# Regina v Palmer Timber Limited

## [2019] EWCA Crim 611

Before: Lady Justice Sharp Mr Justice Goose His Honour Judge Sloan, QC (Sitting as a Judge of the Court of Appeal Criminal Division)

Tuesday, 12 March 2019

### Representation

Mr D Adamson appeared on behalf of the Applicant.

### Judgment

Mr Justice Goose:

### Introduction

1 This is an appeal, with leave, from the decision of His Honour Judge Berlin sitting in the Crown Court at Wolverhampton on the 22 June 2018. Palmer Timber Limited, the appellant, appeals against the sentence imposed by the court of a fine of £730,000, to be paid over four years. Before sentence, on the 3 August 2017, the appellant had pleaded guilty in the Magistrates' Court to an offence, contrary to Regulations 4 and 17(1) of the Workplace (Health, Safety and Welfare) Regulations 1992 and section 33(1)(c) of the Health and Safety at Work etc Act 1974 , of failing to ensure that the workplace was organised in such a way, as to ensure that pedestrians and vehicles could circulate in a safe manner.

2 Before turning to the appeal itself a short, preliminary point has been identified by the Registrar. The Memorandum of Conviction records the offence as having been committed to the Crown Court under section 4 of the Powers of Criminal Courts (Sentencing) Act 2000 , whilst it should have been committed for sentence under the general power section 3 of the Act. However, since the Magistrates' Court was vested with the necessary jurisdiction to commit the case to the Crown Court, any error does not affect the validity of the committal - see *R v Ayhan [2011] EWCA Crim 3184* .

### The facts

The appellant is a privately-owned company that operates from Cradley Heath, Sandwell, in the West Midlands. It operates from a large site of 30 acres and

employs almost 100 people. The appellant's business is concerned with wood products used in the construction industry and operates a large modern mill. Also, the appellant owns its own transport fleet, which includes articulated lorries and forklift trucks.

3 On Monday 23 February 2015 at around 4.00pm, the yard, which contained open spaces between large and open-ended buildings was working as normal. This Court has had the opportunity to view a CCTV recording of the relevant area, but not of the accident, which shows the movement of vehicles and employee pedestrians within the appellant's site. The process involved employees picking wooden products from stacked shelves within the buildings and transferring them via forklift, side-lift or Combi-lift vehicles being driven by other employees, to be loaded onto lorries within the yard. At the time of the accident the yard was busy and noisy, whilst the loading and unloading of lorries was being carried out. Six or seven lorries were being loaded at any one time and forklift trucks, whether front or side-lifting or Combi-lifting, were being used. Pedestrian employees were present to assist in the movement of wooden products from racks to forklift and from forklifts to the lorries.

4 Sean Buttery, a side-loader driver, and Paul Baker, a picker, had just completed loading an 18-tonne curtain-sided lorry, driven by Kevin Price and were working in loading bay number four. Both Sean Buttery and Paul Baker were wearing high visibility jackets but were not seen by Matthew Williams who was driving a Combi-lift truck. The Combi-lift trucks in operation on the site were a recent addition to the forklift fleet. In 2014 the appellant had acquired some Combi-lift trucks to trial them within the business. They were not without criticism from the drivers or one of their supervisors, who found that their vision to the front offside was obscured by the lift mast. The drivers complained that it created a substantial blind spot for the operator. The appellant provided some additional training and awareness instruction before introducing the Combi-lift trucks permanently on 6 February 2015.

5 After completing their previous task, Sean Buttery and Paul Baker were waiting to commence further work and were standing in the yard. They were not seen by Matthew Williams, as he drove his Combi-lift truck towards them. It appears that both men were positioned in the blind spot, such that they could not be seen by Mr Williams and were struck by the Combi-lift. Sean Buttery was initially struck on the ankle by the right side, causing him to suffer a fractured ankle. He avoided more serious, life-threatening injury by clinging to the fork of the truck and the safety bar on top of the engine. Paul Baker was also struck to the right side of his lower leg but was then dragged along the ground for six or seven yards before the driver stopped. Paul Baker's head was directly in front of the wheel of the Combi-lift; his life had been saved by pure chance. The high visibility coat he wore was made of a material which was able to slide along the ground rather than become trapped under the wheel of the Combi-lift, which would certainly have led to his death. Nevertheless, Paul Baker suffered very

