OSHI v Princes Tuna Mauritius Ltd

2023 IND 49

Cause Number 222/17

In the Industrial Court of Mauritius
(Criminal side)

In the matter of:

OSHI

v.

Princes Tuna Mauritius 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 29th day of March 2016 to ensure so far as is reasonably practicable the safety, health and welfare at work of its employee to wit: one Marie Parmella Olivier sustained fracture of coccyx when she was hit by a trolley which was being moved in a passageway where she was walking during her work, at Quay D, Port-Louis.

The Accused represented by Mrs. Priya Chingen in her capacity as Head of Human Resources pleaded not guilty to the amended information and was assisted by Counsel at its trial.

The case for the Prosecution unfolded as follows:

Ms. N. B. Bakady, a degree holder having about 9 years' experience in Occupational Health and Safety, enquired and investigated into an accident at work which occurred on 29.3.2016 at the factory of Princes Tuna Mauritius Ltd at Quay D, Port Louis where Mrs. Marie Parmella Olivier, an employee, sustained a fracture of her coccyx at her said workplace as per a medical certificate produced viz. Doc. A.

Thus, she went to the locus of the said factory on 22.4.2016 and took 2 photographs as per Docs. B1 & B2 respectively. She took another photograph on 14.6.2016 as per Doc. C showing the designated location where the trolley was then kept after the accident when used by Grading Line 3 workers and it could be seen to be no longer in fish cleaners working area nor in the passageway. She recorded a statement from the representative of Accused, Mrs. Priya Chingen, under warning on 4.4.2017 as per Doc. D wherein she denied the charge. She drew up a report on 5.5.2017 as per Doc. E.

Her observations were as follows –

The accident had occurred in the passageway on the production floor of the accused company between Fish Cleaning Lines 2 and 3 found opposite each other and which were work tables in front of which fish cleaners stood to perform fish cleaning works.

The space between those two Cleaning Lines was about 2.5 m as per Doc. B1. That space was used by the fish cleaners to stand to clean fish on the work tables so that it was a workspace. It was also used as a passageway by Line Inspectors to supervise the fish cleaners and to issue productivity cards to them, by Supervisors and Foremen.

Doc. B2 was a photograph of a similar trolley as to the one involved in the accident and which was made of metal and fitted with wheels for mobility. It was 1.03 m long, 61 cm wide and 1.8 m high. When it was placed between the two Lines, it reduced considerably the workspace for the employees to circulate in that passageway which represented a serious danger to the fish cleaners at their work tables and to the other employees concerned as well as to any person who was using that passageway. According to her, as an expert, the accident was very predictable.

Her enquiry revealed that:

On 29.3.2016, the trolley concerned was placed between Cleaning Lines 2 and 3 adjacent to Grading Line 3 where its workers were using the said trolley.

Mrs. Shelani Ratno who was working on Fish Cleaning Line 3 was having difficulty to work with the trolley at her back as it was hindering her movement. She requested Mr. Christopher Perrine who was a worker on Grading Line 3 to move that trolley slightly. When he did so, it hit the Line Inspector, Mrs. Olivier, who was walking in that space to issue productivity cards to the fish cleaners. She fell down heavily on her back and sustained a fracture injury to her coccyx.

After the accident, the Accused took several measures to prevent recurrence. The most effective one as per Doc. C was that a designated area was provided on the production floor to keep a trolley while it was being used by employees of Grading Line 3 so that there would no longer be any obstruction in the passageway and where the trolley was subsequently placed, it represented no danger to any employee on that floor.

A free passageway was important at a workplace to prevent any risk of injury to any person using that passageway and another important reason was in the event of an emergency, an employee would be able to evacuate the building freely, rapidly and without any additional risk to his safety and health.

The employer should have sufficiently assessed the risk of placing a trolley in that space and should have taken appropriate measure to ensure that there was no obstruction to that passageway.

Under cross-examination, she stated the following:

As an expert, she accepted that she made mistakes, as in her report she did not put the date as per Doc. E.

Although she did pay attention to what the representative of the accused company said in her unsworn statement given to her as per Doc. D. wherein the defence of Management was that the accident occurred due to the negligence of a

worker, she did not include that fact and nor did she address the question of handling of trolley in her report as according to her it was just secondary.

The information with which the Accused stands charged is that Mrs. M.P. Olivier sustained a fracture of coccyx when she was hit by a trolley which was moved in the passageway where she was walking during her work but it was moved not because it had to be transferred to another section. The normal transfer process of trolley was done by two persons that the employer took into consideration. It was not a transferring of trolley process that was going on at the time of the accident but a worker, Mrs. Ratno, requested to another worker, Mr. Perrine, to slightly move the trolley because it was hindering her movement as it might be a potential cause of injury to her. That trolley was moved by Mr. Perrine to help her work freely and without any risk to her health and safety and it accidentally hit Mrs. Olivier causing her to sustain injury.

