Regina v Mick George Ltd

[2019] EWCA Crim 519

Before: Lord Justice Males Mr Justice Sweeney His Honour Judge Martin Edmunds QC (Sitting as a Judge of the CACD)

Thursday, 7 March 2019

Representation

Mr K Morton QC appeared on behalf of the Appellant.
Mr J Puzey appeared on behalf of the Crown.

Judgment

Mr Justice Sweeney:

Introduction

1 This is an appeal against sentence by limited leave of the single judge.

2 On 9 February 2018, in the Northamptonshire Magistrates' Court, the appellant company, Mick George Ltd (hereafter "MGL"), pleaded guilty, at the first opportunity and with a detailed basis of plea, to a charge of contravening regulation 25(3) of the Construction, Design and Management Regulations 2015 , in that, where there was a risk to construction work from overhead electric power cables, it had failed to provide suspended protections where vehicles needed to pass beneath the cables, or to provide measures providing an equivalent level of safety, contrary to section 33(1)C of the Health and Safety at Work Act 1974 . Thereafter MGL was committed for sentence, pursuant to section 3 of the Powers of Criminal Court (Sentencing) Act 2000 .

3 On 25 May 2018, in the Crown Court at Northampton, His Honour Judge Mayo sentenced MGL to a fine of £566,670 and ordered it to pay £9,000 towards the costs of the prosecution. Both sums were ordered to be paid within 12 months.

The facts

4 The facts, in short, are these. MGL is a substantial company involved in, amongst other things, construction and waste management, with an annual turnover of £54 million, £76 million, £87 million and £131 million in the financial years 2014 – 2017, and with annual operating profits in those years ranging from £3.8 million to £8.7 million. As at the end of the year to 31 May 2017 it had

net assets worth £32 million.

5 MGL had no previous convictions but had been the subject, in October 2012, of an Improvement Notice at a landfill site in relation to unsatisfactory safety arrangements that it had made in relation to overhead power cables. That Notice related to the improvement of works that had been done rather than the absence of works.

6 In early 2016, MGL was undertaking development of a field site at Great Billing in Northamptonshire, which was to become a waste transfer station. That required earth to be taken to the site in MGL's tipper trucks, driven by their employees, and then tipped there in order to raise the ground level by about a metre.

7 There was an obvious risk to health and safety at the site, in that a short distance after the entrance there were overhead high voltage power cables. MGL's tipper lorry drivers received training and had detailed written guidance and instructions in relation to high voltage overhead power cables, including instructions not to drive with their tipper raised (other than for a short distance in order to dislodge material in the tipper); to keep a lookout for overhead power cables and bunting; and not to load or unload their vehicle under cables. In addition, regulation 25 of the 2015 regulations provided that, where there was a risk to construction work from overhead power cables, either the traffic had to be directed away from the area of risk; or, if it was not practicable to do that, then suitable warning notices had to be provided together with suspended protections known as "goal posts" in the area where vehicles needed to pass underneath the cables.

8 On 24 February 2016, prior to the start of the tipping operation, one of MGL's experienced managers attended the site and requested that goal posts be erected. However, when on 3 March 2016 tipper lorries began tipping at the far end of the site, about 200 metres from the power cables, no goal posts had been set up. On 8 March 2016 an MGL employee attended the site to erect two sets of goal posts - one on each side of the power cables. However, he only installed one of the sets and some warning signs. He reported back to MGL that he had not installed the second set and apparently intended to do so on a subsequent visit.

9 On 9 March 2016 the weather changed to heavy rain and the site became very wet. Thus, that morning, it was decided to move the tipping operation to a location near to the entrance. The location was close to the side of the power cables where there were no goal posts. The plan was for lorries to reverse under the power cables and to tip once sufficiently beyond them.

10 One of the drivers who then arrived with a load of earth was Robert Earley. He had been trained to look for hazards on arrival at a site. Indeed, he had been to the site before and had seen the one set of goal posts that had been erected and was aware there were overhead power cables. He duly reversed under the

power cables from the side where the goal posts had been erected to the side that they had not, and to a point a little more than two lorry lengths past the power cables - where he then endeavoured to tip. However, not all the earth came out, so he drove forwards, with the tipper container still fully raised, in an attempt to dislodge the remaining earth. The raised tipper container then struck or came very close to striking the overhead power cables. CCTV footage from the lorry shows electrical arcing at that point. Mr Earley then got out of his cab to inspect the state of his lorry and then got back in again to reverse, immediately upon which there was more arcing and flames from the tyres of the lorry as well. Mr Earley was clearly fortunate not to have been seriously injured or killed during the incident.

11 The incident was reported to MGL's health and safety manager later that day. The following day it was reported to the Health and Safety Executive and a second set of goal posts were installed. MGL also put in place more systematic measures to address the risk.

