OSHI v Deep River Beau Champ Milling Co. Ltd

2022 IND 58

Cause Number 12/18

In the Industrial Court of Mauritius
(Criminal side)

In the matter of:

OSHI

v.

Deep River Beau Champ Milling Co. 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 2005 – Act No.28 of 2005 coupled with Section 44(2) of the Interpretation and General Clauses Act with unlawfully failing on or about 20 June 2013 to ensure so far as is reasonably practicable, the safety and health at work of its employees namely one Pydiah Gurriah as a result of which he sustained second degree burns over face and scalp when his face got stuck into the aperture of a sight glass on a continuous vacuum pan at its place of work at Deep River-Beau Champ Milling Co. Ltd.

The particulars of the charge are: *"failing to securely fence the sight glasses on its continuous vacuum pan and through which Pan boilers were required to look to observe the process."*

The Accused represented by Mr. Arvind Sooknauth in his capacity as Safety and Health Officer pleaded not guilty to the charge and was assisted by Counsel.

The case for the Prosecution unfolded as follows.

Mr. M.R.F. Joomun in his capacity as Acting Divisional Occupational Health and Safety Officer being a holder of a degree in Electro Mechanical Engineering and a Diploma in Occupational Safety and Health gave evidence in Court.

He enquired into an accident at work which occurred on 20 June 2013 at Deep River Beau Champ Milling Co. Ltd, Grand River South East where one of its employees namely one Pydiah Gurriah sustained burn injury at his face as per a medical certificate viz. Doc. B.

He went on the locus of the accident on 22.6.13. He took 5 photographs on that day, 1 photograph on 4.7.2013 and 2 more on 18.9.2013 with explanatory notes respectively as per Docs. C1 to C5, Docs. D and D1 and Docs. E, E1 and E2. He recorded a statement from the representative of the Accused, Mr. Jean Marc Patrick Richard Coombes, Factory Manager, who was duly authorized to represent the company, on 19.8.2014 under warning as per Doc. F.

He observed that there was a continuous vacuum pan namely a huge cylindrical vessel which was the machine that was involved in the present accident. On the vessel, there was a lower working platform and another higher working one as there was a staircase leading to that higher one on a second level where the sight glass on which the accident happened was found.

Doc. C1 showed a circular sight glass which was found on one side of the continuous vacuum pan. The sight glass was the same as the one shown in Doc. D1 which was the sight glass on which the accident happened.

The sight glass consisted of a circular glass disk which was held in place by a circular metal seat and bolted in place with bolts and nuts. There was also a retaining ring welded to the internal wall of the sight glass and was used to support the glass disc as per Doc. C3. The sight glass was used by the pan boiler operators to check the state of the thickening of the hot sugarcane syrup that was passed into the machine during the process of the manufacture of sugar.

The glass disc was free as there was no barrier or guarding onto the sight glass which was also the case for the one involved in the accident.

His enquiry revealed the following:

(a) The vessel or the huge vacuum pan was used for the process during the manufacture of sugar and it was controlled by a pan boiler operator. Pan boiler operators had to check the state of the hot syrup inside by looking through the sight glasses several times during the day. That cylindrical vessel was used under vacuum usually to catalyze that process of the production of sugar as the outside pressure was higher than the pressure inside the vessel such that there was continuously a force being exerted on the walls of that vessel trying to compress it.

(b) On the day of the accident the injured person was looking into the sight glass of the machine meaning the continuous vacuum pan. At a certain moment, the glass disk of the sight glass collapsed and was sucked into the machine due to the difference in pressure and the fact that it was vacuum inside the machine, the person's face got stuck onto the aperture of the machine and got sealed off. He was stuck in that position for about 5 minutes or more according to his enquiry.

(c) The air temperature inside the vessel was about 60 degrees centigrade which was the normal operating temperature at which the equipment, that is, the machine worked and he was eventually freed from the vessel about 5 minutes after and he sustained burn injuries to his hands, face, eyes and upper part of his body.