In the present case, the trolley being found in the passageway which was a working space causing it to be obstructed was the root cause of the accident. Who moved that trolley and how it was moved was secondary to the cause of the accident although she agreed that the trolley had to be pushed so that it was manhandled.

Even if the trolley had been handled and pushed by 2 persons, there could have been a wrong coordination or a rush of work where the accident could have occurred anyway. Had the trolley not been there in the first place, such type of situation would not have been created. Thus, she did not mention in her report that training was required to handle the trolley as the act of pushing the trolley was an additional cause of the accident and not the root cause and was secondary. Likewise, Mr. Perrine who was the person handling that trolley was not found in her report as it was not important although he confirmed that he received training in handling trolleys.

She did consider the risk assessment report which was an internal document carried out by the accused employer on what the associated risks were to the workplace which was an overall assessment made. The trolley had not been assessed particularly between those two Lines. It was not specific to that particular location of the accident because the dimension had to be taken into consideration. Thus, the risk assessment report of the Accused was not sufficient and suitable. Because the accident happened when the employees were working on a particular fish, Skipjack, and the process at that time was different from what was being done

normally with other fish. So, when working with that fish, the trolley was placed directly in the passageway between Lines 2 and 3. It was another circumstance in whole so that it was another danger and the risk assessment was overall and general in terms of trolley transfer. Because there were different kinds of process which were going on along the production floor related to different kinds of fish, the accident would not have occurred if the risks were properly assessed.

The injured person, Mrs. Marie Parmella Olivier gave evidence in Court. On 29.3.2016, she was working for the Accused at the material place as Line Inspector namely a kind of Supervisor in charge of ten employees. On that day, when she was on her way to collect cards to be placed in the trays of the fish cleaners after they completed their work for payment purposes while the employees were working already, she saw Christopher Perrine coming with a trolley. As the trolley was high, he did not notice that there were people so that although she moved to allow the said trolley to pass, it came directly onto her and hit her causing her to fall down. She asked him whether he did not see her and he replied that really, he did not see her and he was the one who handled that trolley. She was conveyed to hospital thereafter for treatment as she suffered a fracture of her coccyx. In fact, that trolley needed two persons to handle it as the person at the rear would not see what was in front of the trolley and vice versa and he kept pushing it forward and coming towards her. She had on several occasions said that trolleys should not be kept there because there were people working on both sides of that trolley. When the trolley was being brought in the middle, already it represented a danger but it was kept like that in the passageway since the operation of the factory. She continued to work after the accident. She was not aware whether there were other workers who were injured in the past with the trolley as she remained in one department. She was aware that trolleys had to be pushed for the processing and canning of fish in that passageway.

At the material time, there was only one person pushing the trolley. She was at her place of work in the vicinity of the middle of the passageway when she saw the trolley coming as she had to stand there behind the back of her ten workers. She squeezed herself towards the workers, but the trolley came directly onto her. She was where she was supposed to be at her place of work because the trolley had to pass behind her in the passageway and not directly onto her. She did not agree that the accident happened because of an act of negligence or by the negligence of the person pushing the trolley.

Mrs. M. C. Perine gave evidence in Court. At the time of the accident on 29.3.2016, she was working as Inspector supervising a group of workers in the section of Grading Line 3 where trolleys were used and kept at the Grading area. Because of lack of space, the trolley was kept in the middle but it was an obstruction as there were people working on both sides of the trolley within a small squeezed space. Each section had a foreman to control the movement of the trolleys. There should be two persons pushing the trolley. The accident happened in the passage way between Lines 2 and 3.

Mrs. Shelani Ratno gave evidence in Court. On 29.3.2016, her work at Line 3 namely the sieving of the fish, was being hampered as there was a trolley behind her so that she could get injured at her hand and elbow. She only asked a man to move the trolley a bit further and he moved it to the other side. Then, she did not see how the accident happened. She was never hit by a trolley before.

Mr. Christopher Perrine gave evidence in Court. He was working as helper on 29.3.2016 for Defendant. His job was concerned with trolleys namely pushing them and getting them filled up upon instructions received from either the Foreman or the Inspector. On that day, he received instructions from the inspector namely Mrs. Perrine to bring a trolley in the passageway between Lines 2 and 3. There were two of them who moved that trolley as trolleys were being moved by 2 persons. He received two trainings from Defendant viz. on 27.10.2015 and on 18.1.2016 as per Docs. F and G on how to handle trolleys and when to move them. He had to ensure *inter alia* whether there was not anyone at the rear of the trolley or in front of it and not to push it fast. He was also taught that 2 persons were required to move the trolley as it was never to be done by one person and it had to be handled with care. At the material time, the trolley was full in front and at the rear there was still space to be filled with fish near Line 3. Thus, his friend who was operating the trolley went to bring another one so that not to interrupt the continuity of the work. While he was alone in front of the trolley, Mrs. S. Ratno asked him to move it a little as it was difficult for her to do the sieving work because she could get injured in the limited space she was found to be in. He was not asked by an Inspector then, to move it. Thus, by acting on her request alone, he took it upon himself and moved the trolley while he was in front of it although he could not see at its rear in order to prevent Mrs. S. Ratno from getting injured. In so doing, Mrs. Olivier was hit by it while she was giving her back. In order to move trolleys, he was not supposed to receive orders

from workers other than from the inspector. From then onwards, he was posted to another department at Defendant and there was a place designated for keeping the trolley for work purposes.

