine.

Indeed, the enquiring officer did not ascertain whether both emergency switches were to be switched off in case of plastic being jammed in the machine. Regrettably, the enquiring officer only focused on the fact that it was an unsafe system of work at the material time as the injured person was not specifically trained to remove jammed plastic from the machine. Obviously, he was not trained for that purpose as he was not the one that was concerned, as he was concerned with the production side only. The version of the enquiring officer is further open to doubt as he admitted that there were mistakes in his report following his enquiry. Moreover, he stressed in Court that the Accused was duly cautioned prior to a statement being recorded from its representative but same was not reflected in his statement (Doc. E) which is deemed to have been obtained involuntarily for the reasons which will become apparent later.

The Accused representative was cautioned so that he was informed by the recording officer that he had either a right to remain silent or a right to retain the services of Counsel. Given that he could not choose both, he opted to decline to exercise his fundamental right to Counsel as guaranteed by Section 10(2)(d) of the Constitution (*vide* - Doc. E) with the result that more importantly, he admitted liability as regards counts two and three to the information.

In view of such turn of events, I find it relevant to quote an extract from the case of **State v Coowar Mamode Aniff** [1998 SCJ 64] where the Supreme Court highlighted the following:

"It was necessary, so counsel argued, for the court to consider the conduct of the enquiring officers to see if they had acted in good faith or not. If the officers had acted in bad faith, there would be a substantial breach and the statements should not be admitted.

(…)

*The ruling in **Samserally** is perfectly sound when dealing with a statement obtained in breach of an administrative direction which I think cannot be applied in a breach of a fundamental right protected by the Constitution and I have doubt as to the principle laid down in **Kuruma** and **Sang** when the evidence was obtained in breach of a fundamental right.*

*(…) that the provisions of the Constitution must be observed as absolute command (vide **Mahboob v. Government of Mauritius** [1982 MR 135]) and that "violation of fundamental rights under the Constitution should not be looked upon with levity (vide **Babet v. R** [1970 MR 222]), it is clear that when dealing with fundamental rights, the provisions of the Constitution should not be treated lightly and that violation of those provisions should be sanctioned severely otherwise the provisions of the Constitution would cease to have any meaningful content whatsoever.*

*Furthermore, the right to be assisted by counsel is so intricately and invariably linked with another fundamental principal of our criminal law which is the right of an accused person to silence, whether from the beginning of the arrest at the enquiry stage or throughout the proceedings at the trial stage (vide **Ramdeen v. R [1985 MR 125]** and **R. V. Boyjoo[supra]**), that it would be retrograde to simply inform an accused party of his right to silence and refraining from telling him the right of consulting a legal adviser for fear that a consultation might make the enquiry more*

difficult when the accused might , whether or not thereafter, choose to exercise his right to silence.

(…) Anyway as I would show later, any waiver in order to be valid and effective must be one made by the suspect after having given full thought of the consequence of giving up such a right. It must in other words be made avec connaissance de cause.

(…)

I am therefore of the view that in the light of the authorities above and in the absence in our Constitution of a provision giving the court the discretion to admit evidence obtained in breach of a fundamental right, evidence so obtained would per se be inadmissible and I do not have any discretion in the matter. I rule accordingly." ***(*emphasis added)**

In the present out of court statement of the Accused (Doc. E), the manner the Accused was informed that either he had a right to silence or a right to Counsel had for effect for the recording officer to refrain from telling him that he had an unconditional right to Counsel which is abundantly clear for "*fear that a consultation might make the enquiry more difficult"* leading to the intended result whereby the Accused pleaded guilty to counts two and three.