significant and life-threatening injuries. Photographs of the aftermath reveal substantial blood loss at the scene. He has been left with permanent and life-changing injuries. He suffered a fractured eye socket and a lost piece of bone from his face, he had a nine to ten-inch scar on the left side of his face, and 14 stitches were required to reattach his left ear. He has nerve damage on both sides of his face and is unable to raise his eyebrows. He has trouble with his speech and eating because of damage to his tongue. His left collar bone was broken and required to be pinned and plated. He suffered a de-gloving injury to his hand and left forearm, losing eight to nine inches of skin. Both forearm bones were broken on the left side. He had a broken rib and damaged his left knee. He required six skin grafts and lost an artery from his arm. He has very limited movement in his fingers, which is likely to be permanent.

6 On 10 March 2015 an Improvement Notice was served on the appellant by the Health and Safety Executive, requiring the company to remedy its failure to organise its workplace in such a way that pedestrians and vehicles could circulate in a safe manner. It was after the service of this notice, consequent upon the accident, that the appellant undertook the necessary changes to the workplace. After proceedings were commenced against the appellant in the Magistrates' Court, an early indication of plea was given, leading to the committal for sentence to the Crown Court at Wolverhampton.

## Pre-sentence discussion between the parties

In their approach to sentencing, the prosecution and appellant indicated their submissions in respect of culpability and harm under the Health and Safety Offences Guideline by the Sentencing Council. The prosecution contended that culpability should be assessed as high under Step 1, whilst the appellant submitted that it would be assessed as medium level of culpability. Under the assessment of harm under paragraph 1, the parties agreed that the seriousness of harm risk was at level A, namely death or the highest physical or mental impairment. It was also agreed between the parties that the likelihood of level A harm was at the medium level, thereby setting harm at Category 2 under the Guideline.

7 In sentencing the appellant, the judge found that culpability was high and that harm was at category 1, involving a high likelihood of harm. Recognising that there had been some measure of agreement between the parties, when suggesting harm was at medium level, the judge made his own finding and explained his reasons, to which we will return later. On behalf of the appellant, it is submitted that the agreement of level A harm was not tentative but was "…an agreement reached between the defendant and a specialist prosecutor". The appellant argues that it was wrong for the judge to effectively ignore the agreement between the parties.

8 When faced with this submission the judge correctly referred to the decision of this court in *R v ATE Truck and Trailer Sales Limited [2018] EWCA Crim 752* in which Gross LJ stated:

> "Such sensible agreement is to be encouraged and it is to be expected will be weighed carefully by any Court before departing from it. However and ultimately, no such agreement can bind the Court; as a matter of constitutional principle […] the imposition of a sentence is a matter for the Judiciary […] Principles of transparent and open justice point to the same conclusion. A private agreement between [the] prosecution and defence will doubtless inform the Court but, helpful though it may [well] be, [it] cannot be determinative of sentence."

9 This court repeated the same principle in the earlier decision of *R v Diamond Box Limited [2017] EWCA Crim 1904* when Hickinbottom LJ stated:

> "The assessment of the likelihood or chance of harm is quintessentially a matter for the sentencing judge on all the evidence before him."

Accordingly, whilst it was important for the judge to consider the agreed position between the parties upon the likelihood of harm, he was not bound by such agreement.

## The Judge's sentencing and reasoning

10 His Honour Judge Berlin applied the Guideline in the correct stepped approach. He concluded that culpability at step 1 was at the upper end of high, under the Guideline. There was evidence that the appellant had failed to put in place measures that were recognised standards in the industry, as particularised in the Health and Safety Guidelines on Safe Site Design. Further, the appellant failed to conduct any suitable and sufficient risk assessment, which was made more serious by the introduction of Combi-lift vehicles in January 2015. Drivers and a supervisor had raised clear concerns about the significant blind spot created by the use of the Combi-lifts, which the judge described as "[…] highly culpable in itself". The appellant also allowed the breach of its duty to subsist over a long period of time. Taking these factors cumulatively, the judge concluded the culpability was at the upper end of the high category.

