Regina v SPR Trailer Services Ltd

Court of Appeal Criminal Division

5 September 2018

[2018] EWCA Crim 2668

Before: Lord Justice Lindblom Mrs Justice McGowan DBE Mrs Justice Cheema-Grubb

Wednesday, 5 September 2018

Representation

Ms M A F Bennett appeared on behalf of the Appellant.
Ms E Lambert appeared on behalf of the Crown.

Mrs Justice Cheema-Grubb:

1 This appeal against sentence arises out of a guilty plea entered by the appellant company to an offence contrary to S.2 and S.33(1)(a) of the Health and Safety at Work etc Act 1974 . Upon committal for sentence to Ipswich Crown Court the company was sentenced by His Honour Judge Levett to a fine of £120,000 to be paid at the rate of £5,000 per month, the total to be satisfied within 2 years. A victim surcharge order was imposed in the sum of £120.

2 The circumstances giving rise to the charge concerned the death at work of one of the appellant's employees, Mr Douglas Skinner, on 23 January 2015. Mr Skinner is described by his family in an impact statement as a loving and caring husband, dad and grandad, a hard-working, honest man who would help anyone and who was liked by all who met him. He was in his 67th year and had bravely fought and overcome cancer. We express our sympathy to his family and recognise that the impact of his untimely death upon his wife, children and grandchildren cannot be estimated.

3 The business of the appellant company commenced in 1997 and is in trailer repair and servicing. At the relevant time it had 36 employees across three sites. Subsequent investigation demonstrated that the company's Health and Safety policy was distributed to all employees and relevant inductions and training were provided. Generally, employees had to prove competence for tasks they were to take unsupervised.

4 Mr Skinner had worked for the appellant for over 10 years and was a valued and trusted experienced trailer fitter. On 22 January 2015, the day before the fatal incident, he was asked by the appellant's operations manager, Mr David Rivers, to remove some signs at the entrance to the company's site, which is adjacent to a busy public road. This was described as general maintenance rather than Mr Skinner's usual work. Another employee, a maintenance worker,

Mr Paul Arbon, was asked to help, but neither man was directed as to how the work was to be accomplished. The signposts were metal, 12 feet high and they stood in a triangular shape. In order to remove them the two employees used a mobile elevating work platform known descriptively as a scissor lift, which they parked between two of the three signposts as they worked on them. No barriers were constructed to protect the two workers and no cones or signs were used either. Mr Arbon acted as a banksman whenever lorries pulled in or out of the site even though the scissor lift was not obstructing the site access road and a speed limit of 5 miles per hour was strictly enforced in that area. During that first day a number of lorries passed the place where Mr Skinner and Mr Arbon were working without any incident.

5 The following day, Mr Rivers asked Mr Skinner to refit the signs that had been taken down. Again he was just left to get on with it. Another employee, Mr Atkins, assisted him. The work began with the scissor lift parked inside the signposts in the same way as the previous day, but Mr Skinner experienced difficulty in placing the signs correctly and he decided to move the scissor lift across the front of the signposts. Mr Arbon helped him with the repositioning. In this new position, which was arrived at at around lunchtime, the lift was at an angle to the signposts and its left-side rear encroached into the access road, obstructing part of it.

6 During the resumed task, at about 2.30 pm, when Mr Skinner was in the cage of the scissor lift elevated form the ground and Mr Atkins was standing at its rear, the work platform of the scissor lift was struck by a trailer leaving the site. The driver of the trailer, Mr Woodcock, another employee of the appellant, had pulled up briefly alongside Mr Skinner and Mr Atkins at a crawling speed in a Leyland tractor attached to which was a 45-foot trailer. He spoke to Mr Skinner while he paused to check that his exit was clear. But when he drove his tractor left out of the site and executed a 90-degree turn crossing both lanes of the highway, the rear offside corner of the trailer caught the rear nearside corner of the work platform of the scissor lift causing the lift to tip over onto its left and Mr Skinner to fall from the platform cage. He struck the tarmac on the public road and was immediately unresponsive, with bleeding form his head and a distorted breathing pattern. Efforts by the appellant's employees and, in due course paramedics, were insufficient to save his life and he died from his injuries.

7 A full investigation followed, including the instruction of experts. No mechanical fault was found in the scissor lift that could have contributed to the accident, but one of the experts, Mr Rudland, concluded that the lift was vulnerable to topple over if subjected to side loading. Another expert, Mr Wonford, described the availability of several publications which supplement the operating manual for the scissor lift concerned and which provide a framework for identifying dangers in using such equipment alongside significant traffic movements.