The case for the Accused rested on the evidence given by Mr. Manish Roy Joggesser in his capacity as Registered Safety and Health Officer. He was a degree holder in Occupational Safety and Health management. He had 9 years' experience in that field including 7 years as registered Safety and Health Officer. He had been working for Defendant at the section where the accident took place for more than 5 years.

He focused on the unsafe behaviour of the trolley handler. According to him, from the trolley in the passageway to the work tables on each side there were 63.5 cm. The trolley had to be handled by two persons and at the material time, it was handled by only one with no visibility of what was found at its other end. The distance and its positioning had little significance because irrespective of whether there was ample space or a limited one as in the present case, if it was handled by one person, there would be no visibility at its other end and the accident would have still occurred. The use of trolleys designed for factory use, would still have to be relied on as there were no other alternatives. He concluded that the accident happened by an act of negligence as it was an unsafe act done by the trolley handler. Any activity done with an impaired visibility would lead to accidents.

Trolley handlers were not supervised by Accused as they followed training and it would be practically impossible for the accused company to supervise each employee when there were about 600 in that specific work area. He was not present at the time of the accident and was not employed as Health and Safety Officer by the Accused then. He was of the view that the space was sufficient and that there was no need to designate another space for that trolley.

I have given due consideration to all the evidence put forward before me including the documentary evidence and the submissions of learned Counsel for the Defence.

First and foremost, the material circumstances of the offence with which the Accused stands charged as per the information read as follows:

"*failing on or about the 29th day of March 2016 to ensure so far as is reasonably practicable the safety, health and welfare at work of its employee to wit: one Marie Parmella Olivier sustained fracture of coccyx when she was hit by a trolley which was being moved in a passageway where she was walking during her work, at Quay D, Port-Louis.*"

True it is that in the present case, no application for particulars as regards the material circumstances of the offence was made by the Defence.

Nevertheless, I find it relevant to quote an excerpt from the Supreme Court Case of **Attorney General v Saurty [1963 MR 1]**:

"The case stated by the magistrates sets down the question which is submitted for our decision as follows: -

"The question for the opinion of the Supreme Court is: Were we right in directing the appellant to give particulars of the offence charged and in dismissing the information after the appellant had declined to give particulars?"

The magistrates must have thought that the language of the provisions of the law regulating procedure before courts of summary jurisdiction on the one hand and before assizes on the other with respect to the requirement for the statement of the material circumstances of the offence charged were different, and concluded that different principles applied. This reasoning proceeded from wrong premises as appears hereinafter.

Subsection (1) of section 125 of the District Courts (Criminal Jurisdiction) Ordinance reads as follows: -

"The description in the information of any offence in the words of the law creating such offence with the material circumstances of the offence charged shall be sufficient."

This provision was no doubt taken from paragraph (1) of section 89 of the Summary Jurisdiction Act, 1879, which states that: "the description of any offence in the words of the Act, or in any order, by law, regulation, or other document creating the offence, or in similar words, shall be sufficient in law." It will be noted that although the English Act does not mention the "material circumstances of the offence charged" as is the case in the local enactment, these were required to be stated on

the principle laid down even before the coming into force of the above Act that an accused party is entitled to have sufficient information of the nature of the charge so as to be able to plead thereto.

Rule 77 of the Magistrates' Courts Rules, 1952, in force in England, which repeated the provisions of section 32 of the Criminal Justice Act, 1925 regarding the description of offences in magisterial cases, made no change in the existing law except that it required that ordinary language should be used and technical terms avoided and laid down specifically what was already required by the case- law on the subject, namely, that such particulars be given "as may be necessary for giving reasonable information of the nature of the charge". The following comment on rule 77 is made in Stone's Justices Manual, 1962 edition p. 258: -

"As to the description of the offence, the general rule is (as was formerly the case in indictments), that all the facts and circumstances should be stated with such certainty and precision that the defendant may be enabled to judge whether they constitute an offence, to determine the species of offence and be enabled to plead a conviction or acquittal in bar to another prosecution for the same offence".

The author makes the same observations in the manuals edited before 1952 (see 1918 edition p. 1025; 1931 edition p. 176; 1951 edition p. 218).

The provision regarding the contents of criminal informations brought before the Supreme Court is contained in section 17 of the Criminal Procedure Ordinance which reads as follows: -

"……..in all cases of crime brought before the Supreme Court, the Crown or other prosecutor shall draw up a criminal information which must be direct and certain:

(i) as regards the party charged;

(ii) the description of the offence charged;

(iii) the material circumstances of the offence charged".