The judge rejected the contention that there was only a medium likelihood of risk of harm at level A. He concluded that the likelihood of such harm was high. An independent Health and Safety Consultant had identified the vehicle and passenger movement on site as a high risk in 2013, before the introduction of

Combi-lifts. Notwithstanding this previously identified high risk problem, in January 2015 the appellant introduced Combi-lift vehicles, being some six weeks before the accident. In the mind of the judge this increased the likelihood of very serious harm, given the blind spot problem, which added to the already high risk and noisy yard, particularly at peak loading times. The judge expressed himself in this way:

> "It is no coincidence that within six weeks of their introduction a very serious accident, which could have been fatal, occurred. It is noted that there was no recorded risk assessment following their introduction or before their introduction."

Given that the risk of death or of the most serious injury was obvious in collisions between forklift and Combi-lift vehicles, this caused the judge to find that there was a high likelihood of level A harm caused by the offences of the appellant.

Further, the judge found that the harm assessment in paragraph 2 of the Guideline, both sub paragraphs(i) and (ii) were engaged. The breach of duty exposed a number of workers to the risk of harm on a daily basis as they moved around the yard. Also, whilst the type of harm caused to complainant, Mr Baker, fell within with level B, it was only a matter of chance that he did not suffer fatal injury and was only just short of level A.

11 The turnover of the appellant's business meant that it fell within a medium-sized organisation within step 2 of the Guideline. With high culpability and harm at category 1, the starting point was a fine of £950,000 with a range of £600,000 to two and a half million pounds.

12 Adjusting the starting point upwards to reflect the harm, paragraph 2, findings and balancing the mitigating factors whilst reflecting on the appellant's Annual Report and financial statements, the judge increased the fine to £1.1 million. After discount for early plea, the fine imposed was £730,000. The judge granted four years in which the fine was to be paid.

## Grounds of appeal

13 Firstly, the appellant contends that the judge incorrectly concluded that culpability was high. It is submitted that the judge did not give sufficient account to the fact the workforce had received training in the use of the Combi-lifts which included techniques when operating the plant. In short, the operator should adjust his head position to see around the obstruction created by the lift mast. Also, the judge failed to take sufficient account of the difficulty in segregating plant and pedestrians within the site.

Secondly, it is argued that the judge was wrong to conclude that the likelihood of harm risk at level A was high. Leaving aside the contention that the agreement between the parties upon this issue should have been adhered to by the judge, it is argued that he wrongly elided the harm risked with the likelihood of harm arising. Further, the judge gave insufficient weight to the limited measures introduced by the appellant to reduce risk, for example, by imposing a one-way system, speed limits and driver leaflets with toolbox training. The appellant also submits that the judge failed to take sufficient account of industry data, that only 50 people are killed and over 5,000 are injured in accidents involving workplace transport each year. It is submitted that such data does not lead to a conclusion of high likelihood of level A harm.

Thirdly, it is argued by the appellant that the judge disproportionately increased the fine to £1.4 million before reducing it to £1.1 million after mitigating factors were taken into account. It is submitted that the increase in fine should not have been so great when the actual harm caused was not at level A, death.

Fourthly, it is submitted that the level of fine of £1.1 million was disproportionate, compared to the pre-tax profit of the appellant's business which averaged over a period from 2015 to 2017 to approximately £600,000. It is argued that the fine represented close to twice the average pre-tax profit of the business and that such fine should be reserved for the most serious cases.

