

OSHI v Canaye L.

2024 IND 15

Cause Number 52/19

**In the Industrial Court of Mauritius
(Criminal side)**

In the matter of:

OSHI

v.

Lutchmansing Canaye

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 with unlawfully failing on or about the first day of July 2014 to ensure so far as is reasonably practicable, the safety, health and welfare at work of its employees namely by having failed to ensure that the sliding gate was properly secured and the said sliding gate fell on one Sushdeo Mahadoo, his employee at his place of work at Riambel when he sustained depressed fracture of skull and subsequently passed away. The Accused pleaded not guilty to the information and was assisted by Counsel at his trial.

The case for the Prosecution is to the following effect:

Mr. Pradeep Bhowany in his capacity as Divisional Occupational Safety and Health Officer enquired into the cause of death of late Mr. Sushdeo Mahadoo which occurred on 1.7.2014 at his place of work at Riambel.

He gave evidence in Court as main enquiring officer in the present matter. He was posted at the accident unit and reckoned twenty years of experience at the material time. He took two sets of four photographs at the place of accident within a time interval of about ten months between the two sets, the first one being taken on 2 July 2014 and the second on 23 April 2015 as per Docs. C (C1-C4) and D (D1-D4) respectively. He also recorded three statements from the Accused dated 2 & 4 July 2014 and 25 April 2019 after he was duly cautioned as per Docs. E, E1 & E2.

Following his investigation, he made a report dated 22 February 2018 wherein he put the facts and his conclusion. However, his opinion evidence in the form of a conclusion in his report as to what was observed by him in relation to the facts was disallowed by the Court after arguments were heard. The reason being that although he had the practical experience needed in that field, he did not have the academic skill in that specific field which is a cardinal principle as amply illustrated by the Supreme Court in **State v Jean Desire Huberto Charles** [\[2012 SCJ 418\]](#) the relevant part of which reads as follows:

“Before a witness can give his opinion as an expert, it must be shown that he has some knowledge over and above the knowledge that an ordinary person may have on the subject at hand. At this stage, two aspects have to be stressed:

[1] The knowledge that we are concerned with must be specifically in the field which is being considered by the Court for the purposes of the particular case that is being dealt with. It is not sufficient that the person has the extra-knowledge required in a general field of study or in a connected field or in a related field.

[2] The extra - knowledge referred to can take the form of academic studies done by the witness as demonstrated by the qualifications that he holds. However, academic study is not the only criterion on which we can base ourselves in determining whether the witness can give his opinion evidence. The witness may have acquired extra knowledge on a subject through practical experience in the matter over a period of time. At the end of the day, the test is whether the witness can show that he has demonstrable practical knowledge and skill on the subject at

hand. If it is shown that the witness does not have such demonstrable knowledge and skill, then his opinion ought not to be received. This is so because he is not to be considered as having the specialisation which would qualify him as an expert. On the other hand, if the witness can show that he does have such demonstrable skill and knowledge, then there is no bar to his opinion being received.”

Thus, in the absence of such skill outside his field of practical expertise disabling him to say whether the cause of the fall of the sliding gate was because it was not properly secured or because there was an alternative scientific explanation (*vide – Pointe aux Piments Multipurpose and Agro Mechanical Co-operative Society Ltd v New India Insurance Co. Ltd* [\[2016 SCJ 20\]](#)), his conclusion as per his report was ruled inadmissible.

Now on the following day of the accident viz. on 2.7.2014, Mr. Pradeep Bhowany went to the locus meaning near the sliding gate *in lite* at Riambel where late Mr. Sushdeo Mahadoo sustained serious injury and subsequently passed away as a result. There was a yard at that main entrance giving to the workshop of Accused. That gate was made of two sliding doors, one of which fell out completely and was to be found on the ground while the other was at its place. Each door being made of metal was heavy and was welded with rollers both at the bottom and on top so that it could slide on sliding rails found on ground level and on a wall on top as per Docs.C1, C2, C3 & C4.

He observed how the door of the gate that was still at its place functioned. There were rails for the whole length of the gate fixed to the ground and to the wall on top. When the door was opened, it rolled on the rails found on top and at the bottom. When that door was closed, the same rolling exercise on the sliding rails caused the door to slide. There were two rollers and two sliding rails on top and three rollers and three sliding rails on the ground level. He observed that the door when closed, it was unstable as it could be shaken. Then, he decided that the entire gate was not stable and could be shaken.