The proceedings in the Crown Court

12 The prosecution submitted that there were three matters that made the case a serious one, namely, the fact that the risk had existed since operations began on 3 March 2016; the fact that MGL knew perfectly well that warning barriers and goal posts should have been erected; and the fact that this was not the first time that MGL had been pulled up for having inadequate protection against the risk of striking overhead power cables. Further, it was the prosecution case that the approach to assessing the risk was too relaxed - for example, MGL had not established the exact height of the power cables from the ground. It was also submitted that the failure to erect the second set of goal posts was a significant, underlying and causative factor.

13 Against that background, and applying the relevant Definitive Guideline, the prosecution submitted that culpability was high, as there was a period of risk. It was not a single lapse on a single day. Rather, MGL had failed to follow industry practice (even though it had received a warning before) and the actions that it had taken had not been enough to prevent a repetition. Thus, it could not be said that significant steps had been taken to comply with MGL's legal duty. There had been some efforts, it was said, but they were quite inadequate.

14 MGL submitted, in contrast, that culpability was low. It was common ground between the parties that the harm risked was death and that therefore the seriousness of that harm fell into level A. The prosecution submitted that the likelihood of the harm eventuating was at least "medium" and arguably "high" and underlined, given the likely number of people exposed to the risk during the tipping operation, that the guideline recognised that the greater the number of people exposed to the risk, the greater the risk of harm. In contrast again, MGL argued that the likelihood of the harm risked eventuating was nil up until 9

March - when what happened had been an isolated incident which had arisen out of a series of coincidental factors, not least that the driver had driven forward, further than anticipated, with his tipper container up. Therefore, MGL suggested, the risk was low.

15 The prosecution further submitted that the previous warning went to culpability, starting point and the category range.

16 In passing sentence, the judge rehearsed the facts and explained that he did not regard the issue of the Improvement Notice in 2012 as being an aggravating factor - rather, it had simply prevented MGL from asserting in mitigation that it had never had enforcement action taken against it.

17 Following the steps in the Guideline, the judge concluded that culpability was towards the bottom end of "medium". MGL, he said, had been aware of all the safety measures that had to be in place and had continued to allow tipping operations when they were not fully in place. MGL had not fallen far short of the appropriate standard and thus culpability was not high - but nor did the descriptions of low culpability in the Guideline apply. The judge continued that the seriousness of the harm risked was agreed to be level A but, against the background that MGL was responsible for 422,000 tipping operations a year, he did not agree with MGL that the likelihood of the harm risked eventuating was "low". Once the regulations had been breached that likelihood was, he concluded, "medium" and thus, applying the Guideline, overall harm fell into category 2.

18 However, to avoid double counting he did not apply any uplift to reflect the number of people exposed to the risk of death. As MGL's current annual turnover was in excess of £50 million it was, in the terms of the Guideline, said the judge, a "large organisation" and thus the combination of "medium" culpability and harm category 2 yielded a starting point of a fine of £600,000 and a range from £300,000 to £1.5 million. There were no aggravating factors, said the judge, including no actual harm. However, in mitigation, MGL had a good safety record. The judge then reassessed the starting point, though it is not clear on what basis, and concluded it should go up to a fine of £850,000. The judge continued that he was next required to set a notional fine after trial which would have a real economic impact on MGL, and which would bring home to its management and shareholders the need to comply with health and safety legislation.

19 Whilst the judge noted that the defence had suggested that MGL was at the bottom of the large organisation range, had recently made substantial investments, and so was not cash rich, he nevertheless opined that MGL was a very healthy and well run business and said that, having stepped back, as required by the Guideline, he had concluded that the notional fine after a trial should be the same as the starting point, namely £850,000. From that he deducted one-third for the early guilty plea - thus resulting in the fine to which we have already referred.

The Grounds of Appeal

20 There are two grounds of appeal, namely that:

(1) The judge fell into error in his assessment of the likelihood of the level A harm occurring, which led to the erroneous conclusion that this was a harm Category 2 case when he should have concluded that it was a harm Category 3 case;
(2) Even on the judge's findings he imposed a starting point which was manifestly excessive.

21 It is submitted on MGL's behalf that, whether in isolation or in combination, those two grounds lead to the conclusion that the fine imposed was manifestly excessive.

The submissions

Ground 1 – The likelihood of level A harm occurring

22 As we have indicated, the judge concluded that culpability was towards the bottom end of "medium". No issue is taken with that, nor with the seriousness of harm risked being level A, as that was agreed. Equally, it is common ground that the next matter for assessment by the judge was the likelihood of the harm risked (i.e. death) eventuating, not the likelihood of any harm eventuating.