(d) Doc. C4 showed the same equipment meaning the continuous vacuum pan on the higher working platform where a similar sight glass of the same size as the one involved in the accident, was held in place with bolts and nuts but with a cross like metal barrier fitted onto the glass disc. Doc. C5 was a closer view of the sight glass shown in Doc. C4.

(e) That metal barrier could act as a distance guard to prevent any part of the body of a person from getting sealed off with the opening of the sight glass in case of the glass disc collapsing like in the present accident situation.

However, as regards the sight glass involved in the accident, there was no such barrier.

(f) After the accident, remedial action was taken in the sense that metal barriers had been fitted to all sight glasses of the equipment and on similar equipment.

(g) Doc. E1 showed the opening of the sight glass that was involved in the accident. Modification had been done to that sight glass which was now rectangular in shape and that a metal barrier having been fitted onto that sight glass would act as a distance guard to prevent any part of the body of a person coming into contact with the opening in case of failure of the glass disc. That was done after the accident. Doc. E2 showed the other sight glasses onto the same equipment and which had been provided with metal barriers as well for the same purpose.

In cross-examination, he stated that he inspected the piece of machinery involved in the accident.

1. He did not inquire as to the brand of that particular machine or the manufacturer's specifications. Thus, he would not know whether or not the machine as inspected by him was exactly as the machine was delivered by the manufacturer. He was aware from the statement recorded from the Accused that the machine was purchased from Reunion Island. But he would not know that subsequently the machine was installed within the factory as per the manufacturer's specifications as per the photographs namely Docs. C1 to C5, Docs. D and D1 as he did not enquire into that aspect. He did not have information whether as per the photographs taken after the accident by him, the machine presented by those photos were as delivered by the manufacturer.

2. He did not measure the level of the sight glass which imploded from the floor level from which the pan boiler operator would be standing namely Mr. Pydiah Gurriah sustaining injury, but he estimated that it would have been more than 2 metres. There was also some sort of step bench that was used by the pan boiler operators to step up to be able to look into the sight glass which was 2.4 metres high.

3. He did not agree that the question as to whether or not the machine should have been fitted with those barriers should have been taken up by the manufacturer. He said that it was because it involved workers looking into the sight glass or working in the close vicinity of the sight glass, would imply that given the fact that there was a risk of failure of the glass disc and implosion and the exposure of the hot temperatures and the suction pressure around the machine, would require that the machine be provided with barriers. He meant that he would believe that if the Accused was delivered an original piece of machinery from a manufacturer, a supplier, an expert in the domain, nevertheless, the Accused had to go beyond the expertise of a particular manufacturer to go and find further ways to potentially safeguard a machine which was found in its original form to safeguard workers from the machine. According to him, he expected the Accused to go over and beyond verifications and the safety measures which were put in place by the expert who was the manufacturer of a particular piece of machinery in order to protect the employees. The occupational safety and health inspectorate was responsible for carrying out routine visits at the factory to ensure compliance of the law. He, despite his area of expertise, or the other members of the inspectorate team who did carry out several visits at the Accused before and he never or any member of that team deemed it fit to make any recommendation or any such thing of the sort to that particular sight glass as it was the responsibility of the employer to ensure the safety of the employees. He agreed that as a representative of the inspectorate he was an expert in the occupational safety just like the other representatives of that inspectorate. He carried out inspections on that particular piece of machinery and he never deemed it fit as an inspectorate to make any recommendation as to that particular sight glass. He added that the factory also employed a safety and health officer who was also an expert in occupational safety and health and the employer was an expert of the sugar processing business. Then together with the safety officer and the employer, they were constantly 24/7 at the workplace whereas their inspectors were there once in a year or may be twice in a year that went around for an inspection at the workplace as compared to the employer and the safety health officer who were permanently there and aware of the full process and should have taken necessary measures to prevent such accidents. He meant although there could be understaffing, the responsibility was on the employer and not on the inspectorate.

4. He was not aware that risks assessment reports as regards that particular piece of machinery were submitted to his Ministry as his contribution was only on the circumstances of the accident and he was not aware of the main file. As per the risk assessment report which he submitted to the Ministry, the particular sight glass which imploded was marked as being low/medium risk but he was not aware that the inspectorate never deemed it fit to challenge that aspect or review that aspect of the risk assessment report.