8 One of those is a British Standard 8460, which described how a small impact to

such a platform could have a disproportionate effect, causing it to fall and the occupant of the working basket to be ejected. The Standard states that the operating area in such circumstances should be coned off. The scissor lift training that Mr Skinner and Mr Arbon had undertaken was in August 2014 and it had included instructions about segregating the scissor lift.

9 In due course, the Health and Safety Executive investigation established that although the scissor lift was the safest method of working at the height required for the task Mr Skinner was engaged in, and only staff who had completed training in its use were allowed by the appellant company to use it, no risk assessment had been completed in respect of the particular task Mr Skinner was undertaking. This led to an unsafe system of work being implemented and exposed those carrying out the work to risks which had not been given proper consideration.

10 In response to the Health and Safety Executive investigation's report, the appellant company accepted that there had been no written system of work in place for the procedure that Mr Skinner was engaged in the employees had been expected to apply the training they had been given and in particular to separate or segregate the working area to ensure their safety.

11 The investigation concluded that although during the day and particularly at concentrated periods at the beginning and end of the working day a substantial number of heavy goods vehicle movements into and out of the yard took place, no supervision was provided to these workers and no particular method to deal with these movements in conjunction with the scissor lift was suggested, recommended or advised; the workers themselves made the decision to use the scissor lift and where to locate it.

12 In the company's response, it stated that periodic supervision had been provided and it was not practicable to have supervised the entire task. In any event, there had been insufficient time, it claimed, to have intervened between the time that Mr Skinner decided to move the scissor lift and when the accident occurred. However, it was also clear that the training provided to Mr Skinner and the other employees did not extend to how to plan and manage such tasks as those they were engaged in at the relevant time, which omission had led them to adopting a system of work that exposed them to risk.

13 The investigation concluded that it would plainly have been reasonably practicable for the appellant company to take further steps to ensure the scissor lift was used in a safe manner, including by carrying out a risk assessment and determining a method statement or something similar. Equally, given the time that had elapsed between the training and the accident, it was insufficient for the company to assume that the employees would take the initiative themselves to ensure a safe working practice and it would have been reasonably practicable to have to instructed the employees to consult the training manual and to have

ensured that instruction was obeyed by way of simple checks.

14 In short, as the sentencing judge observed, Mr Skinner's death was avoidable. Even a basic generic risk assessment was omitted and the judge concluded that the risk to Mr Skinner from the repositioned scissor lift was patently obvious. The company had failed to take basic measures to provide a safe system of work for him. Something as simple as an instruction to the employee that if a lorry was turning left out of the site he should get off the platform and move the lift out of the way would have totally eliminated the risk. Other methods, such as introducing barrier beacons, would have reduced the risk, albeit in the circumstances of the layout concerned it would not have eliminated it.

15 The company had responded positively to the findings of the Health and Safety Executive investigation by purchasing equipment to allow cordoning off of areas and it had provided further training on safe working methods and risk assessments in relation to the scissor lift. Supervision had also been increased. There was evidence which satisfied the judge that the appellant was now highly vigilant to this form of risk.

16 Prior to sentencing, the judge viewed CCTV footage, which has also been made available to this court. There is no doubt that access from the appellant's company's site from and onto the public road required a significant turning manoeuver which, if a long vehicle (particularly one pulling a trailer) was making the movement, would result in an overswing at its tail end due to the positioning of the axles. The judge had also read the experts' reports and looked at five publications which highlighted the dangers and risk associated with the use of the scissor lift.

17 Mr Bennett, who appears for the appellant, submits that despite the sentencing exercise carried out by the judge, the fine imposed was manifestly excessive. His arguments can be encapsulated thus. Firstly, the learned judge's provisional sentence before credit for mitigation and guilty plea was significantly too high a starting point on the facts of this case. Secondly, insufficient reduction was applied for mitigation. Thirdly, viewed overall, the fine imposed was too high within the offence category because the company's turnover had only just brought it into that category. Separately, allowing just 2 years for a company of its size and profitability to pay the fine was unfair and could put the company into terminal difficulty. He relies on up-to-date information from the appellant's accountant in that respect.

18 It is necessary to examine the sentencing process and the judge's rationale, which he set out in a detailed judgment. The Sentencing Council has issued a definitive guideline for Health and Safety offences among other crimes. Offences contrary to S.2 of the Health and Safety at Work etc Act 1974 engage with the general duty upon an employer to ensure as far as reasonably practicable the health and safety at work of its employees. The guideline provides a step-by-step

framework for sentencing cases such as this one. Like all sentencing guidelines, it is not to be applied unthinkingly or rigidly as such an approach is inimical to justice but it provides a framework for the exercise the judge must perform.

