OSHI v Forges Tardieu Limited

2022 IND 9

CN186/15

THE INDUSTRIAL COURT OF MAURITIUS
(Criminal Side)

In the matter of:-

Occupational Safety And Health Inspectorate

v/s

Forges Tardieu Limited

JUDGMENT

The Accused Company stands charged with **one Count of Failing To Ensure That Persons Not In Its Employment Are Not Exposed To Any Risk To Their Safety, contrary to ss. 5(2)(e) and 94(1)(i)(vi)(3)(b) of the Occupational Safety And Health Act (hereinafter referred to as OSHA) [Act No. 28 of 2005]**.

The Accused Company pleaded Not Guilty to the charge and was assisted by Learned Defence Counsel throughout the Proceedings.

Learned Counsel holding Watching Brief for Oodesh Shyamlaul and Nocolas Lafrance (hereinafter referred to as W2 and W3 respectively) was present for part of the Proceedings.

The Labour Officer (hereinafter referred to as 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 09-11-13, in the District of Savanne, the Accused Company, as represented by its Chairman, whilst being an employer, did wilfully and unlawfully fail to ensure, so far as is reasonably practicable, that persons not in its employment are not exposed to any risk to their safety as a result of which, to wit: one Oodesh Shamlaul, employee of Appave Indian Ocean Ltd, sustained fracture injury to his left ankle, when he fell through a platform of a staircase, at its place of work at Omnicane Energy Plant site situated at La Baraque, L'Escalier.

The Defence Case

The Accused Company denied the charge in its out-of-Court statement (Doc. E), and elected to adduce no evidence, as was its Right.

Analysis

The Court has duly analysed all the evidence on Record and all the circumstances of the present matter, and the Court has watched the demeanour of all the Prosecution Witnesses with the utmost care.

The Court has also given due consideration to the Submissions of Learned Defence Counsel and to the caselaw referred to by Learned Defence Counsel.

At the outset, the Court notes that the Information does not bear the signature of the Prosecutor.

Further, although the Accused Party is a Company, no mention is made in the Information of s. 44(2) of the Interpretation And General Clauses Act.

Applying s. 73(1) of the **District and Intermediate Courts (Criminal Jurisdiction) Act**, no objection shall be allowed to the Information for any alleged defect in its substance or form.

Further, the Court is of the considered view that no prejudice resulted to the Accused, its being assisted by Learned Defence Counsel throughout the Proceedings, who took no objection to the present Information as it stands.

The Court therefore proceeds to determine the present matter on the basis of the Information as it stands.

The Court has also duly considered all the documents produced in the course of the Proceedings:

1) 01 Medical Certificate (Doc. A) in relation to Oodesh Shamlaul drawn up by Dr. P. Panchoo (hereinafter referred to as W6) put in by the Prosecutor;
2) 01 booklet of 04 photographs (Doc. B (B1 to B4)) produced by Mohammad Faryaz Bhugalee (hereinafter referred to as W1);
3) 01 Incident/Accident Investigation Report made up of 03 pages (Doc. C) produced by W1;
4) 01 letter dated 22-09-14 (Doc. D) produced by W1;
5) 01 Accident Report made up of 02 pages (Doc. F) produced by W1 ;
6) 01 Curriculum Vitae made up of 06 pages (Doc. G) of one Oodesh Shamlaul produced by W1;
7) 01 Certificate of Radioprotection and two Certificates Of Attendance (collectively marked as Doc. H) of one Oodesh Shamlaul produced by W1; and
8) 01 *Analyse de Risques* (Doc. J) produced by W1.

The Court notes the following:

1) the name of Oodesh Shamlaul appears in the body of the Information, and on (Docs. A, E, F, G, and H);
2) the name of Oodesh Shyamlaul appears as Witness 2 on the List of Witnesses on the Information;
3) the name of Mr. Shamlaul appears on (Docs. B1 and B2);
4) the name of Raj Shamloll appears on (Doc. C);
5) the name of Raj Shamlaul appears on (Doc. J); and
6) as per the Transcript of 09-09-2020, the name of Oodesh Shamloll appears.