5. In the course of his enquiry, he was not made aware of similar occurrences within the Mauritian Sugar Industry. It was a first occurrence within the Mauritian Sugar Industry and it had not occurred since then. As regards that particular piece of machinery, he was aware that it was regularly serviced and maintained. He added that it looked like the Accused could not be taxed with not having properly maintained and ensured the upkeep of that piece of machine. But then, he stated that the seat meaning the circular ring onto which the glass disc rested was badly corroded and was found to be quite thin and which should not have been the case, as there was quite an amount of pressure being exerted and the disc should have been thicker. He was shown the ring and the glass disc during his enquiry. The mere fact that the glass disc collapsed showed that there was a fault on the part of the employer. It was often easier to find out after the event. The Accused took corrective measures following the event and the machine was improved in health and safety terms from what it was upon being delivered by the manufacturer.

Mr. Louis Harold Marianne gave evidence in Court. He stated that on 20.6.2013 he was working at the factory of Accused as “Bruleur” meaning doing the manufacture of granulated sugar from the concentrated syrup. On that day meaning on the day of the accident, at about 4.50 hours, he was in the control room and went upstairs in order to prepare himself for someone else to take over when he saw Mr. Gurriah’s body hanging out. Then, he held him and shouted for his colleagues who were in the control room who heard him and helped him to hold Mr. Gurriah and to stop the engine quickly. Given that when the engine was switched off, there was no vacuum created by the water vapour meaning there was zero vacuum, the victim fell on their hands. When he was shown Doc. C comprising of Docs. C1 to C5, he said that the sight glass imploded while Mr. Gurriah was looking at it and he was sucked

in by the vacuum. He could not say when those barriers were put to a sight glass as per Doc. E1.

In cross-examination, he stated that he did work on that machine. Since its installation, the machine was in the factory. He meant that as from the moment the machine was bought by Accused, the machine had there been installed in the factory until the moment when Mr. Gurriah met with that incident. The machine had remained there as installed on the spot from its origin. The sight glass was like that from its origin. The place where Mr. Gurriah got sucked in, he was found at a height of about 2.4-2.5 metres. Someone walking on that platform could not see through the sight glass directly, he had to go on a step like gadget to reach there to see through the sight glass to know what was happening in the machine. During intercrop season each year, the maintenance work on that machine was being done including repairs. In June, Mr. Gurriah was injured when the maintenance work was just completed.

Mr. Joseph Raoul Lindsay Luquet gave evidence in Court. On 20.6.2013 he was on a lower level performing his work at the factory of Accused. At about 5.00 p.m., he heard an abnormal noise from a machine and he went there and saw Mr. Gurriah who was injured at his head that went inside the machine and that was why his other colleague, Harold was holding him. It was where the thick syrup was found and which could be seen through a sight glass which imploded and his head went inside. After the accident, a protective barrier was added to the sight glass.

In cross-examination, he stated that at the time of the accident, he was Chief pan boiler operator. The maintenance during intercrop season was done as per the instructions given by his Superior. He was instructed and he did the maintenance on that machine. The sight glasses were cleaned individually and manually and it was ascertained whether they contained a slit for example. If ever that was the case, they would have been changed and at the same time the machine would not have worked as it would not have been able to pick up air because of the leak. The bolts on sight glasses were checked as well. It was normally checked whether they were well screwed to the machine and that the discs were not rusty both internally and externally of the machine. When he did the maintenance work, he did not notice anything abnormal with the sight glass. After reparation, verification work was done as part of the maintenance work. The machine was like it was since it was delivered to the factory but the maintenance work and the cleaning were done by them. The structure did not change and it was after the accident that a metallic structure was

added to protect the sight glass. When the accident happened, he had already worked for Accused for 32 years and there had never been such an incident before.

Accused did not adduce any evidence in Court and has denied the charge in its unsworn statement given to the police as per Doc. F.

