OSHI v Shivani Manufacturing Ltd

2024 IND 24

Cause Number 72/14

In the Industrial Court of Mauritius
(Criminal side)

In the matter of:

OSHI

v.

Shivani Manufacturing Ltd

Judgment

Accused being an employer is charged under Section 5(1) and Section 94(1) (i) (vi) of the Occupational Safety and Health Act – Act No.28 of 2005 coupled with Section 44(2) of the Interpretation and General Clauses Act with unlawfully failing on or about the eighteenth day of December 2012 to ensure so far as is reasonably practicable, the safety, health and welfare of its employees as a result of which one of its employees namely one Gopalu Naiko Navin, machine operator, sustained crush injury to his right hand while he was operating a knitting machine make Schimatronic of type SES 122RT at its place of work at Block A, Industrial Zone, Phoenix.

The Accused represented by Mrs. Hau Wing Lun Yim Lim Mary Jane pleaded not guilty to the information and was assisted by Counsel.

An accident occurred at work on 18 December 2012 at Shivani Manufacturing Ltd, Block A, Industrial Zone, Phoenix while Mr. Naiko Navin Gopalu, a machine operator employed by Accused, was intervening inside the knitting bed of a flat knitting machine make Schimatronic of type SES 122RT, when the carrier of that machine got into contact with his right hand causing him to sustain crush injuries to that hand as per the six medical certificates produced namely Docs. A and A1-A5.

The case for the Prosecution rested on the testimonies of Mr. M.F. Bhugalee (the Enquiring Officer) who went to the locus of the accident on 24.12.2012, Mr. N. N. Gopalu (the Injured Employee) and Mr. V. K. Coonjan (the Head Technician).

After having duly considered the unrebutted testimonies of the said Prosecution witnesses, I find that they have lamentably failed to establish that the system of work of Accused was unsafe at the material time for the following reasons:

1. The enquiring officer inferred that the system of work of Accused was unsafe because the interlocking system of the said machine was bypassed by means of a key and which remained unsubstantiated. On the contrary, he stated that at the time he was doing the investigation, the interlocking device was working properly.
2. The interlocking system is a transparent guard meaning safety cover which when placed on the machine, the latter would move and when opened, it would stop.
3. The machine was maintained so that there were other safety gadgets added to it prior to the accident.
4. The enquiring officer at no time produced photographs showing that the machine's interlocking system was bypassed by means of a key and where the key was to fit in the machine and to explain how the accident occurred. He did not produce any report to conclude his observations while being on the locus of the accident.
5. There is no expert report or evidence to show that the machine was defective or unsafe at the material time by reason of a bypassed interlocking system by means of a key.
6. There are no eye witnesses nor any witness who deposed to the effect that because the machine was defective at the material time, they did the needful to inform Management to have it repaired after the accident.

7. None of the witnesses were aware where such a bypassing device namely the key was placed on the machine, where the key fitted on the machine, how it inhibited the stoppage of the machine and where it was kept, and by whom it was kept.
8. The injured person at no time, testified that, although the interlocking system was in operation at the material time, because the guard was opened or removed, the machine which was meant to stop, failed to do so, because the said interlocking system was bypassed by means of a key, causing him to sustain injuries. On the contrary, he stated that the machine had to stop while being put on Reset mode as if the interlocking system was achieved by the activation of the Reset mode. Such fact has not been confirmed by the two other witnesses.
9. The injured person is still working as operator for Accused and which he did as from the year 2001 and he was aware of the nature of the work he was performing at the material time as he had received training for that purpose.

In view of the above glaringly blatant inconsistencies, I find that the Prosecution on whom the onus lies, has utterly failed to establish the primordial issue namely that the system of work adopted by Accused was unsafe as highlighted in the case of **The DPP v Flacq United Estates Ltd** [2001 SCJ 301] where the Supreme Court stressed the following in relation to a breach of Section 5(1) of the Occupational Safety, Health & Welfare Act 1998 (similar to the above Section 5(1) of the Occupational Safety and Health Act) :

"(…) Section 5 of the Act indeed provides for the duties and responsibilities of an employer towards his employees. One of the primordial duties expressly set down in the law is that of ensuring the safety, health and welfare at work of the employees.

The primordial issue which the learned Magistrate had to decide was whether the particular system of work adopted by the respondent (…) 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." (**emphasis added**)

In the same vein, in **Talbot Fishing Co Ltd. v Ministry of Labour & Industrial Relations (Occupational Safety and Health Inspectorate)** [2006 SCJ 76], the Supreme Court held that it was for the Prosecution to show that the Accused employer *"had failed in its duty under the Act"* meaning imposed upon it by section 5 which is to ensure the health and safety of its employees at work.