19 Step 1 is to determine the offence category by analysing culpability and the harm caused. As to culpability, within a range of four options - low, medium, high and very high - the judge agreed with the submissions of both prosecution and defence and placed this case at the medium point, which is described in the guideline as "offender fell short of the appropriate standard in a manner that falls between descriptions in 'high' and 'low' culpability categories" and/or "systems were in place but these were not sufficiently adhered to or implemented". As to harm, the guideline points out at the top of page 5 that "health and safety offences are concerned with failures to manage risks to health and safety and do not require any actual proof that the offence caused any actual harm. The offence is in creating a risk of harm".

20 The initial assessment of harm must be reached based on the risk of harm caused by the offending by considering both the seriousness of the harm risked and the likelihood of that harm arising. A degree of judgment must be exercised by the sentencing court. The judge found that the seriousness of the harm risked was the highest because death was risked and the likelihood of that harm was medium rather than high or low. The guideline reveals that the appropriate category of harm in this situation is category 2. This is a provisional conclusion, as we shall see.

21 Mr Bennett has not sought to argue that the judge erred in applying the guideline up until this point. It is necessary therefore to examine the judge's reasoning thereafter in a little more detail before turning to the criticisms it has attracted. To reach a final conclusion as to the harm category the judge was required to ask himself whether either or both of two further factors applied. If so, then either the provisional conclusion as to category of harm may be adjusted upwards to the next category or a substantial move upwards within the relevant category range may be justified at step 2. The guideline specifically requires the judge to consider one of these two options. The two factors are (1) whether the offence exposed a number of workers or members of the public to the risk of harm; the greater the number of people, the greater of risk of harm and (2) whether the offence was a significant cause of actual harm.

22 In a footnote, the guideline provides that "a significant cause is one which more than minimally, negligibly or trivially contributed to the outcome. It does not have to be the sole or principal cause". It was agreed that the offence was a significant cause of the actual harm, the death of Mr Skinner, and although the appellant denied that a number of workers or members of the public had been exposed to the risk of harm, the judge concluded that both factors applied in this case. He said:

> "In this case, it's said that the risk exposed four other employees who

> worked on this particular task over the course of those two days. They're all exposed to a risk in the same way that Mr Skinner was because the fact that if there's no risk assessment or there's no visits to the site to make, that assessment so the control measures can't be put in place, well then everyone is at risk who goes into that unsafe zone and therefore, I do reach a conclusion that there were four employees who were exposed to a risk.
>
> That's not to say they're exposed to the same risk as Mr Skinner and it's tempting to consider that in a narrow context, but I think it's right that it should be considered in its wider context."

23 Despite being satisfied that both factors applied, he declined to move up into the next category of harm and so remained at his provisional conclusion that medium culpability category 2 was correct. The judge said:

> "I do not find it necessary to move up into the next category. However, I decline to remain of the view that it should stay in the same part of the starting point because to me, it seem that this was a significant factor which I need to look at in terms of making a final harm assessment and I do conclude that it is necessary to move up the range and perhaps, substantially so in a case of this nature.
>
> There is sufficient scope in any event, in my judgment, for the case in terms of its penalty that falls within the range of category two, medium culpability, in any event, because it does actually cross into the coinciding range in category one. So, I don't believe I am doing anyone a disservice in approaching it in that way."

24 At step 2 in the guideline inevitably the court was concerned with the financial size, status and health of the appellant company. The company provided evidence to enable an accurate assessment of its financial status as the guideline requires. This demonstrated to the judge that in 2016 the company returned a profit of around £114,000 before tax and £85,000 net from a turnover of around £2.3 million.

25 There was no dispute that the appellant was a small business and the relevant table on page 8 of the guideline covers enterprises with a turnover between £2 million and £10 million. Applying the medium culpability harm category 2, as he said he would, the judge reached a provisional fine of £220,000. The judge found no aggravating features present. By way of mitigation, the company could rely upon its clean record and otherwise good history of health and safety and the fact that there had been a delay in bringing the matter to resolution due to the investigation process which had followed a complex

route, as is commonly the case in such situations.