It is apposite to note the observations of Lord Kerr in **Pora v The Queen [2015] UKPC 9**, an appeal to the Judicial Committee of the Privy Council from a judgment of the Court of Appeal of New Zealand referred to in **Boodhoo L. v The State of Mauritius [2016 SCJ 258]** where the Supreme Court made the following pronouncement:

"It goes without saying that each case must be decided on its own particular facts and circumstances. It is a basic principle that trial Courts are expected to exercise caution and great care when assessing the reliability of a confession in line with the following observations of Lord Kerr at paragraph 57 of the judgment in ***Pora*** *and which read as follows:*

"Any court must therefore be astute to examine the reliability of seemingly straightforward confession of guilt where that comes under later challenge. […] it is precisely because of the experience that people confess to crimes that they did not

commit that one should be vigilant to examine possible reasons that confessions may be false. […] Indeed, such is the potential potency of confession evidence that particular care is required in examining whether it reflects the true state of affairs." (**emphasis added**)

Thus, the manner in which the Accused's statement was recorded (Doc. E) inescapably leads to a substantial breach of his Constitutional Right to Counsel and is unreliable as it is not deemed to have been made *avec connaissance de cause*. Hence, I find that such a statement containing admissions from the Accused in relation to counts two and three, were involuntarily extracted from the Accused and no weight can be attributed to those admissions by the Court. Nor did the enquiring officer record a statement from the 3 witnesses namely the two trainees and the Floor Manager, Mrs. Reena, as to the extent of the injuries encountered by the injured person on the material day bearing in mind that the medical certificates produced (Docs. A, A1-A6) do not establish that the injuries fall under the provisions of count two. Moreover, the enquiring officer said that the injured person did not specify his injuries when he recorded a statement from him. Now, the injured person admitted having said for the first time in Court that he did all kinds of job at the accused company. He also said that he was a driver at the material time and that he asked his trainees to tie his injured hand so that he would have driven his car to the hospital directly. Now, only the medical certificates (Docs. A & A6) reveal that his fingers were cut while the others only show other illnesses having nothing to do with injuries. Further, the maker of the medical certificates emanating from a private Wellkin Hospital Fortis and Clinique Fortis Darné (Docs. A & A6) namely the treating Doctors did not give evidence in Court in relation to the contents thereof and more importantly such medical certificates do not fall within the exceptions to the rule against hearsay pursuant to Section 181(1) of the Courts Act. Therefore, the degree of the cut as far as the three fingers are concerned are not conclusive enough in order to attract the provisions of the 11th schedule to the Occupational Safety and Health Act 2005 – Act No 28 of 2005 as per count two.

The applicable part of the Eleventh Schedule to the Occupational Safety and Health Act 2005 – Act No 28 of 2005 provides:

*"**ELEVENTH SCHEDULE***

[Section 85]

LIST OF INJURIES REQUIRING IMMEDIATE NOTIFICATION

(…)

3. *Amputation of –*
   (a) a finger, thumb or toe, or any part thereof if the joint or bone is completely severed.
10. *Any other injury which results in the person injured being admitted into hospital for more than 24 hours."*

Therefore, counts one and two should fail.

As regards count three, Accused's admission in its out of court statement (Doc. E) cannot be relied upon as the statement was not given voluntarily in the context explained earlier. However, the Accused had a duty to report the accident within 7 days as it has remained unrebutted that he was injured at its place of work on the material day and at the material time. Now, learned Counsel for the Defence has submitted that in relation to counts two and three, whereby the information was not precise as regards the party charged as it referred to the Accused mentioned in count one by averring *"the said Accused"* in counts two and three instead of giving its full name as in count one so that the information was fundamentally defective in relation to the said two counts and have to be dismissed under the authority of **Attorney General v Saurty [1963 MR1]**.

It is significant to note that in the present information, only one accused party is concerned in relation to all three counts although each count is an offence on its own for which there is the same accused party.

It is relevant to note that no objection was taken to the information as regards counts two and three prior to the plea being recorded from the Accused under the authority of **Saurty** (supra). Therefore, the same Accused pleaded not guilty to each count to the information and for which there has been no prejudice being caused to that Accused. It is important to note that those two counts are simple contraventions and not akin to criminal informations brought before the Supreme Court.

The following extract from **Attorney General v Saurty [1963 MR1]** reads as follows:

"*The provision regarding the contents of criminal informations brought before the Supreme Court is contained in section 17 of the Criminal Procedure Ordinance which reads as follows: -*

"……..in all cases of crime brought before the Supreme Court, the Crown or other prosecutor shall draw up a criminal information which must be direct and certain:

(i) as regards the party charged;

(ii) the description of the offence charged;

(iii) the material circumstances of the offence charged".