## Discussion and conclusion

In reaching the conclusions that the judge did in this case he undertook a careful and detailed assessment of the evidence placed before the court. Before turning to the Guideline, the judge made express findings on the evidence:

> **"Findings:**
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> The company did not address the workplace transport matters which required planning and work to resolve the difficulties during loading and unloading within a cluttered, noisy and high-risk yard to enable
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> pedestrians and lorries to circulate in a safe manner and to ensure safety by enough segregation. There were short-term measures introduced, such as the driver leaflet, the one-way system and the speed limit, but this did not address the core problem of too many lorries and too many pedestrians mingling in the yard at one time. The additional ingredient of the Combi-lifts with its known blind spot added significantly to the already high-risk area
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> …The primary cause of the accident was the failure to organise its

> workplace so that pedestrians and lorries could circulate safely. The incident was a serious example of such a failure. It is noted that whilst there have been no previous actual injuries from the incidents from the yard, on two previous occasions in 2013 there was physical contact between the side loaders and pedestrians in the yard. This should have put the company, if nothing else had, on notice."

14 In our judgment, the judge's finding on culpability within high category, and particularly its upper level therein, cannot be faulted. The breaches of duty had subsisted over a long period of time, with near misses two years earlier, even before the introduction of Combi-lifts. Such risk assessments as had been made, none for the Combi-lifts, did not lead to any significant planning or changing to the workplace beyond the most conservative of effort. The judge was right to conclude that culpability was in the high category.

15 In assessing harm, the judge observed that there was no argument otherwise than that seriousness of harm risked was at level A. The likelihood of such harm, which the judge found to be high, is a principal point of challenge by the appellant. In our judgment, the judge was entitled to find on the evidence that there was a high likelihood of harm in this case.

16 The judge did not elide the two questions that needed to be asked, namely what the likelihood of the event occurring was and what was the likelihood of that event causing level A harm. The Independent Consultant (Mr Peck) had identified as a high risk, the arrangements within the yard of vehicle and pedestrian accidents. The introduction of the quiet Combi-lifts with their blind spot, added not only to the likelihood of an accident or event, but also the likelihood of that event causing level A harm. Collisions between forklift and similar vehicles and pedestrians are highly likely to cause the most serious injuries and death. The injuries caused in this case were undoubtedly life-threatening, and death was only avoided by mere chance. In answering the two questions positively within paragraph 2 of harm within the Guideline, the judge was correct to conclude that there was a high likelihood of harm and not merely a medium likelihood. The judge took into account, when assessing the likelihood of harm, the limited steps taken by the appellant, but said of them:

> "…this was not addressing the real and critical, daily problem of mixing pedestrians and vehicles in a congested yard. There were not any barriers or delineated traffic routes to enable safe circulation, which itself increased in risk following the introduction of the three Combi-lifts in January 2015."

With that observation of the judge we agree.

In arriving at a fine of £1.1 million, the judge took into account the aggravating and mitigating factors identified within his sentencing remarks. He carefully assessed the financial position of the appellant disclosed within its accounts, including its pension scheme liabilities. We do not find that the judge fell into error.

A starting point for harm category 1, with high culpability, for a medium-sized organisation under the Guideline was £950,000. When taking into account the number of workers who were at risk on a daily basis within the yard and that the offence was a significant cause of actual harm just short of death, the judge then correctly increased significantly the fine to £1.4 million before reducing it by £300,000 (sic) to take into account mitigating factors.

It should also be borne in mind that the appellant had spent £1.7 million over a two-year period developing its site so as to increase the size, erecting further warehousing and racking and adding electrical fixed installations. All of this was undertaken or almost complete before the appellant had properly turned its attention to the serious and obvious risk which comprised the offence. This demonstrated, firstly, that the appellant had failed to prioritise the health and safety of pedestrians within the yard above development of the site, and secondly, it revealed the financial resources of the appellant. This was particularly significant in relation to step 3 of the Guideline, ensuring that the proposed fine based on turnover is proportionate to the overall means of the offender. The fact that the fine imposed exceeded the pre-tax profit of the company is plainly something to be taken into account by the court when sentencing for step 3 of the Guideline. We do not find that exceeding the annual pre-tax profit of the company should only occur in the most serious cases; the Guideline makes no such prescription. It requires a careful judgment after following the Guideline.

We are not persuaded in this case that the fine was disproportionate. In addition, permitting the applicant four years to pay the fine of £730,000 required payments of £182,500 a year. This was well within the means of the appellant.

In conclusion, we are satisfied that the fine imposed on the appellant was neither manifestly excessive, nor wrong in principle, and accordingly, we dismiss this appeal.