OSHI v Domur H.

2025 IND 42

Cause Number 321/21

In the Industrial Court of Mauritius
(Criminal side)

In the matter of:

OSHI

v.

Hemrajsing Domur

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 – Act No.28 of 2005 with unlawfully:

1. failing on or about the thirtieth day of August 2019 to ensure so far as is reasonably practicable, the safety and health of one of its employees at work namely one Lazia Ronaldino Andy Franky who sustained amputation of his distal Phalanx index and his ring finger and a fracture of his middle phalanx middle finger when his right hand got caught in the in-running nip created between the chain and sprocket drive of the worm gearbox of the lorry make Mitsubishi bearing registration number 3775 AG 99 at his place of work situated at Banane.

2. failing on or about the thirtieth day of August 2019 to forthwith notify the Director, Occupational Safety and Health by the quickest practicable means of an accident arising out of work and resulting in an injury specified in the Eleventh Schedule to the Occupational Safety and Health Act 2005 – Act No 28 of 2005 to wit: one Lazia Ronaldino Andy Franky sustained amputation of his distal Phalanx index and his ring finger and fracture of his middle phalanx middle finger when his right hand got caught in the in-running nip created between the chain and sprocket drive of the worm gearbox of the lorry make Mitsubishi bearing registration number 3775 AG 99 at his place of work situated at Banane.

3. failing on or about the sixth of September 2019 within 7 days to send a report of an accident 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 to wit: one Lazia Ronaldino Andy Franky sustained amputation of his distal Phalanx index and his ring finger and fracture of his middle phalanx middle finger when his right hand got caught in the in-running nip created between the chain and sprocket drive of the worm gearbox of the lorry make Mitsubishi bearing registration number 3775 AG 99 at his place of work situated at Banane.

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

The case for the Prosecution rested on the evidence led by Mr. L. Bhuruth in his capacity as Principal Occupational Safety and Health Officer and Mr. V. Ramrecha in his capacity as Mechanical Engineer while no evidence was adduced by the Defence.

Mr. L. Bhuruth in his capacity as Principal Occupational Safety and Health Officer gave evidence in Court. He enquired into an accident at work which occurred on 30.8.2019 at a sugarcane field situated at Banane where Mr. Lazia Ronaldino Andy Franky sustained crushed injuries at his right hand with amputation of his distal phalanx and ring finger as per Doc. MC.

He went to the locus of the accident and he took a first set of 6 photographs on 30.10.2019 and another set of 3 photographs on 16.7.2020 as per Docs. A1 to A6 and B1 to B3 respectively.

During his enquiry, he recorded a statement from the Accused under warning on 16.10.2020 as per Doc. C. After his enquiry, he drew a report which he produced as per Doc. D. When he went to the locus of the accident, he met the Accused who was the employer of the injured person and the driver of the lorry involved in the accident.

His observations were as follows: -

1. The lorry bearing registration number 3775 AG 99 was used for transportation of cut sugarcane.
2. A lorry box was provided on the bed of the lorry where there was a winch to mount and dismount the lorry box from the bed of the lorry.
3. The winch was driven by the motor engine of the lorry by means of a worm gearbox make 'Crofts'.
4. There were 2 sprocket drives provided in all namely a big one and a small one. There was a chain which rotated around the 2 sprocket drives.
5. Access to the in running nips created between the chain and the sprocket drives of the worm gearbox was not restricted.
6. In the cabin of the lorry, there was a large window through which one could have a look at the back of the lorry. There was also a gear shifter which when activated made a sprocket drive to rotate.

His enquiry revealed: -

(a) The in running nips created between the chain and the sprocket drives of the worm gearbox were not securely fenced.
(b) On the day of the accident, the chain got displaced from the sprocket drive and the Accused instructed Mr. Lazia to place back the chain onto the sprocket drive.
(c) In order for the sprocket drives to rotate, the engine of the lorry must be on and the gear shifter in the cabin of the lorry must be activated.
(d) In order to prevent the accident from happening, the in running nips created between the chain and the sprocket drives should have been securely fenced to prevent access to the in running nips which were the dangerous part.