23 On behalf of the appellant, Mr Keith Morton QC submits that there were two aspects to that assessment namely, the likelihood of a situation arising resulting in the risk of any harm occurring and, if that situation did arise, the likelihood of that harm being death. Here, Mr Morton submits, in order for there to be any risk at all, a tipper truck would have to be driven contrary to the training provided, that is, with the tipper container raised into, or into close proximity with, the power cables. Here, that had only occurred as a result of an unusual combination of events, namely the decision taken, because of the bad weather, to move the tipping area closer to the overhead power cables but still a safe distance from them; the fact that the driver had moved forward from that location for a considerably greater distance than the short distance required to achieve the purpose of dislodging the remaining earth. In so doing, the driver had moved into, or into very close proximity of, the overhead power cables, which he knew to be present and which he knew were marked (albeit on the other side of them) by a set of goal posts.

24 Mr Morton underlines that MGL does indeed undertake in the order of 422,000 tipper truck operations every year, which are undertaken by around 230 drivers using 200 vehicles, and emphasises that there has never been a similar incident. Whilst accepting that each case turns on its own facts, he has referred us to *R v Tata Steel UK Ltd [2017] EWCA Crim 704* and *R v Diamond Box Ltd [2017] EWCA Crim 1904* and the facts of those cases. We shall return to the *Diamond Box* case in due course.

25 Against that background Mr Morton submits that the likelihood of any harm occurring was "low". Mr Morton accepts that, if any harm occurred, it obviously could result in deaths - but emphasises that there was in fact no harm in this case and, albeit accepting that one must be cautious about statistics, points out that of the 15,297 safety related electrical incidents reported to the Health and Safety Executive in 2017, only six, that is 0.04% of them, resulted in death. Therefore, Mr Morton submits, the judge's assessment should have been that there was a low likelihood of level A harm and thus that harm fell overall into category 3 not category 2.

26 On behalf of the respondent, Mr Puzey submits that:

(i) The fact of the bad weather causing the decision to move the tipping area to the top of the field, and thus closer to the power cables, cannot be viewed of itself as an unusual or unlikely factor.

(ii) In very bad weather and with a sticky load, the driver moving forward more than two lorry lengths to dislodge the load could not be viewed as unlikely, albeit that that was not suggested by the driver himself. That is particularly so, it is said, as there is no evidence that the driver was ever instructed on a maximum distance that he was permitted to move forwards with the tipper up. At worst, Mr Puzey submits, it was simply a misjudgement by the driver.

(iii) Similarly, the fact that the driver knew that there were overhead cables did not of itself render an incident of this nature unlikely. Reliance on training and instructions falls at the bottom of any hierarchy of safety measures as employees do make mistakes and can misjudge their positions. Indeed, it is precisely because of that that precautions such as goal posts are required in situations of this type.

(iv) The fact that there is no evidence of any previous near miss is simply one factor to take into account, as the court made clear in the *Diamond Box* case (above) - in which, at paragraphs 17 and 18 of the judgment, it addressed a similar submission made on behalf of the appellant and concluded that the assessment of the likelihood of the relevant risk eventuating is quintessentially a matter for the sentencing judge on all the evidence before him. The court continued that a substantial period in which a risk did not fruit into an accident did not necessarily mean that the likelihood of the risk was not high but may weigh heavily in the balance. It all depends, said the court, on the circumstances of the case. Other relevant factors may include the extent to which the source of the risk was isolated, accessible and in fact accessed; whether the risk was exposed or contingent on an individual taking other unexpected steps, and the nature of any safety features that were over-ridden. In the instant case, Mr Puzey submits, the source was not physically isolated, it was accessible and did not involve safety features being over-ridden nor upon particularly unforeseeable actions on the part of employees.

(v) The fact that there was no harm was a matter of pure good fortune.

(vi) The statistics as to electrical incidents quoted by MGL were not helpful as there was no way of knowing whether the situations were comparable. However, this was not the first time that MGL had been put on notice of failures concerning its physical precautions against this type of incident.

(vii) The judge was correct to conclude that there was a medium likelihood of the

harm that was risked eventuating and thus this was a harm category 2 case.

27 During the course of argument, when it was put to him by the court, Mr Morton accepted that it was also appropriate to take into account the fact that the accident happened within hours of work beginning at the relevant part of the site.

Ground 2 – The starting point was manifestly excessive

28 Mr Morton accepts that if the judge was right to conclude that, overall, this was a harm category 2 case, the starting point was £600,000, with a range from £300,000 to £1.5 million, but underlines that, if it was a harm category 3 case, the starting point would have been £300,000 with a range from £130,000 to £750,000.

29 Whilst Mr Morton's first argument is that the latter was the correct category, he further submits that, even on the judge's categorisation, the jump from £600,000 to £850,000 was plainly manifestly excessive, not least as it failed to reflect, at all, the judge's conclusion that culpability was at the lower end of medium.