26 Although it was no mitigation that an employee was neglectful of his own safety, the company having a duty to protect all workers, even those who might be neglectful of their safety in a reasonably foreseeable way, the judge proceeded on the basis that the appellant company had admitted its liability at the first reasonable opportunity. It had also acted swiftly and effectively to remedy its failures. Although the judge was not persuaded that the appellant company had co-operated with the investigation to an inordinate degree justifying an additional allowance in mitigation, the mitigation he had found available to it justified a reduction of £30,000 in the provisional fine.

27 At step 3 in the guideline the judge is required to step back and review the proposed fine to ensure that it fulfils the objectives of sentencing and at this point the guideline makes clear that the court may adjust the fine upwards or downwards, including outside the range. This provision emphasises the degree of flexibility available to the sentencing judge to ensure that the punishment imposed meets the circumstances. The ability of the organisation to pay a financial penalty proposed is plainly a vital feature. The guideline anticipates that the court's power to allow time for payment and to order that the fine be paid in instalments will be taken into account in the final review before imposition of the penalty.

28 In this regard, the judge considered a statement from Mr Rivers, which included his view of the ongoing viability of the company and the potential impact of a deterrent sentence. Specifically, the guideline states that the level of the fine should reflect the extent to which the offender fell below the required standard. It sets out the principles that the fine should meet in a fair and proportionate way the objectives of punishment, deterrence and the removal of any gain derived through the commission of the offence, that latter feature plainly not relevant here. The guideline also says that the fine must be "sufficiently substantial to have a real economic impact which will bring home to both management and shareholders the need to comply with health and safety legislation". The judge explicitly referred to these principles.

29 At step 4 other factors that may warrant adjustment of the proposed fine must be considered, but none apply here.

30 Similarly, at step 5 assistance to the prosecution or other matters indicating a reduction do not apply.

31 The judge did apply a full one third discount at step 6, recognising the guilty plea.

32 The features at steps 7 and 8 do not apply, concerned as they are with ancillary orders and the totality principle, and, as we have made plain, the learned judge gave reasons for his sentence as required at step 9.

33 Having heard submissions as to time to pay, the judge concluded that 2 years, whilst having an inevitable impact on the extent to which profits could be drawn from the business, would not cause disproportionate hardship.

34 Mr Bennett submits that although the judge declined to move up to category harm 1, his provisional sentence of a fine of £210,000 is well above the starting point for a harm category 1 case and was too severe. Then, reducing that starting point by only £30,000, a seventh of the provisional sum, failed to recognise the substantial mitigation available, in particular from the appellant's previous impeccable record on health and safety matters, which had been attested to by a number of corroborative witnesses, clients and fellow contractors.

35 Having set out the steps taken by the judge and his explanations, we find his approach to be an impeccable one. The provisional sentence of £210,000 is within the category range of medium culpability harm category 2 for small businesses, albeit very close to the top of that range. The judge was aware of the crossover into category 1. We find no error in principle in the circumstances. He was entitled to move up within the category range he had reached at step 2 and, as Ms Lambert for the respondent points out in written submissions, the guideline deliberately states that if such a move is to be made, it can be a substantial one. If the judge had decided to move up to category 1, the starting point would have been £160,000 within a range of £100,000 to £600,000.

36 We reject the submission that because the business was at the lower end of the small business class in terms of turnover it was impermissible for the judge to move so far up the category range. Whilst we recognise that a substantial portion of the appellant's profit will be taken up with paying the fine for some time into the future, there is no evidence that the business will become insolvent as a consequence and on the information provided to the court its outgoings will be met.

37 Nor are we persuaded that the reduction made by the judge for mitigating features was insufficient. In a case where a business has committed such a clear beach of the law with devastating consequences, however unblemished its previous health and safety record, the guideline enables a fine to be reached which sharply underlines the importance of health and safety for small businesses. The judge properly gave a full discount of one third for the early guilty plea and in our judgment the fine ultimately imposed properly reflected all the relevant factors whilst also allowing fairly for the size of the enterprise.

38 We therefore reject the grounds of appeal targeted at the size of the fine.

39 However, Mr Bennett's final submissions on the appeal have touched more promising territory. This court has seen the appellant's accounts for the years leading up to the accident and we have seen a letter from the appellant's accountant in which he sets out reasons why the future turnover is likely to be

below that which has previously been achieved. It has been recognised by this court in previous judgments that an appropriate length of time should be provided to enable a business to trade satisfactory in the round while paying the fine and we are prepared to restructure the impact of the sentence imposed by allowing more time to pay.

40 We have come to the conclusion that the rate of payment should be £30,000 per year and the period within which to complete payment will be extended to 4 years.

41 To that extent only, this appeal is allowed.