This section states what is in fact the English common law on the subject and which is now statutorily provided for in England by section 3(1) of the Indictments Act, 1945, which provides that:

"……Every indictment, shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is

charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the charge."

Here again as regards the general principles governing the particulars which an indictment should contain, the Indictments Act,1915, made no material change in the existing law.

Taking into consideration the language used in section 89 of the Summary Jurisdiction Act of 1879, the Criminal Justice Act, 1925, the Magistrates' Courts Rules 1952, and the Indictments Act 1915, governing the requirements for the statement of the material circumstances of the offence charged, and the case-law on the subject, we are of the view that general principle was never altered and, further, that there is no difference in substance between section 125 of the District Courts (Criminal Jurisdiction) Ordinance and section 17 of the Criminal Procedure Ordinance. (See the cases cited in Stone's Justices Manual, 1917 edition p. 1025, 1934 edition p. 176, 1951 edition p. 218, 1962 edition p. 258; Archbold Criminal Pleading Evidence and Practice, 1838 edition p. 39 et seq., 1878 edition p. 54 et seq., 1962 edition paras. 104, 254 and 2466).

(…)

Close attention to the text of section 72(1) of the District Courts (Criminal Jurisdiction) Ordinance which provides that: -

"when the accused shall be present at the hearing, the substance of the information shall be stated to him and he shall be asked if he has any cause to show why he should not be convicted",

indicates that the proper course for an accused party to adopt is not to move for particulars, but to move that the information be quashed for being defective in not disclosing the material circumstances of the offence charged as required by section 125(1) of the same Ordinance. If the prosecution thought differently and declined to cure any defects in the information, the Court should, if it agreed with the defendant's contention, merely quash the information.

The material circumstances to be stated in an information are those that can reasonably be expected to be given and must depend on the nature of the offence charged and its constituent elements. There may be cases where the statement of material circumstances over and above the constituent elements of the offence would entail the supply of a considerable part of the evidence to be adduced in support of the charge. The supply of such evidence was in our view never intended by the law.

(…)

A similar observation which was directed towards the question of proof was made by this Court in the case of The Honourable the Attorney General v Nabee Meea Calcateea [1958 MR 233],235, in connection with a charge of "involuntary wounds and blows by imprudence". The Court stated: "in our view, it is not necessary to prove what precise act of the driver in the series of acts which must be performed in the overtaking of a vehicle constitutes the unlawful act committed and such proof indeed would be, in the majority of cases, impossible to adduce. It is sufficient if the circumstances in which the accident occurred establish that a driver failed to do any or all the acts which a prudent driver would have done." ***(all the above underling is mine)***

As per **Saurty**(supra), it Is now clear that criminal informations brought before either the Supreme Court or the Industrial Court, there is no difference in substance between the now section 125(1) of the District and Intermediate Courts (Criminal Jurisdiction) Act and section 17 of the Criminal Procedure Act, the *general principle was never altered* where the information must be direct and certain – (i) as regards the parties charged; (ii) the description of the offence charged; (iii) the material circumstances of the offence charged.

The question that calls for consideration is whether the material circumstances of the offence charged have answered the test of being direct and certain which is a creation of our local law (see- **Saurty**(supra)).

In the case of **Saurty**(supra), it was held that the supply of a considerable part of the evidence was in their view never intended by the law but not generally, but in the context of cases of reckless driving, involuntary wounds and blows, involuntary homicide, driving without due care and attention or careless driving as the test of certainty and precision was answered without the need to supply part of the evidence or a substantial part of the evidence because *the material circumstances to be stated in an information are those that can reasonably be expected to be given and must depend on the nature of the offence charged and its constituent elements.*

Now in the present amended information, the material circumstances of the offence as averred met the test of being direct and precise so that no application for particulars was made by the accused party namely "*failing on or about the 29th day of March 2016 to ensure so far as is reasonably practicable the safety, health and welfare at work of its employee to wit: one Marie Parmella Olivier sustained fracture*

of coccyx when she was hit by a trolley ***which was being moved*** *in a passageway where she was walking during her work, at Quay D, Port-Louis."* The accused party pleaded not guilty to that information which is precise and direct as regards the case it has to meet as per the said material circumstances.

However, the evidence led by the Prosecution was in relation to "*failing on or about the 29th day of March 2016 to ensure so far as is reasonably practicable the safety, health and welfare at work of its employee to wit: one Marie Parmella Olivier sustained fracture of coccyx when she was hit by a trolley* ***which was brought and being moved*** *in a passageway where she was walking during her work, at Quay D, Port-Louis."*

In the same vein, evidence was led by all Prosecution witnesses to the effect that the accident happened mainly because of the trolley having been brought in the passageway in the first place which was a working space, had to be moved subsequently by a worker to avoid injury being caused to another worker, Mrs. S. Ratno, when injury was then caused to Mrs. Olivier who was another worker. Thus, Accused failed to ensure so far as is reasonably practicable her safety as she was injured as a result. The trolley should not have been brought there in the first place but placed in a designated place as the accident was very predictable.

