OSHI v Best Construct Co Ltd

2023 IND 43

CN311/18

THE INTERMEDIATE COURT OF MAURITIUS
(Criminal Side)

In the matter of:-

Occupational Safety And Health Inspectorate

v/s

Best Construct Co Ltd

JUDGMENT

As per the amended Information, the Accused Company stands charged with **one Count of Failing To Provide Adequate Facilities For The Taking Of Meals, contrary to ss. 44(1) and 94(1)(i)(vi) of the Occupational Safety And Health Act [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 Company 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.

Case For The Prosecution

It was the case for the Prosecution that on 31-07-18, in the District of Quatre-Bornes, the Accused Company, being an employer, did unlawfully fail to provide facilities for the taking of meals for the employees remaining on the premises during meals (sic) intervals at its place of work at the site of Rehabilitation and Upgrading of Berthaud Avenue, Quatre-Bornes.

Case For The Defence

The Accused Company accepted the charge in its unchallenged out-of-Court statement (Doc. A) but denied same 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 given due consideration to the Submissions and to the Authorities submitted by Learned Defence Counsel.

Not In Dispute

It was not disputed that:

1) The Accused Company was an employer (Doc. A);
2) There were 08 employees working at the locus (testimony of Mr. Kamal Fakoo (hereinafter referred to as W1) and (Folio 0061 of Doc. A));
3) No facilities were provided to the said employees for the taking of meals, as works had started at the said site since April 2018 (Folio 0063 of Doc. A);
4) The Accused Company undertook to provide such facilities at the said site (Folio 0063 of Doc. A); and
5) As at 17-05-18, no such facilities had been provided (Item 3 of Doc. B).

Defective Information?

Learned Defence Counsel offered Submissions to the effect that the Information was defective as all the elements of the offence provided for under **s. 44(1) of the OSHA** were not present in the Information.

S. 44(1) of the OSHA is reproduced below for ease of reference:

> Subject to subsection (2), every employer shall provide and maintain adequate facilities for the taking of meals, due regard being paid to the number of employees remaining on the premises during meal intervals, and the facilities shall be away from the habitual work position and shall include tables and chairs or benches with backrests.

As per Learned Counsel, **s. 44(1) of the OSHA** is to be read subject to **s. 44(2) of the OSHA**.

The Court is however of the considered view that **s. 44(2) of the OSHA** would only place a statutory obligation on an employer to provide and maintain a mess as specified in the said subsection, where the said employer had more than 25 employees.

In the present matter, it was not disputed that there were 08 employees, and hence **s. 44(2) of the OSHA** does not apply to the present matter.

The Court is comforted in reaching the said conclusion, as whilst neither "facilities for the taking of meals" nor "mess" have been defined in the Interpretation Section of the **OSHA**, the said words are respectively specifically mentioned for instance in **s. 95(2) and Item 5(c) of the Fifteenth Schedule of the OSHA**, and hence cannot be taken to have the same meaning.

That being said, it is clearly apparent from a comparison of the wording of **s. 44(1) of the OSHA** with the present amended Information as it stands, that the following words are not reproduced in the present Information:

1) and maintain;
2) adequate;
3) due regard being paid to the number of; and
4) and the facilities shall be away from the habitual work position and shall include tables and chairs or benches with backrests.

Not just any type of facilities are to be provided by an employer. Such facilities are to be adequate, are to be away from the habitual work position, are to consist at least of tables and chairs or benches with backrests, due regard being paid to the number of employees remaining on the premises during meal intervals.

And the employer's duty goes further than merely providing such facilities, as it is specified in the said section that the employer is maintain such facilities.

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So that an offence would be committed by an employer, due regard being paid to the number of employees remaining on the premises during meal intervals, where:

1) he failed to provide and maintain facilities for the taking of meals;
2) such facilities were not adequate;
3) such facilities were not away from the habitual work position; and
4) such facilities did not include tables and chairs or benches with backrests.

By setting out these specificities in the Law, the Legislator was in effect setting the minimum standard to be observed by an employer in relation to the provision of facilities for the taking of meals, and hence these elements went to the essence of the offence.

Further, the Court is of the considered view that given the wording of the said section, and in particular given the Legislator chose to use the word "shall" in relation to the duty for the employer to provide and maintain adequate facilities, in relation to where such facilities are to be, and what such facilities are to include, these are essential elements of the offence.

It is settled Law that "having regard to principles underlying statutory interpretation, when the words used are unambiguous the clear intention of the legislator must be put into effect for the legislator does not legislate in vain" (**Curpen v The State** [2008 SCJ 305]).

It was therefore essential for all the "constitutive component[s] of the offence […] to be expressly set out in the information in order to create a complete criminal offence known to law and also in order to enable the [Accused Company] from the outset to know with precision the offence with which [it] stands charged and the case which [it] has to answer so that [it] is not prejudiced or misled in the preparation and conduct of [its] defence. The failure to aver and prove th[ese] essential element[s] of the offence is fatal to the case." (**Lobogun v The State** [2006 SCJ 227]).

Applying the abovementioned principles to the present matter, given all the essential elements of the offence have not been expressly set out in the present Information, the Court is of the considered view that the Information does not disclose an offence known to the Law, and that hence the present Information is defective and the present Proceedings cannot stand.

Testimony of Jean Gérard Clair (hereinafter referred to as W2)

The Court having found above that the Information is defective, there is no need for the Court to consider the Merits of the present matter, but the Court proceeds to do so for the sake of completeness.

The Court has duly analysed the testimony of W2, and whilst W2 stated that the Accused Company provided no facilities for the taking of meals and that he was having his meal under a tree, the Court is of the considered view that W2's testimony did not support the Prosecution case.

First, W2 stated that he thought that in 2018 he worked for the Accused Company. It therefore follows that his testimony was not certain on this issue.

Second, W2 stated that he believed he worked at Laventure on the relevant day, i.e. 31-07-18. It is clear from W2's said testimony that he was not sure where he worked on the day.

Third, as per the amended Information, the locus of the offence is mentioned as Avenue Berthaud, Quatre-Bornes, whereas W2 stated that he believed that he worked at Laventure on the relevant day.

Not only was W2 not sure he was working for the Accused Company at the relevant time, but he was also not sure where he was working on the relevant day, and W2's testimony in effect contradicted the version of W1 as to the locus of the present offence.

The Court also takes Judicial Notice of the fact that Laventure is a village, and that the Information mentions a specific avenue in Quatre-Bornes.

The Court has borne in mind that the Accused Company in effect admitted the charge in its unchallenged out-of-Court statement (Doc. A) and in its Risk Assessment (Doc. B).

The burden of proving their case however rests squarely on the Prosecution (**Andoo vs The Queen [1989 SCJ 257]**).

In light of all the above, the Court is of the considered view, that on the Merits also, the Prosecution have not proven their case.

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 have not proven their case against the Accused Company beyond reasonable doubt, and the present matter is therefore dismissed.

[Delivered by: D. Gayan, Ag. President]
[Intermediate Court (Financial Crimes Division)]
[Date: 12 July 2023]