The Court further notes that the name of Nocolas Lafrance appears as Witness 3 on the List of Witnesses, whereas the name of Nicolas Lafrance appears on (Doc. J), and the name of Nicholas La France appears as per the Transcript of 09-09-2020.

The Court also notes the following:

1) the name of Appave Indian Ocean Ltd appears in the body of the Information and on (Doc. F);
2) the name of Apave Indian Ocean appears on (Doc. C);
3) the name of Apave Indian Ocean Ltd appears on (Doc. E); and
4) the name of Apave appears on (Docs. G, H, and J).

Be that as it may, at no stage of the Proceedings was the Identity of any of the said Parties put in issue, and the Court therefore proceeds to determine the present matter on the basis that:

1) the names Oodesh Shamlaul, Oodesh Shyamlaul, Mr. Shamlaul, Raj Shamloll, Raj Shamlaul, and Oodesh Shamloll, all relate to one and the same person, i.e. the alleged Victim in the present matter, who is hereinafter referred to as W2;
2) the names of Nocolas Lafrance, Nicolas Lafrance, and Nicholas La France, all relate to one and the same person, who is hereinafter referred to as W3; and
3) Appave Indian Ocean Ltd, Apave Indian Ocean, Apave Indian Ocean Ltd, and Apave, all relate to one and the same Company, and is hereinafter referred to as Apave.

Now, s. 5 (2)(e) of the OSHA provides as follows:

> **5. General duties of employers**
>
> […]
>
> (2) The employer shall, so far as is reasonably practicable, in particular –
>
> […]
>
> (e) ensure that any person not in his employment is not exposed to any risk to his safety or health.

An employer therefore has a statutory duty to ensure, so far as is reasonably practicable, that any person not in his employment, is not exposed to any risk to his safety or health.

And s. 96(6) of the OSHA provides as follows:

> In any proceedings for an offence under any provision of this Act consisting of a failure to comply with a duty or requirement to do something so far as is practicable or so far as reasonably practicable, or to use practicable means or to take practicable steps to do something, it shall be for the accused to prove that it was not practicable or not reasonably practicable to do more than was in fact done to satisfy the duty or requirement, or that there was no better practicable means or step than was in fact used or taken to satisfy the duty or requirement, as the case may be.

Now, in the present matter, the Accused Company is charged with whilst being an employer, having wilfully and unlawfully failed to ensure, so far as is reasonably practicable, that a person not in its employment, i.e. W2, employee of Apave, is not exposed to any risk to his safety, as a result of which the said W2 sustained fracture injury to his left ankle, when he fell through a platform of a staircase, at his place of work at Omnicane Energy Plant site situated at La Baraque, L'Escalier.

Not In Dispute

It was not disputed that W2 was injured on the day in question, at the site in question, which was his place of work, when a grating he was walking on fell, causing him to fall.

It was further not disputed that the staircase platform in question had been erected since early October 2013 (Folio 105339 of Doc. E and question put to Louis Herve Pitchia (hereinafter referred to as W4) at page 47 of 64 of the Transcript of 09-09-2020), i.e. well before the present incident, and that it was being used by about 80 persons (Folio 105338 of Doc. E) everyday (question put to W3 at page 38 of 64 of the Transcript of 09-09-2020) by all persons working on the site (question put to W4 at page 47 of 64 of the Transcript of 09-09-2020).

Also, in view of the line of cross-examination adopted by Learned Defence Counsel in relation to W2, it is clear that the Accused Company did not dispute that there was a contract between the Accused Company and Apave for some works to be performed by W2, who was employed by Apave.

Was The Particular System Of Work Adopted By The Accused Company Safe?

W2 testified in Court and explained how he fell through the said platform when the grating he was walking on moved and caused his fall. W2 maintained throughout the Proceedings that the grating in question had not been bolted, when it ought to have been. W2 further maintained that such grating could not be welded, but had to be secured with a bolt.

W2 further stated that some of the gratings had been bolted, whereas some had not, and that the grating which moved and caused his fall had not been bolted.