I have given due consideration to all the evidence put forward before me and the submissions of learned Counsel. At no time as per the unsworn version of the Accused, it was mentioned that the accident was caused by the fact that the metal structures supporting the sight glass which imploded were corroded as opposed to the testimony of the enquiring officer bearing in mind that none of the photographs taken by that officer showed or pinpointed to any level of corrosion of the metal structures supporting the sight glass involved in the accident both internally and externally and their thickness or of similar sight glasses found on that continuous vacuum pan let alone that all the photographs were taken by him in black and white and not in colour. In the same breath, the unrebutted testimonies of the 2 employees of the accused company boil down to the fact that the sight glass involved in the accident and the rest of the machine was maintained yearly in the sense that it was repaired if need be and verified. The inner and outer metal structures supporting the glass disc of the sight glass involved in the accident were checked and there was nothing abnormal noted at the level of the glass disc or its metal support both internally and externally and that the accident happened in June just after maintenance work of the machine was done. Now, the injured person did not testify in Court and none of the Prosecution witnesses saw how the accident happened but only saw the victim when his head was already stuck in the aperture of the sight glass after it imploded. It has remained unchallenged that for a pan boiler operator to see through the sight glass involved in the accident, he could not do so from ground level but he had to go on a step like gadget. It has also remained unrebutted that the machine involved in the accident namely the huge continuous cylindrical vacuum pan contained sight glasses in order to enable the checking of the thickness of the sugarcane syrup before reaching the stage of granulated sugar was as it was installed when bought from its manufacturer and there were no modifications whatsoever in its structure since its installation save and except repairs if need be as part of the maintenance work during intercrop season. Now, the enquiring officer was not aware of the risk assessment reports of that machine being sent to his Ministry and he did not enquire as to whether, the machine was installed the way it was bought after it was commissioned by its brand manufacturer at Reunion Island.

He was not aware that as per the manufacturer, there was no need for a barrier to be present on the sight glasses on the continuous vacuum pan which was a huge cylindrical vessel or equipment or machine. It is abundantly clear that neither the Health and Safety Inspectorate of the Ministry who carried out inspections yearly nor the health and safety experts employed on a 24/7 basis by the Accused as candidly admitted by the main enquiring officer, expressed the necessity as a measure of safety to put a barrier or a guard on all the sight glasses found on that continuous vacuum pan because of a possibility of implosion of the glass discs bearing in mind the presence of the suction pressure around the machine meaning higher pressure outside that continuous vacuum pan than inside it meant for the compression of the thick syrup into granulated sugar and the addition of more load on its surface in terms of barriers on the sight glasses should be relative to the thickness of that piece of machine. In the same vein, the enquiring officer who was tantamount to an expert in electro mechanical engineering by virtue of his degree in that field, did not produce in Court any conclusion or opinion in terms of a report as to the cause of the accident after having been to the locus 2 days after its occurrence. Indeed, there has never ever been such a case of an implosion of a sight glass of that machine and as a result of which an employee's head got stuck in that aperture and sustained burn injuries as a result in the whole sugar Industry in Mauritius.

Thus, we are here in a situation in view of the tenor of the evidence where neither the Health and Safety Inspectorate's experts like in the case of the enquiring officer by way of opinion evidence as per the absence of their reports being produced in Court, nor the experts of the manufacturer of the machine and nor those of the employer viz. the Accused saw the necessity to put barriers on the sight glasses which were regularly maintained and found on the continuous vacuum pan to prevent the present accident from being caused by a possible implosion of their glass discs or one of them.

Hence, it cannot be construed that it was easier for the accused company or it was within its specific field of knowledge to prove those particular facts namely the reasonable practicability to have ensured that barriers be placed on the sight glasses of the continuous vacuum pan to prevent the kind of accident from happening as in the present case.