30 Equally Mr Morton submits that:

(i) The judge failed to take sufficient account of the fact that the definition in the guideline of a "large organisation" is one with an annual turnover, or equivalent, of £50 million or more - which definition thus applies to organisations with far greater turnovers than MGL, with the guideline making specific provision for the increase of starting points in relation to such organisations - and submits that the ranges should be seen in that light and that thus MGL's starting point should be towards the lower end of the relevant range.

(ii) It was only in 2017 that turnover had significantly escalated to £130 million and, by relying on that figure, the judge had effectively punished MGL for its recent hard work and success.

(iii) The judge accepted that there were no aggravating factors and also accepted that there was significant mitigation. Indeed, it is submitted, all the mitigating factors set out in the Guideline were present, albeit that the judge did not particularise them in his sentencing remarks.

Mr Morton therefore submits that, by whichever route, a starting point of £850,000 was simply unsustainable. Likewise, he submits, when checking at step 3 whether the proposed fine was proportionate to the means of the offender, the judge failed to have sufficient regard to the overall financial circumstances of MGL, including its turnover in past years, its low profit margins (averaging just under 8%), its poor cash flow and the fact that an investment proposed in its most recent accounts had not taken place because of its overall financial position.

The judge, Mr Morton submits, attached too much significance to turnover in the most recent year and thus fell into the very error that step 3 was intended to avoid - as turnover was a factor to determine the starting point, but thereafter it was incumbent on the court to reflect the defendant's overall financial position when determining the actual fine to be imposed. That was, he submits, consistent with the Guideline - which expressly provides that profitability will be relevant and that, if an organisation has a small profit margin relative to its turnover,

downward adjustment may be needed.

31 In response, Mr Puzey underlines that the definition of "large organisations" is a very wide one and that MGL's turnover for the years 2014 to 2016 was well over the £50 million threshold, and that it was 2.5 times that threshold in 2017. Therefore, he submits, an upward adjustment from £600,000 to £850,000 at step 3 was entirely justified and, given that the purpose of step 3 is to ensure that a fine is sufficiently substantial to have a real economic impact, which will bring home to managers and shareholders the need to comply with health and safety legislation, a fine of £850,000 was entirely appropriate as the notional sentence after trial. It represented about 10% of the recent operating profit per annum and the judge had expressly taken into account MGL's points as to its relative size, the fact that it had recently made substantial investments and that it was not cash rich.

32 This was, Mr Puzey submits, plainly a large company which was comfortable financially. In reality, the principal feature of its mitigation was that it had no previous convictions. In the result, Mr Puzey submits, the fine imposed was within the margin of discretion afforded to the judge by the Guideline.

Analysis

33 Applying the Guideline and the principles identified in the authorities, and addressing the steps that the judge was required to follow, as to step 1 there is, as we have indicated, no dispute with the finding that culpability was at the lower end of "medium", nor is there any dispute with the finding that the seriousness of the harm risked fell into level A.

34 Equally, as was made clear in the *Diamond Box* case, the assessment of the likelihood of the harm risked eventuating was quintessentially a matter for the sentencing judge on all the available evidence. It seems to us, particularly in the light of the submissions made on behalf of the respondent and the fact that the accident occurred within hours of the relevant work beginning, that the judge was entitled to conclude that, in this case, the risk of eventuation was "medium". No upward adjustment of that sentence was required via the number of people exposed to the risk and, as we have indicated, there was no actual harm.

35 At step 2, MGL was clearly a large organisation and thus the appropriate starting point was a fine of £600,000, with a range from £300,000 to £1.5 million. However, MGL was clearly not a very large organisation and nor did its recent turnover justify a substantial increase from the starting point at that stage. Rather, in our view, there should have been, in the course of the balancing exercise, some reduction from the starting point to reflect the fact that culpability was in the lower part of the "medium" range and a further reduction to reflect the fact that there were no aggravating features and a number of mitigating features.

36 We consider that the appropriate total reduction from the starting point should have been one of £150,000 (rather than an increase of £350,000) resulting, at that stage, in a notional fine, after trial, of £450,000.

37 At steps 3 and 4, the judge had to step back and review and, as necessary, adjust that notional fine, so that it fulfilled the need of being sufficiently substantial to have a real economic impact which would bring home to both management and shareholders the need to comply with health and safety legislation.

38 Having taken into account MGL's submissions, the judge concluded that MGL was very healthy financially. In our view, he was entitled to reach that conclusion and to apply it at stage 3. We conclude that that should have resulted in an increase from the initial notional fine, after trial, of £450,000 to an ultimate notional fine, after trial, of £500,000. From that, full discount for plea must be deducted, thereby giving an ultimate fine, modestly rounded up, of £334,000.

Conclusion

39 For the reasons set out above, we allow the appeal. We quash the fine imposed and substitute for it the fine of £334,000 that we have indicated - which will remain payable within a year of the imposition of sentence below.

40 Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.