This section states what is in fact the English common law on the subject and which is now statutorily provided for in England by section 3(1) of the Indictments Act, 1945, which provides that:

"……Every indictment, shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the charge."

Here again as regards the general principles governing the particulars which an indictment should contain, the Indictments Act,1915, made no material change in the existing law.

Taking into consideration the language used in section 89 of the Summary Jurisdiction Act of 1879, the Criminal Justice Act, 1925, the Magistrates' Courts Rules 1952, and the Indictments Act 1915, governing the requirements for the statement of the material circumstances of the offence charged, and the case-law on the subject, we are of the view that general principle was never altered and, further, that there is no difference in substance between section 125 of the District Courts (Criminal Jurisdiction) Ordinance and section 17 of the Criminal Procedure Ordinance. (…)" **(emphasis added)**

Therefore, there is no difference in substance between section 125 of the District Courts (Criminal Jurisdiction) Act and section 17 of the Criminal Procedure Act as regards the general principle governing the particulars which a criminal information should contain. **Saurty** (supra) is not authority as regards the party charged.

Section 125(1) of the District and Intermediate Courts (Criminal Jurisdiction) Act provides:

"(1) The description in the information of any offence in the words of the law creating such offence, with the material circumstances of the offence charged, shall be sufficient."

It is worthy of note that no mention has been made of the party charged. But same is specifically provided in section 17 of the Criminal Procedure Act.

Now section 17 of the Criminal Procedure Act reads:

*"**17. Information to be certain***

In any case of crime brought before the Supreme Court, the State or other prosecutor shall draw up an information which shall be direct and certain as regards-

(a) the party charged;

(b) the description of the offence charged;

(c) the material circumstances of the offence charged."

Indeed, in the case of **Municipality of Beau Bassin- Rose Hill v S.B. Khodabaccus** [2002 SCJ 77], the following extract is relevant and reads as follows:

"Now, an information must comply with section 125(1) of the District and Intermediate Courts (Criminal Jurisdiction) Act which provides that "the description in the information of any offence in the words of the law creating such offence, with the material circumstances of the offence charged, shall be sufficient.

*In **Beekhan v The Queen** [1976 MR 3], it was stated that section 125(1) of the District and Intermediate Courts (Criminal Jurisdiction) Act simply restated the fundamental principles of our law that all essential elements of an offence must be averred in the information and proved by the prosecution.*

*An information which fails to aver particulars of an offence may still disclose an offence (vide **Moussa v Q** [1972 MR 99]) but it is a different matter where an essential element of the offence has not been averred. The defect in such cases is said to be fundamental. It is not because the accused party was fully aware of the charge against him that a charge must be drafted in a perfunctory manner. Under section 10(2)(b) of the Constitution, an accused party is entitled to know what is the charge levelled against him."*

In the present case, section 125(1) of the District and Intermediate Courts (Criminal Jurisdiction) Act applies and the accused party being the same accused party in relation to all three counts was fully aware of the 3 charges against him and the test of certainty and precision was answered in that context. Therefore, I take the view that the defect in the information as regards the party charged in relation to counts two and three is not fundamental as it does not relate to the said two charges, but the imposition of a conditional Right to Counsel to the accused party when a Defence statement was being recorded from its representative(Doc. E) is *stricto sensu* inadmissible as it is deemed to be given involuntarily so that no weight can be given to the admissions found therein concerning the said two charges.

Therefore, count three succeeds as the Accused has failed to produce a report of the accident involving injury to the said employee within the prescribed delay of 7 days (pursuant to the Thirteenth Schedule to the Occupational Safety and Health Act 2005 – Act No 28 of 2005) to the Director of Occupational Safety and Health as per the unchallenged testimony of the enquiring officer in that respect.

For all the reasons given above, I am unable to find that the case for the Prosecution has been proved beyond reasonable doubt in relation to counts one and two only. Accordingly, counts one and two are dismissed against the Accused. However, I find Accused guilty as charged in relation to count three.

S.D. Bonomally (Mrs.) *(Vice President)*
19.9.25