W2 confirmed having carried out a risk assessment at the spot where he was to work.

W3's testimony was to the effect that he had carried out a risk assessment on the site and that the said accident occurred not at the spot where he and W2 were working, but where they had to walk to gain access to the site.

W2 and W3's respective testimony was also along the same lines, to the effect that there were other employees using the said platform prior to the said accident.

This is in line with the version of the Accused Company, which, in its Defence Statement (Doc. E), conceded that the said staircase platform with gratings had been erected since early October 2013 (Folio 105339 of Doc. E) and that it had been used by approximately 80 persons (Folio 105338 of Doc. E).

It was the contention of the Defence that W2 ought to have known the risks associated with the work he was performing on the locus, the more so as he was the senior most technician on site on the relevant date, and had carried out a risk assessment.

As per the Risk Assessment (Doc. J), W2's specific duty was to carry out a radiographic inspection on pipe welds during the erection of one FBC water tube bi-drum boiler at the locus. There is no mention on the said document that it was W2's duty to make a risk assessment as to the said platform.

Now, it is beyond dispute that there are inherent risks associated with working on a staircase platform with grating, at a certain height, and Learned Defence Counsel laid much emphasis on

W2 and W3's respective qualifications and experience, and on the fact that W2 and W3 had done a risk assessment of the place of work in question.

True it is that W2 conceded for instance that he had been on the said site of work several times, that he had used the said platform staircase several times, and that he ought to have checked the safety of the said platform staircase.

These issues are however irrelevant to the determination of the present matter, applying the principles set out in the Authority of **DPP v Flacq United Estates Ltd [2001 SCJ 301]**:

> The primordial issue which the learned Magistrate had to decide was whether the particular system of work adopted by the respondent with regard to the cleaning operation of its steam boiler, including its furnace, was safe. The issue was not whether the death of Labiche had been caused by the respondent's negligence or imprudence or whether Labiche had himself been imprudent when he entered the ashtray through the small door. Also, it is not because no serious accident had occurred in the past that a system of work is necessarily compliant with the requirements of the Act.

W4 and Sylvain Percheron (hereinafter referred to as W5) deponed as regards the particular system of work used by the Accused Company in the present matter.

W4 deponed to the effect that he had a fading recollection of the present matter, as it had occurred in 2013, i.e. about 07 earlier, and stated in Court that he had followed the instructions of W5, the Contractor he was working for.

Now, W4's testimony was to the effect that where the gratings moved, "tackwell" [1] had been placed in order for the gratings not to move, and where the gratings did not move, they put nothing.

W4 maintained throughout the Proceedings that the tack-weld was not used to hold the platform and that in fact the grating had to be bolted to be secure.

[1] "Tack-weld" means to fasten (two pieces of metal) together by welding them at various isolated points, as per the Merriam-Webster Dictionary.

W4's testimony to the effect that no bolts had been placed on the said platform, remained unchallenged.

W5 for his part deponed to the effect that no bolts had been placed on the grating where W2 fell from, as they had not been able to reach that level yet, and that after the said accident, all corrective measures were taken, with bolts being fixed to secure the structure.

W5 also confirmed, upon his statement being put to him, that Omnicane Ltd had given him the prefabricated platforms to be erected. W5 further stated that the tack-weld had been placed as a temporary measure, and that bolts had to be affixed.

The Accused Company's own version in its out-of-Court statement (Doc. E) was to the effect that it believed that the gratings were bolted and welded to the frame (Folio 105339 of Doc. E).

The Accused Company's belief that the gratings were bolted and welded to the frame implies that the Accused Company itself was not sure of how the platform had been secured to the frame.

The Court has duly assessed the testimony and demeanour of W2, W3, W4, and W5 and the Court has noted that W4 specifically stated that he had a fading recollection of the present matter, and the Court bears in mind the principles set out in the Authority of **Vythilingum v The State [2017 SCJ 379]**:

> Giving evidence in Court is not a memory test and failure to recollect with precision all the circumstances and details of an incident is understandable. What is important is for the Court to be satisfied that a witness is speaking the truth in substance.