Under cross-examination, he admitted that he took a first set of photographs on 2.7.2014 and a second set on 23.4.2015 meaning about 10 months after. He admitted that he did not make any statement to explain the photographs. The body of the deceased was not present when he went to the locus on the following day of the accident. But although he saw only one of the gate's sliding doors on the ground,

he could not say whether on the day of the accident, that door was on the ground at the spot he found it. He admitted that the said door had a small rope in the middle so that pedestrians could use it as a pedestrian door to get in and out of the yard. It was not *quasi-impossible* for the sliding doors of the gate to fall down once installed. The doors could be shaken by someone or by the wind. But on the day of the accident, he had no idea of the weather conditions prevailing. The unfallen door when closed was unstable and could be shaken manually. That sliding gate was installed to a wall more than 10 years ago and it never happened in the past that a sliding door fell down. But measures could have been taken to prevent the accident from happening.

Mrs. Oomabye Mahadoo gave evidence in Court. She was married to late Mr. Sushdeo Mahadoo since the year 1991. During her marital life, he was working at Accused's factory and as stonemason. Because her husband got hooked on alcohol, he complained of pain and tiredness. However, he did not lose his job at the factory. But he stopped by himself by leaving his factory work and he was working as helper, stonemason, labourer at sugar cane fields and vegetable fields and doing other jobs. Then, he went to work for the Accused as watchman for the night. Because of his alcohol dependence, she left the conjugal roof together with her child. She could not say for how long he had been working for the Accused and how much he earned. He did not have a pay slip. She did not agree that her husband was not obtaining a salary from Accused and that because they were friends, he gave him Rs 50 or Rs 100. She was not told by her husband that because of the friendship between the Accused and him, he was given a room by the Accused at Accused's workshop to reside and was provided with a television set therein.

The case for the Defence rested on the testimony of the accused party alone. He deposed as to the truth of his three statements in Court namely Docs. E, E1 & E2. He stated the following. The sliding gate *in lite* found at his workshop/factory was there for over 25 years and workers and owners used it to get in and out on a daily basis. It was made of metal and was a sliding one having two doors. Apart from the accident that happened to late Mr. Sushdeo Mahadoo, there had never been any accident for the past 25 years. That gate was made and installed by a Professional Welder. On his side, he took all reasonable precautions for the gate to function or to operate without risks. It had always operated well. According to him, there was not more to be done to it to cause it to become safer or more secure.

Under cross-examination, he conceded that in one of the statements given to Mr. P. Bhowany, the main enquiring officer, it was possible that he said that in one month, he was giving the deceased Rs 1500 – Rs 1600 for his work. Then, he admitted that he did say so in his statement. He did not agree that the gate at times shook if there were winds or bad weather, because that gate was a very heavy metallic one. The gate slid in the middle. Should the sliding gate start coming out with its welded rollers when it moved, there was a safety device to stop it and which was installed after the accident as per Doc. D4. He took all the necessary precautions as he had the experience in installing the gate but not professionally. That was why he asked a person whose job was to install the gate to do so. He did not think that had he really taken precautions, the gate would not have fallen. But he agreed that because the gate fell on late Mr. S. Mahadoo, it caused his death. In the same statement, he said that he gave the deceased at times Rs 100 and at times Rs 50 for his needs including his drinking purposes. At times, he was given Rs 15, Rs 20, Rs 50 and Rs 100 and when he was short of money, he asked for it. During the 25 years, there was not good weather all the time and for about 5 years there were strong winds. The gate was correctly secured and would never have fallen.

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

The point to be thrashed out by the Court at the outset is whether the deceased, Mr. Sushdeo Mahadoo, was an employee of the Accused. The testimony of his wife remained unrebutted that he was working as Watchman for him at his said premises and was in receipt of wages although he was not provided with a pay slip after having stopped factory work because of his alcohol dependence causing him to do many other jobs as well. It remained uncontested that she had left the conjugal roof with her child because he was hooked on alcohol.