Indeed, *"so far as is reasonably practicable"* is a constitutive component of the offence as expressly set out in the information in order to create a complete criminal

offence known to law and also to make known to the Accused from the start 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 (see- **Heera v. R** [1969 MR 80], **Beekhan v. R** [1970 MR 3], **Sahadeo v. R** [1976 MR 264] and **Teeluck v. R** [1990 SCJ 34]). Thus, it is incumbent on the Prosecution, not only to aver *"the failure to ensure the safety and health at work of Accused's employees"* as what is prohibited and would constitute a criminal offence would be when it meets the criterion as being *"so far as is reasonably practicable"*. It has been averred in the information meaning *"so far as is reasonably practicable"* as it is a constitutive component of the offence which had to be set out in the information in order to create a complete criminal offence known to law. The failure to aver and prove this essential element of the offence is fatal to the case.

At this stage, I find it useful to quote an extract from the Supreme Court case of **Renghen P v The State [2022 SCJ 291]** which reads as follows:

"Now, it is trite law that 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 enactment creating such offence, with the material circumstances of the offence charged shall be sufficient". There is a string of cases which support this proposition amongst which we can cite the cases of ***Beekhan v The Queen [1976 MR 3]****,* ***Heera v The Queen [1969 MR 80]*** *and* ***Teeluck v R [1990 MR 293]****."*

I find it appropriate at this stage to quote an extract from the Supreme Court case of **Municipality of Beau Bassin – Rose Hill v S.B.Khodabaccus [2002 SCJ 77]** as follows:

"*In* ***Beekhan v The Queen****(supra), the information charged the appellant for "having unlawfully fished more than ten fishes by means of an underwater spear gun in one day". Under the definition section, fish included turtles, lobsters, crab and octopus, cuttlefish, rays, sharks and marine shells. The Fisheries Act made it an offence for any person "to fish in any one day by means of an underwater spear gun more than ten fishes other than lobster, crayfish, crab or octopus." It was held that as the species of fish found in the possession of the appellant was not one of those facts which were specifically within the knowledge of the appellant but as it was also within the knowledge of the prosecution, it was incumbent on the prosecution to*

*prove that none of the fishes were lobster, crayfish, crab or octopus. It was consequently the duty of the prosecution to aver in the information that the fishes were not lobster, crayfish, crab or octopus. It was held that in failing to aver those facts, the information therefore did not disclose an offence." (**emphasis added**)*

As clearly illustrated in **Beekhan**(supra) - *"one may note that s. 125(2) itself underlines the natural connection between what must be proved in evidence and what must be averred in the information: in general, what must be averred must be proved, and, reciprocally, what must be proved should be averred (…).*

*If one goes back to first principles, one expects the Prosecution to prove everything which constitutes guilt, unless there are valid reasons for dispensing them from such proof and for casting the burden of proof on the defence."(**emphasis added)***

In the present case, the Prosecution was in as good a position as the Accused to know whether the Accused has failed to ensure "*so far as is reasonably practicable"* the safety and health of its employees as per the particulars provided namely by failing to *securely fence the sight glasses on its continuous vacuum pan and through which Pan boilers meaning the Pan boiler Operators were required to look to observe the process of the production of solid sugar.* That negative averment in the present case did not constitute of particular facts that were specifically within the knowledge of the Accused or easier to be proved by the Accused than by the Prosecution as regards the element of the offence namely "*so far as is reasonably practicable"* as described in the information so that the onus of proving that the Accused had failed "*so far as is reasonably practicable"* to ensure the health and safety of its employees as described in its particulars lies on the Prosecution (see- **Beekhan**(supra)) which the Prosecution has lamentably failed to discharge. Had that negative averment constituted of particular facts being specifically within the knowledge of the Accused or easier to be proved by the Accused than by the Prosecution as per the tenor of the evidence namely "*so far as is reasonably practicable"* as described in the information, like in cases akin to those belonging to the category of offences of non-holder of licences (see- **The King v Carr-Briant [1943] KB 607** cited in **Toofany v R [1957 MR 186],196**) , then the onus of proving that it was not reasonably practicable to comply with the obligations laid under the Act, would have lied on the Accused although the burden could have been discharged on a balance of probabilities – vide **Halsbury's Laws of England, 4th Edition, Reissue Vol 20(1) para** 624.(see-

Talbot Fishing Co Ltd. v Ministry of Labour & Industrial Relations (Occupational Safety and Health Inspectorate) [2006 SCJ 76]).

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)*
13.12.22