The Court also makes allowances for the passage of time given W4 was deponing about 07 years after the present incident.

The Court is satisfied that W4 was a credible Witness, who was speaking the Truth in substance as to what he recalled of the present matter.

W2, W3, W4, and W5 all corroborated each other as regards the fact that the platform in question had not been bolted.

In light of all the above, the Court finds that W2, W3, W4, and W5 were Witnesses of Truth, who deponed in a convincing and consistent manner, and that the Court can safely act on their respective testimony.

In light of all the evidence on Record and all the factors highlighted above, the Court is of the considered view that is has been established that the said platform had not been bolted completely at the time it was erected in early October 2013, but also that it had remained so up to 09-11-13.

Now, there was about 01 month between the said platform being erected in early October 2013 and the present incident which occurred on 09-11-13. There was therefore ample time for the Accused Company to properly secure the said platform, the more so as it was being used by about 80 persons working on the site, on a daily basis.

The fact that the said staircase platform was being used by all persons working on the site on a daily basis according to the Accused Company itself, inevitably means that this said staircase was not meant for the exclusive use of W2, and did not form part of the works to be carried out by W2. The blame cannot therefore be laid at W2's door.

From all the above, the Court is of the considered view that the evidence on Record conclusively establishes that the said platform on the staircase had not been completely secured with bolts at the relevant time.

The said staircase platform was intrinsically unsafe, when unbolted, as various parts of the said platform, including the gratings, could potentially become loose. This is even more so when bearing in mind that there were about 80 persons using the said staircase platform on a daily basis.

In light of all the above, the Court is of the considered view that the particular system of work adopted in the present matter by the Accused Company was not safe.

At no stage of the Proceedings was evidence adduced to establish that it was not practicable or not reasonably practicable to do more than was in fact done in the present matter, to satisfy the

duty or requirement, or that there was no better practicable means or step than was in fact used or taken, to satisfy the duty or requirement.

Also, there is no evidence on Record to suggest that a regular assessment/inspection/maintenance of the said staircase platform had been carried out by the Accused Company between the time the said staircase platform was erected in October 2013 and 09-11-13.

As per the out-of-Court statement (Doc. E) of the Accused Company, after the accident, it gathered its team and instructed it to immediately weld the grating at 04 corners after the bolting had been fixed (Folio 105338 of Doc. E).

This action of the Accused Company immediately after the present incident indicates that the said grating had not been bolted prior to the said incident, but also that there were easily available means to the Accused Company to cause for the said staircase platform to be secured properly.

The Court is of the considered view that the evidence on Record overwhelmingly establishes that the said staircase platform with gratings had been installed about one month before the relevant date, and that it had been used by about 80 persons for about one month prior to the said incident, without being bolted.

Given the said staircase platform had been used by about 80 persons for about one month prior to the present incident, coupled with the specific duty of W2 as evidenced by the Risk Assessment (Doc. J), the Court finds the contention of the Defence that it was W2's duty to perform a risk assessment of the said staircase platform untenable.

And the very fact that bolting of the said grating to the staircase platform was carried out immediately following, and as a direct result of, the present accident, clearly shows that it was reasonably practicable for the Accused Company to have done so from the outset.

In light of all the above, the Court is of the considered view that the Accused Company has failed to prove that it was not reasonably practicable to do more than was in fact done to satisfy its duty or requirement, and has therefore failed to ensure, so far as was reasonably practicable, that W2, who was not in its employment, was not exposed to any risk to his safety or health.

And “[a]lso, it is not because no serious accident had occurred in the past that a system of work is necessarily compliant with the requirements of the Act.” (**DPP v Flacq United Estates Ltd (supra)**).

Conclusion

In light of all the evidence on Record, all the circumstances of the present matter, and all the factors highlighted above, the Court is of the considered view that the Prosecution has proven its case against the Accused Company beyond reasonable doubt, and the Accused Company is therefore found Guilty as charged.

[Delivered by: D. Gayan, Ag. President]
[Industrial Court]
[Date: 23 February 2022]