Had the Prosecution been successful in establishing that the crush injuries sustained by Mr. Naiko Navin Gopalu at the material time (in line with the medical certificates produced viz. Docs. A and A1-A5) were the result of an unsafe system of work adopted by Accused(*vide*- **The DPP v Flacq United Estates Ltd** [2001 SCJ 301]), then only, the Accused would have been exempted from liability, should it then have established on a balance of probabilities that it was not reasonably practicable for it to comply with such *" duty under the Act "* (see- **Talbot Fishing(supra)**).

Therefore, in the present case, the threshold has not been reached by the Prosecution so that the accused company would have been expected to claim exemption from liability. In the same breath, it is significant to note that the Accused's representative did not adduce any evidence in Court although an out of Court statement was recorded from her by Mr. Bhugalee viz. the same enquiring officer, on 27.8.2013 as per Doc. B. wherein she was cautioned as follows:

"After having been warned that whatever she states may be taken in writing and be given as evidence in court and after having been informed of her Constitutional rights of being assisted by a legal advisor or to remain silent which she declines."

Indeed, **Rules I, II and III of the Judges' Rules** read as follows:

"Rule I – When a police officer is trying to discover whether, or by whom, an offence has been committed he is entitled to question any person, whether suspected or not, from whom he thinks that useful information may be obtained. This is so whether or not the person in question has been taken into custody so long as he has not been charged with the offence or informed that he may be prosecuted for it.

Rule II – As soon as a police officer has evidence which would afford reasonable grounds for suspecting that a person has committed an offence, he shall caution that person or cause him to be cautioned before putting to him any questions, or further questions, relating to that offence.

The caution shall be in the following terms:

"You are not obliged to say anything unless you wish to do so but what you say may be put into writing and given in evidence."

When after being cautioned a person is being questioned, or elects to make a statement, a record shall be kept of the time and place at which any such questioning or statement began and ended and of the persons present.

Rule III – (a) where a person is charged with or informed that he may be prosecuted for an offence he shall be cautioned in the following terms:

"Do you wish to say anything? You are not obliged to say anything unless you wish to do so but whatever you say will be taken down in writing and may be given in evidence."

(b) It is only in exceptional cases that questions relating to the offence should be put to the accused person after he has been charged or informed that he may be prosecuted. Such questions may be put where they are necessary for the purpose of preventing or minimising harm or loss to some other persons or to the public or for clearing up an ambiguity in a previous answer or statement.

Before any such questions are put the accused should be cautioned in these terms:

"I wish to put some questions to you about the offence with which you have been charged (or about the offence for which you may be prosecuted). You are not obliged to answer any of these questions, but if you do the questions and answers will be taken down in writing and may be given in evidence."

Any questions put and answers given to the offence must be contemporaneously recorded in full and the record signed by that person or if he refuses by the interrogating officer.

(c) When such a person is being questioned, or elects to make a statement, a record shall be kept of the time and place at which any questioning or statement began and ended and of the persons present."

Now, the evidence elicited by the Defence by way of cross-examination of the same enquiring officer namely Mr. Bhugalee, reflects the levity with which the

Accused's representative was informed by him that she had either a right to remain silent or a right to retain the services of Counsel which according to him was only part of the Judges' Rules meaning administrative directions only. It is clear that such undermining of her said two rights not forming part of the Judges' Rules above, led her to decline both of them and to make the following admission as per Doc. B:

"The enquiring officer is informing me and is putting a question to me, that the interlocking device on the transparent guard/safety cover can be bypassed and has been bypassed on the day of accident and my answer to this question is that I am not aware that the interlock device can be bypassed. After the accident, I had been made aware that there was a key which can be placed in the interlock device, whereby the machine operates normally with the transparent guard/safety cover opened. As remedial action, the company has decided to carry out proper maintenance on the machine to avoid further incident.".

I find it also relevant to reproduce below an extract from the Court sitting of 3.5.2023 at page 8:

*"**CROSS EXAMINATION:***

***BY ME MOOLLAN**:*

Q: Mr Bhugalee?

A: Yes Your Honour.

Q: First of all, allons commencer par le commencement. When you cautioned the representative of the accused company, I see from the statement that you have produced, Doc B, the caution states: "She is informed of her constitutional of being assisted by a legal adviser or to remain silent."?

A: Yes Your Honour.

Q: So do I understand from your caution that either she is assisted and she talks or she remains silent? Can she not. Let me put it in another way. Can someone who is giving a statement not be assisted by counsel and remain silent?