Indeed, the Accused admitted while deposing as to the truth of his three statements in Court that frequent small amounts of Rs 15, Rs 20, Rs 50, Rs 100 and Rs 200 were given to the deceased by him giving a sum total of about Rs 1500-1600 a month was payment for the deceased's work as he kept watch of his workshop when he was not around. The deceased was also provided with a room wherein he lived at the said workshop and the flexibility in payment was to meet his personal needs and drinking habits. Therefore, it is clear enough that the deceased was

working as part time Watchman for the Accused at the said premises. Furthermore, as per the death certificate of late Mr. Sushdeo Mahadoo and his postmortem report drawn by Dr. S.K. Gungadin as per Docs. A and B respectively show that the deceased's occupation was Watchman. Moreover, Section 2 of the Occupational Safety and Health Act 2005 has defined an "employee" as follows:

"2. Interpretation

"employee" means a person who has entered into, or works under, a contract of employment with an employer, and includes a casual worker or a manual worker, however remunerated;"

Therefore, the inescapable conclusion is that the deceased was an employee of the Accused to all intents and purposes.

Now, there is no evidence be it from the Prosecution or the Defence as to how the accident happened which resulted in one of the sliding doors of the gate to be projected away with its welded rollers from its sliding rails both on top and at the bottom of it as per Photographs C1 and C2(Docs. C1&C2).

Indeed, the testimony of Accused remained unrebutted and uncontested that on the material day, one of the doors was thus projected and fell on the person of the deceased who laid on the ground with that door on top of him causing serious injury to him leading to his subsequent death while the other door was opened.

Therefore, the cause as to why that sliding door of the gate was so projected away completely has remained unknown to the Court. The main enquiring officer's observations on the stability of the doors of the gate cannot be relied upon as one of them fell over and the other was opened at the time of his inspection. Therefore, his testimony with respect to the functioning or stability of that opened door cannot be relied upon because had that door been closed, then it could have been inferred that it was unaffected at the material time as a result of the accident. Therefore, I do not accept his observations which obviously cannot reflect the state of the two sliding doors and their functioning at the time of the accident. On the contrary, I believe the unchallenged testimony of the Accused that the gate was made and installed by a professional Welder and was efficiently maintained by the Accused for more than 10 years and that there had not been any accident before and that never before had a door been projected away and the other one opened in that manner. It means that the gate has proved the test of time be it extreme weather conditions like cyclones, for example, and it remained stable and properly secured for more than a decade until the day of the accident.

In the circumstances, it is clear enough that only expert evidence in that specific field of the functioning of sliding gates could enlighten the Court as to the cause of the accident by way of a scientific explanation in relation to that unexplained force or otherwise, let alone that no evidence has been led by the Prosecution to the effect that a risk assessment exercise was necessary in order to assess the ease with which the sliding doors could be removed from their sliding rails so that training could be dispensed thereafter to the Accused's workers. Needless to add that it can hardly be said that such scientific knowledge meaning "*some knowledge over and above the knowledge that an ordinary person may have on the subject at hand*" (see- **State v Jean Desire Huberto Charles** [\[2012 SCJ 418\]](#)) was within the field of knowledge of the Accused to ensure the safety of the deceased as he is not an expert in order to abate the risks of injury entailing a gross disproportionate sacrifice on his part (see - **Sinassamy M.A. & Anor v Navitas Holdings Ltd** [\[2021 SCJ 424\]](#) and **Jeanneton v Cie Sucrière de Bel Ombre** [\[1993 SCJ 455\]](#)) so that the burden lies squarely on the Prosecution to prove its case beyond reasonable doubt. Obviously, it is outside the ambit of current knowledge to expect more force than all extreme weather conditions which were not strong enough to have the door of the gate so removed for so many years bearing in mind that the enquiring officer admitted that the gate had been installed more than 10 years ago and was made of metal and was heavy and he himself took a photograph on the following day of the accident as per Doc. C2 which reveals that the door which fell down and found on the ground was welded with the rollers which were in good condition. True it is that there was an added equipment installed after the accident namely a retaining rail to prevent a door from falling in the sliding action should it come out of the rails. That equipment as rightly stated by the Accused ought to have been installed by the Welder himself and who did not find it necessary bearing in mind again that there is no expert evidence to explain the cause of the accident.

Therefore, in the light of all the reasons given above and in the absence of an expert evidence as to the cause of the accident, the Prosecution has fallen short of establishing its case beyond reasonable doubt. Accordingly, I dismiss the information against the Accused.

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

17.5.24