Now, evidence that the worker who moved that trolley in order to avoid injury being caused to Mrs. Ratno was not any worker being found at random on the production floor but someone who received 2 trainings in trolley handling and which had to be imperatively done by 2 persons because of lack of visibility from one end to the other when handled by one person only. The fact that the trolley was moved by someone who blatantly flouted the training given to him and caused the accident as he could not see in front of the trolley and hit Mrs. Olivier was secondary according to the expert enquiring officer and was not important because according to her although there could be 2 persons handling that trolley, there could be a rush of work or improper communication and the accident would have occurred anyway. It is worthy of note that it is common ground that there was a risk assessment exercise carried out by the Accused which covered extensively the movement of trolleys whether it is called transfer or otherwise, as a transfer is necessarily a movement as the trolleys were manhandled. Again, we are not talking of any 2 employees handling the trolley at random but 2 employees having been trained to do so. Had the relevant worker called another worker who had training to move that trolley slightly in that

passageway to avoid injury being caused to Mrs. Ratno in performing her work, then no accident would have happened. There was unrebutted evidence that the trolley had been there between those two Lines in the passageway since the operation of the factory and there was no evidence of someone being injured previously because of the trolley being found in the passageway on the production floor. In fact, the trolley was not left unattended, there was someone who was trained to move that trolley present at the material time. But he negligently moved it alone instead of asking his Superior to send another trained trolley handler rapidly to move the trolley or called through phone by himself, when there was no visibility in front of it and the accident which could have been avoided in that way was considered as secondary by the prosecution witnesses. Thus, the material circumstances of the offence averred in the amended information with which the Accused stands charged are regarded as being secondary and not the root cause of the accident by the Prosecution.

On the other hand, the evidence led by the Accused was directly and precisely in relation to the material circumstances of the offence with which it stands charged. Because it is not contested that the trolley which was in the passageway was moved by one person only at the request of Mrs. Ratno at the material time and which was meant to be handled by 2 persons for proper visibility and its expert explained the moving of the trolley with no visibility on the other end of that trolley was the cause of the accident, as it went against the established safety procedure and training dispensed to Mr. Perrine. As was explained by Accused's expert, the use of trolleys could not be discontinued on the production floor. This is because of the various processes prior to the canning of fish as they were needed at various stages and in relation to different types of fish as conceded by the Prosecution itself. Thus, there would always be workers near the trolleys doing their job on the production floor like, for instance, workers for Grading Line 3. So, although a designated area on the production floor was found for the workers of Grading Line 3 to use the trolley , yet if the said trolley is being moved again by one person only by blatantly flouting the training given to him in relation to the risk assessment exercise done by Accused in terms of trolley transfer which is essentially and necessarily a trolley movement, there will be no visibility at the other end of the trolley again be it in the course of ordinary transfer process of the trolley or any movement of that trolley from one place to another along the production floor, the risk of injuries being caused to any worker is imminent. As the Accused's expert has explained, there was ample room at the material place at the material time for the workers to perform their work.

It would not be reasonably possible for the Accused to supervise some 600 employees with the trolleys as training was given to them beforehand for that purpose. What Mr. Perrine did was that he went against the 2 subsequent trainings that were given to him and as a result of his negligence that the accident happened. Indeed, dangers can be anywhere on the production floor as the use of trolleys cannot be discontinued and proper handling is necessary in line with training given to trolley handlers.

At this stage, I find it relevant to reproduce Section 125 of the District and Intermediate Courts (Criminal Jurisdiction) Act which reads as follows:

*"**125. Information***

(1) 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.

(2) Any exception, exemption, proviso or qualification whether it does or does not accompany the description of the offence in the law creating such offence, may be proved by the defendant but need not be specified in the information or proved by the prosecutor."

The Supreme Court case of **Fakira AG v The State [2012 SCJ 466]** had this to say on section 125 above:

*"This section had been the subject of severe pronouncements by this Court on the requirement for an accused party to establish certain facts which are within his particular knowledge – see **Beekhan v The Queen** [1976 MR 3]. The presumption of innocence and the right to silence are provided in sections 10(2)(a) and 10(7) of the Constitution.*

10 Provisions to secure protection of law

(1)

(2) Every person who is charged with a criminal offence –

(a) shall be presumed to be innocent until he is proved or has pleaded guilty;

(7) No person who is tried for a criminal offence shall be compelled to give evidence at the trial.