The Ministry of Labour became aware of the accident when the injured person called at the Ministry on 25.9.2019 in the company of his mother, Jennifer Jeanneton, to report his accident. The said accident was not notified to the Ministry by the accused employer.

Given that the injury sustained by the injured person is listed under the Eleventh Schedule of the Occupational Safety and Health Act – Act No.28 of 2005, the accused employer should have forthwith notified the Director of Occupational Safety and Health of the accident by the quickest practicable means, that is, either by phone or by calling in person at the office or by email or by fax and also should have within 7 days sent a report of the accident set out in the Thirteenth Schedule of the Act 2005 to the said Director of Occupational Safety and Health.

Under cross-examination, he admitted that the 6 photographs taken by him on 30.10.2019 (Docs. A1 to A6) were taken much after the accident. The bundle of photographs taken by him on the 16.7.2020 (Docs. B1 to B3) were mainly for the interior of the cabin. On the day of the accident, the lorry box was already dismantled halfway from the lorry bed and access to the chain and sprocket drives was not restricted. As per photograph Doc. A5, the lorry box was on the lorry bed. But on the day of the accident, it was already dismantled half way when suddenly the winch stopped to work. He admitted that whatever he has stated as regards the lorry, was based on the version of the complainant namely the injured person. He further admitted that the conclusion he gave in his report (Doc. D) as to how the accident happened was based on the story given to him by the injured person viz. Mr. Lazia. He again admitted that the conclusion of his findings, that is, his investigation report rested principally and solely on the version of the injured person who had never been present in Court.

Mr. V. Ramrecha in his capacity as Mechanical Engineer gave evidence in Court as an expert witness. He inquired into the said accident at Accused's place of work which occurred on 30.8.2019 following which he drew a report as per Doc. F.

When he called on the locus of the accident, his observations were as follows:

1. In the truck there was a chain and sprocket mechanism which was present. The truck had an engine and the engine drove the truck. There was a power take off which transferred the engine power to a gearbox which drove a pulley which pulled a cane cradle. There was a cradle which stored sugarcane. It

pulled the cradle. So, the mechanism from the engine shaft to that gearbox which drove that cradle was connected to a chain and sprocket mechanism. There was a chain and a sprocket so that when the chain turned, then it pulled the cradle.

2. His observation when he examined the truck was that the chain and sprocket mechanism was not securely fenced as there was no guard covering it which could have prevented someone from getting into contact with the moving mechanism.
3. His enquiry revealed that the chain and sprocket mechanism was not securely fenced and that was the cause of the injury.
4. In order to prevent the accident, that chain and sprocket mechanism should have been securely fenced. There should have been a metal guard covering it so that no one got access to it when it was in motion.

Under cross-examination, he admitted that his investigation was carried out practically 9 months after the accident took place and that he did not have the opportunity to see the lorry registration 3775 AG 99 make Mitsubishi on the day of the accident. He further admitted that the vehicle could have been in a different condition then but stated that the mechanism would have been the same. He was only concerned with the technical side of the truck and he was not the investigating officer. He did not know how the accident happened, he was just looking at the equipment and what was to be fenced was inside the vehicle what we call the dangerous part. He admitted that to know exactly what happened, the circumstances of the accident were important but they were not to his knowledge.

The Defence did not adduce any evidence in Court. The Accused did not admit any charge in his out of Court statement given to the enquiring officer as per Doc. C.

I have given due consideration to all the evidence put forward before me and the submissions of learned Counsel for the Defence. At this stage, I find it apt to deal with counts 2 and 3 first.

As regards count 2, the medical report produced by the Prosecutor namely Doc. MC does not show that the injured person was admitted into hospital for more than 24 hours. Nor has it been established in Court that the amputation of the distal phalanx and ring finger meant that the distal phalanx and ring finger were completely

severed from the bone. The contents of the Medical Report Doc. MC are reproduced below:

"Medical Report (…)

Mr. Lazia has sustained crush injury Rt hand on 30.08.19. Patient was admitted in Nehru hospital. Patient came to this clinic for treatment from Nehru hospital. He had sustained

1. *Traumatic Amputation of distal phalynx index and Ring finger.*
2. *Fracture middle phalynx middle finger. [compound]*
   Patient underwent debridement and K- wire fixation of the Fracture of middle finger – same day. Presently patient is being followed in OPD For dressings. Patient has 10% incapacity."