A: Yes Your Honour.

Q: You agree with me the caution is quite misleading?

A: I cannot say.

Q: My question is very simple, Mr Bhugalee?

A: Yes Your Honour.

(…)

Q: When we say that, you agree with me you are giving her the choice either to be assisted or to remain silent. You are not informing her that she can be assisted and remain silent?

A: This is what the judge's rule.

Q: No, the judge's rule…

COURT: *I cannot hear what he is saying.*

A: This is what I've written it from the judge's rule.

Q: The judge's rule, Mr Bhugalee, it's the constitutional right of an accused is to be assisted by counsel and or to remain silent. It's not or to remain silent?

A: I cannot say, Your Honour."

In the light of the sequence of events and the circumstances in which the admission was extracted from the Accused's representative by the same enquiring officer, it is clear that such undermining of her Constitutional Rights, namely by equating her Fundamental Right to Counsel and her Constitutional Right to remain silent, to a mere administrative guideline and furthermore to take the liberty to impress upon her that, the said two Rights are mutually exclusive is totally misconceived and is tantamount to a breach of her said Constitutional Rights, as it cannot be inferred that such an admission on her part, can be relied upon, inasmuch as such misapprehension under which she was labouring, led her to decline both of her said Rights as enshrined in the sacrosanct provisions of our Constitution.

Such a course adopted by the enquiring officer shows that the statement recorded from the Accused's representative in that manner, to all intents and

purposes cannot he held to be a statement obtained with all the safeguards necessary for the protection of her rights. Hence, such an out of Court statement given by the Accused, although it could be construed as an admission, its unreliability cannot be disregarded. Needless to add that the Accused's representative having been misled in that manner as regards the true purport of her said two Constitutional Rights, is tantamount to a substantial breach. I find it apt to refer to an extract from the case of **State v Coowar Mamode Aniff** [1998 SCJ 64] where the Supreme Court had this to say:

"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.

(…)

*Now, in **Samserally v. The State** [1993 MR 94], the test applied in relation to the admissibility of a statement of an accused party, was "whether it had been made voluntarily in the sense that it had not been obtained by fear of prejudice or hope of advantage, exercised or held out by a person in authority, or by oppression. "*

The Court considered that the Judges' Rules were meant to be guidelines for the enquiring officers to prevent any abuse of authority at the enquiry stage and that they were not meant to act as fetters to the smooth running of the administration of justice. Any breach of those Rules does not automatically render the statement given voluntarily inadmissible for the Court has a discretion to admit or refuse it.

*In **Kuruma v. Q.** **[1955] AC 197** and **R v. Sang** **[1979] 2 WLR 439** the test which was applied to consider whether evidence was admissible was its relevancy to the matter in issue and that the court was not concerned with how it was obtained.*

*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."

I find it apposite to quote an extract from the case of **R v Boyjoo and anor [1991 MR 284]** where the Supreme Court stressed the following:

"This principle of presumption of innocence (section 10(2)(a) of our Constitution) by itself justifies the rule against self incrimination embodied in section 10(7) of the Constitution and which provides that: "No person who is tried for a criminal offence shall be compelled to give evidence at the trial."

(…)

This Constitutional principle against self-incrimination is not limited to cases where the accused is charged before a Court of law. At the stage of the police enquiry, when he has been charged and before he is questioned, the accused must be told of his right of silence, leaving it to him to make the choice whether he wishes to waive the privilege or not.

(…)

The rule against self-incrimination would be ineffective if this fact is not brought home to the accused. And bringing that fact to the accused enables him to make a choice about making a statement or not. This would be highly relevant for the purposes of the voluntariness test. (…) Confessions therefore must reflect the standard of fairness laid down in the Constitution."

I find it also useful to quote the following 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 highlighted the following:

"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. […] "judges and juries tend to disbelieve claims of innocence in the face of a confession, and are usually unwilling to accept that someone who has confessed did not actually commit the crime." In the light of that entirely natural and to-be-expected reaction, careful attention should be paid after the confession has been made to reasons given that it was in fact untrue. 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, in the light of the above major shortcomings laid at the door of the Prosecution, I take the view that the said admission of the Accused's representative as per her out of Court statement (Doc. B) resulting from a substantial breach cannot be construed as being reliable inasmuch as it was not made *avec connaissance de cause* and therefore, it is deemed to be involuntary so that no weight can be attributed to it by the Court.

For all the reasons given above, I am unable to find that the case for the Prosecution has been proved beyond reasonable doubt. I, accordingly, dismiss the information against the Accused.

S.D. Bonomally (Mrs.)
(Vice President)
27.6.24