However the Constitution itself provides for an exception to those two fundamental rules. It itself sets out in section 10(11)(a)-

(11) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of –

(a) subsection 2(a), to the extent that the law in question imposes upon any person charged with a criminal offence the burden of proving particular facts;

This latter subsection was the subject of comment as follows in the case of ***P v. Moorbannoo*** *[1972 MR 22] –*

The principle under section 10(11)(a) of the Constitution aims at expressing in a compendious and general form may be expounded thus: To say that an accused party is to be presumed innocent is really to say that the burden is on the prosecution to prove every ingredient of the charge against him. It has long ago been realised, however, that if that rule were strictly adhered to, many acts or omissions which the Legislature deems of the utmost importance to prohibit for the public good would have to be left unpunished, because the prohibition would be incapable of enforcement, and there has from early times been elaborated a qualification to the rule which is, that facts which bring a defendant within the ambit of a particular exception, if they are peculiarly or exclusively within his knowledge, should be regarded as matters which it is for him to establish.""." ***(emphasis added)***

At this stage, I find it apt to reproduce both Section 5(1) of the Occupational Safety and Health Act 2005 and Section 96(6) of the said Act which read as follows:

*"**5. General duties of employers***

(1) Every employer shall, so far as is reasonably practicable, ensure the safety, health and welfare at work of all his employees.

96. Special provisions as to evidence

(6) 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 is 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."(**emphasis added)***

Now, the present amended information has complied with the requirements of Section 125(1) of the District and Intermediate Courts (Criminal Jurisdiction) Act namely that the description of an offence under section 5(1) of the Occupational Safety and Health Act 2005 are in the words of that enactment creating such offence with the material circumstances of the offence charged and which shall be sufficient.

The equivalent of section 125(2) of the District and Intermediate Courts (Criminal Jurisdiction) Act is to be found in section 96(6) of the Occupational Safety and Health Act 2005 so that the Accused will have to prove the affirmative of the negative averment viz. the failure of the Accused to ensure *inter alia* the safety of its employee as far as is reasonably practicable by having the legal burden or persuasive burden to prove that it was not reasonably practicable for it to do so in the sense that it was not reasonably practicable for it *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 in the present case.

Thus, we are in the realm of an Implied Statutory Exception which is governed by section 125(2) of the above Act so that the onus is on the Accused to prove that it was entitled or excused or exempted to do the prohibited act by relying on the defence that it was not reasonably practicable under Section 96(6) of the relevant Act and there is no need for the Prosecution to aver in the information that Accused falls outside the requirement that it was not reasonably practicable for Accused to do so. In that connection, the effect of Section 44(1) of the Interpretation and General Clauses Act 1974 is to put the legal burden on the Accused to prove its defence whenever a statute under which it is charged makes certain conduct illegal except on certain grounds which in the present case would be akin to those types of offences 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)** and **Edwards v National Coal Board (1949) 1 K.B. 704,712** (cited in **Jeanneton v Cie Sucrière de Bel Ombre [1993 SCJ 455]**)) which will become apparent hereinafter. In order to prove the affirmative of that negative averment as per Section 96(6) of the Occupational Safety and Health Act 2005 in the context of health and safety, it is

significant to quote an extract from the Supreme Court case of **Jeanneton v Cie Sucrière de Bel Ombre** [1993 SCJ 455] as follows:

"Section 5(1) of the Occupational Safety, Health and Welfare Act, 1988 lays down that:

"Every employer shall, so far as is reasonably practicable, ensure the safety, health and welfare at work of all his employees."

The test of what would be reasonably practicable was considered in Edwards v National Coal Board (1949) 1 K.B. 704,712 where Asquith L.J. had this to say:

'Reasonably practicable' is a narrower term than 'physically possible' and seems to me to imply that a computation must be made by the owner, in which the quantum of risk is placed on one scale and the sacrifice involved in the measures necessary for averting the risk(whether in money, time or trouble) is placed in the other; and that if it be shown that there is a gross disproportion between them – the risk being insignificant in relation to the sacrifice the defendants discharge the onus on them. "

(see also Marshall v Gotham Co Ltd (1954) A.C. 360 and Jenkins v Allied Ironfounders Ltd (1970) 1 W.L.R. 304)."

In the same breath, it is relevant quote the following passage from the Supreme Court case of **Sinassamy M.A. & Anor v Navitas Holdings Ltd** [2021 SCJ 424]:

"The term "reasonably practicable", which also appears in various similar - worded English enactments on occupational health and safety, has been explained in ***Halsbury's Laws of England (5th Edition) (2020), Vol 52: Health and Safety at Work at paragraph 382*** *as follows-*

""Reasonably practicable" is a narrower term than "physically possible" and implies that a computation must be made, before the breach complained of, in which the quantum of risk is placed in one scale and the sacrifice involved in the measures necessary for averting the risk (whether in money, time or trouble) is placed in the other and that, if it be shown that there is a gross disproportion between them, the risk being insignificant in relation to the sacrifice, the person upon whom the

obligation is imposed discharges the onus which is upon him. The unforeseeability of a risk may be relevant in deciding what is "reasonably practicable"".