Now, the relevant 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

2. *Fracture of any bone-*
   (a) in the arm or wrist, but not a bone in the hand; or
   (…)
3. *Amputation of –*
   (b) 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."*

Further, the maker of the report namely the treating Doctor, Dr. Saleem Akbar, did not give evidence in Court in relation to the contents thereof and more importantly such medical report does not fall within the exceptions to the rule against hearsay pursuant to **Section 181(1)** of the **Courts Act**.

Therefore, the Prosecution has failed to prove that Mr. Lazia Ronaldino Andy Franky has sustained any injury at all, as the Prosecution has relied on hearsay evidence for which the Court cannot give any weight. Thus, count 2 fails.

Likewise, Prosecution has relied on hearsay evidence to establish that 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 cannot stand. This is because the enquiring officer relied solely on the version of the injured person namely Mr. Lazia who did not depone in Court as regards the state of the lorry concerned at the time of the accident and the circumstances of the accident. Moreover, his investigation report was based solely and principally on the version of Mr. Lazia and on the photographs taken by him at least about 2 months after the accident occurred and the medical report (Doc. MC). Therefore, the Prosecution has relied on hearsay evidence to establish that there was an accident at work which again cannot be relied upon as such evidence is *stricto sensu* inadmissible in Court and for which no weight can be attributed to by the Court which reinforces the unsworn version of the Accused that the chain and sprocket mechanism was not free and accessible on 30.8.2019 which is the material day and has not admitted liability in relation to all three counts.

Now the findings of both the enquiring officer and that of the Mechanical engineer are to the effect that, given that the dangerous part of the inside of the vehicle became accessible, the accident could have been avoided by providing a protective guard placed on the chain and sprocket mechanism as it would have prevented the accident from occurring.

The investigation started about 9 months after the accident and the enquiry revealed that the accident happened when that employee was putting back the chain onto the sprocket drive as it came out and for such an exercise a guard cannot be put on the chain and sprocket mechanism which necessarily would not be in motion then and as rightly pointed out by the expert that the circumstances of the accident were important.

Further, there has been no evidence emanating from the enquiring officer that had a risk assessment been done for that specific activity of putting the chain back onto the sprocket drives, the accident would not have occurred. Nor, did he say that the accident would not have happened had training been given to the workers for the required activity of putting the chain back onto the sprocket drives once it came out and which was a dangerous activity. Given that the circumstances of the accident were based solely on the version of the injured person who had never been present

in Court and nor did he give evidence in Court and the more so as the Accused did not depose under oath, there is no evidence proximate enough with the accident to support what the enquiry had revealed.

Therefore, there is no conclusive evidence that there was an accident at work in the first place leading to injuries warranting the sending of a report within 7 days of an accident to the Director of Occupational Safety and Health, as the Court cannot give weight to hearsay evidence. Therefore, count 3 fails.

This state of affairs lends support to the unsworn version of the Accused that an electrical Mechanic was being called by him and that he had asked Mr. Lazia who was a helper not to do anything.

Therefore, again, there is no conclusive evidence that Mr. Lazia sustained such unfortunate injuries due to an unsafe system of work put into place by the Accused or whether he was injured at all in the course of duty at Accused's place of work or whether there was any accident at all. Thus, the Prosecution having failed to establish its case beyond reasonable doubt as rightly pointed out by learned Counsel for the Defence by relying on hearsay evidence for which no weight can be attributed to in relation to count 1, there is no justification for any burden to be laid at the door of the Accused in the circumstances. Hence, count 1 fails.

In the light of the reasons given above, all the three counts having failed, I, accordingly, dismiss the information against the Accused in relation to all three counts.

S.D. Bonomally (Mrs.) *(Vice President)*
4.6.25