It is to be distinguished from the word "practicable", as is highlighted in the same paragraph –

"Where the statutory obligation is qualified solely by the word "practicable" a stricter standard is imposed, although the connotation of the term is not easy to determine. Measures may be practicable which are not reasonably practicable but, nonetheless, 'practicable' means something other than physically possible. The measures must be possible in the light of current knowledge and invention : thus it is impracticable to take precautions against a danger which cannot be known to be in existence or to take precautions which have not yet been invented, so that the concept of practicability introduces at all events some degree of reason and involves at all events some regard for practice if a precaution can be taken without practical difficulty, then it is a practicable precaution, notwithstanding that it may occasion some risks to those who take it and even though the risk far outweighs the benefit to be achieved."

(see also ***Talbot Fishing Co Ltd v Ministry of Labour & Industrial Relations (Occupational Safety and Health Inspectorate)*** *[2005 SCJ 76],* ***Jeanneton v Cie Sucrière de Bel Ombre*** *[1993 MR 364] and* ***Edwards v National Coal Board [1949] 1 K.B. 704****)."*

Now, it is clear that the word "practicable" is a stricter standard and means something other than physically possible which means that the measures must be possible in the light of current knowledge and invention. Thus, it is impracticable to take precautions against a danger which cannot be known to be in existence.

"Reasonably practicable" is a narrower term than "physically possible" meaning that it is limited in extent so that the sacrifice laid upon the Accused to abate the risk is not absolute but proportionate to the quantum of risk so that the unforeseeability of a risk may be relevant in deciding what is "reasonably practicable". Now Section 96(6) of the Occupational Safety and Health Act 2005 means "*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."* But as per **Sinassamy**(supra), *"'practicable' means something other than physically*

possible". Therefore, it means that following a risk assessment exercise, should the Accused not be in presence of peculiar facts or particular facts exclusively within its knowledge in order to abate the risk, would entail a gross disproportionate sacrifice on its part although employees could sustain injuries varying in degree. Then, the burden laid upon Accused is discharged in the sense that the Prosecution will then be in as good a position to know those particular facts to prove the element of the offence namely the reasonable practicability and that the burden then lies on the Prosecution to prove its case beyond reasonable doubt. This is why for the Accused to prove that it was not reasonably practicable for it to abate the risk is not an element of the offence and is not averred in the information as it is an exception or exemption from liability and such burden is not absolute as the sacrifice is not absolute and which is in line with section 10(11)(a) of the Constitution whose purview has been explained in **Moorbannoo** (supra).

Thus, it is abundantly clear that the issue of knowledge of peculiar facts known to the Accused or of particular facts exclusively to the knowledge of the Accused and not to the Prosecution would be the situation where the quantum of risks and sacrifice are not grossly disproportionate. But where both the Prosecution and the Accused are in as good a position to know the particular facts as regards the reasonable practicability of the risks and whether they can be abated or not, then the burden on the Accused is discharged which means that the Prosecution will have to prove the element of the offence namely the reasonable practicability which means as far as is reasonably practicable to abate the risks. Thus, the sacrifice imposed on the accused party is limited to peculiar knowledge of the particular facts or exclusive knowledge of the particular facts as opposed to the Prosecution, which means that the Accused is not expected to go further than knowledge and which is in line with section 10(11)(a) of the Constitution. Because Section 96(6) of the Occupational Safety and Health Act 2005 cannot infringe section 10(11)(a) of the Constitution which is the Supreme Law precisely because section 2 of the Constitution stipulates:

*"**2 Constitution is supreme law***

This Constitution is the supreme law of Mauritius and if any other law is inconsistent with this Constitution, that other law shall, to the extent of the inconsistency be void."

That is why when there is an overwhelming negligence on the part of the employee which goes beyond the knowledge of the Accused, the sacrifice laid upon

the Accused is not absolute and as such it has discharged its legal burden as it would be grossly disproportionate in the scale of risks entailing an absolute sacrifice on its part. This is precisely because the sacrifice is not absolute where the offence is serious entailing the risks of injury, as then it would be tantamount to having the Accused to prove the element of the offence. As illustrated in **Beekhan v The Queen** [1976 MR 3] where both the Prosecution and the Accused are in as good a position to have the knowledge of particular facts as regards the negative averments, then the burden of proof lies on the Prosecution as those facts are not specifically within the knowledge of the Accused and that is why in the realm of Health and Safety we have the scale of sacrifice on the part of the Accused. The sacrifice is not absolute and is not expected to go beyond specific, peculiar or exclusive knowledge purely and simply because "*so far as is reasonably practicable"* is an element of the offence described in the words of the law creating such offence as per Section 5(1) of the Occupational Safety and Health Act 2005. True it is as highlighted in the Supreme Court case of **The D.P.P. v Flacq United Estates Ltd** [2001 SCJ 301], where it was held that the primordial issue that the Court has to decide is whether the particular system of work adopted by the accused employer was found to be safe. However, before construing a failure on the part of the Accused to provide a safe system of work will have to be assessed as to what is not reasonably practicable, this is where the criterion of sacrifice to avert the risks of injury is equally important and cannot be grossly disproportionate so that the burden then is deemed to be discharged. True it is that this primordial issue is not whether the injuries caused to the employee was because of his own negligence. However, it is significant to note that the case of **Flacq United Estates Ltd**(supra) is not authority for the situation where the negligence of a worker is of the kind where it is so overwhelmingly gross that its effect is tantamount to having nullified the fault of the Accused, because precisely it has not catered for that type of situation which is the situation of an absolute sacrifice being imposed on the accused employer.

Thus, I find that the present case is precisely the type of situation analogous to that envisaged in the Supreme Court case of **Sham v The Queen** [1982 MR 224] wherein the principle laid down at note 50 of Article 319 of Garçon Code Pénal Annoté was applied, an extract of which reads as follows:

"We do of course agree that where an accident is caused by the fault of more than one person, "la faute de l'une ne peut excuser la faute de l'autre"(see Garçon C.P.A. Article 319 Note 41, Ramphul v. Q. [1981 SCJ 301].

However, we also read in Garçon (op cit), at note 50, the following –

50. Il ne faudrait pourtant pas croire que la faute de la victime soit indifférente; le juge doit encore rechercher si elle existe et la defense peut la plaider. Il est évident, en effet, qu'aucune condamnation ne pourrait plus être prononcée s'il était établi que l'imprudence de la victime a été si grossière qu'elle fait disparaître, en réalité, toute faute de la part de l'auteur (…).

*In other words, we are in presence of a victim's imprudence which is so "grossière qu'elle fait disparaître, en réalité, toute faute de la part de l'auteur(…)." (**emphasis added**)*

Thus, I hold that the moving of the trolley by one person only and not by two when there is no visibility from one end to the other by Mr. Perrine who received appropriate training twice in that respect bearing in mind that trolleys are constantly being used at the factory of Defendant at the various stages of the processing of the fish and cannot be done away with let alone on the production floor, was of an imprudence which is so *"grossière qu'elle fait disparaître, en réalité, toute faute de la part de l'auteur(…)"* and as such has nullified the fault of the Accused (see – **Sham**(supra)) because it is totally unacceptable for him to have acted against what he was trained twice not to do following a risk assessment exercise having been carried out by the Accused specifically geared towards trolley movement. Further risks assessment exercise and training would clearly not have prevented the accident from occurring as he has defeated such purpose by having acted as if he was someone handling a trolley for the first time at the factory of Accused without any training at all which is tantamount to the fact that such an absolute sacrifice cannot be placed at the door of the Accused for the resulting injury caused to Mrs. Olivier namely a fracture of her coccyx. The Accused obviously cannot be expected to have specific or peculiar or exclusive knowledge of such particular facts. The burden of proof then rests on the Prosecution. Had those particular facts been specifically or peculiarly or exclusively within the knowledge of the Accused, then the burden of proving that it was not reasonably practicable to ensure the safety of the injured person would have lied on the Accused and which would have have been discharged on a balance of probabilities(see - **Halsbury's Laws of England, 4th Edition, Reissue Vol 20(1) para** 624 and **Talbot Fishing Co Ltd. v Ministry of Labour & Industrial Relations (Occupational Safety and Health Inspectorate)** [2006 SCJ 76]).

Hence, although it has been averred in the information that the accused employer has *"failed to ensure the safety, health and welfare of its employees at work",* such prohibited act would only constitute a criminal offence when it meets the criterion of *"so far as is reasonably practicable"*.

Thus, the words *"so far as is reasonably practicable"* constitutes an element of the offence with which the Accused stands charged and which has not been proved by the Prosecution by the required standard. Furthermore, the Prosecution has relegated the material circumstances of the offence charged as being secondary and not important which is misconceived and defeats its purpose bearing in mind that such provision for the *"material circumstances of the offence charged"* to be averred is confined to our local legislation and shows the fundamentally overriding importance for an information to be direct and precise although it could entail the averment of some evidence varying in degree as stressed in **Saurty**(supra) depending on the context namely which *can reasonably be expected to be given and must depend on the nature of the offence charged and its constituent elements* and which is further reiterated in the Supreme Court case of **Renghen P v The State [2022 SCJ 291]** 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]."*

Moreover, the enquiring officer relied on another provision of the law without specifying same by saying that there was another important reason that should there be a case of an emergency, the passageway had to be kept free from obstruction at all times which appears to be under Section 75(1) of the Occupational Safety and Health Act 2005 in case of fire. It is significant to note that the Accused does not stand charged under that provision of the law and nor does it form part of the *"material circumstances of the offence charged"* under the present amended information.

For all the reasons given above, the Prosecution has fallen short of establishing it case beyond reasonable doubt. I accordingly dismiss the amended information against the Accused.

S.D. Bonomally (Mrs.) *(Vice President)*
26.6.23