NC: [2019] EWCA Crim 1380
No: 201804808/A3
IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
Strand
London, WC2A 2LL

Thursday 11 July 2019

B e f o r e:

LADY JUSTICE NICOLA DAVIES DBE

MR JUSTICE PHILLIPS

MR JUSTICE JULIAN KNOWLES

R E G I N A
v
GASKELLS (NORTH WEST) LTD

Computer Aided Transcript of the Stenograph Notes of Epiq Europe Ltd, Lower Ground, 18-22 Furnival Street, London EC4A 1JS Tel No: 020 7404 1400 Email: rcj@epiqglobal.co.uk (Official Shorthand Writers to the Court)

WARNING: Reporting restrictions may apply to the contents transcribed in this document, particularly if the case concerned a sexual offence or involved a child. Reporting restrictions prohibit the publication of the applicable information to the public or any section of the public, in writing, in a broadcast or by means of the internet, including social media. Anyone who receives a copy of this transcript is responsible in law for making sure that applicable restrictions are not breached. A person who breaches a reporting restriction is liable to a fine and/or imprisonment. For guidance on whether reporting restrictions apply, and to what information, ask at the court office or take legal advice.

Mr A Thomas QC appeared on behalf of the **Appellant**

Miss R Emsley-Smith appeared on behalf of the **Crown**

J U D G M E N T
(APPROVED)

1. MR JUSTICE PHILLIPS: On 15 October 2015, in the Crown Court at Liverpool, the appellant pleaded guilty to failing to ensure the safety of employees, contrary to section 2(1) of the Health and Safety at Work Act 1974. On 16 July 2018 the appellant company pleaded guilty upon re-arraignment on a second indictment to a further offence of failing to ensure the safety of employees, contrary to the same provision. On 26 October 2018, His Honour Judge R. Trevor Jones sentenced the appellant company to a fine of £700,000 for the first offence, imposing no separate penalty for the second offence. The appellant was also ordered to pay costs of £99,806.57. At the same time a director of the appellant, Jonathan Gaskell was sentenced to a total of nine months' imprisonment, having pleaded guilty to two offences of being a director of a body corporate which committed an offence, namely the offences committed by the appellant.

2. Two years earlier a manager of the appellant, Paul Jukes had been convicted of being a manager of a body corporate which committed an offence, namely the first offence committed by the appellant. He was sentenced to nine months' imprisonment on 15 November 2016. On the same date an employee of the appellant, Michael Cunliffe, pleaded guilty to failing to take reasonable care for the health and safety of himself and others who may be affected by his acts or omissions at work contrary to section 7(a) of the Health and Safety at Work Act 1974. He was sentenced to four months' imprisonment suspended for two years.

3. The appellant company now appeals against sentence by leave of the single judge.

4. The facts of the offences are these. The appellant was a waste re-cycling company, located in Bootle, licensed to sort up to 50 tonnes of non-hazardous waste per day. In 2010 it employed 60 people, 20 of whom worked in the waste recycling process. The company expanded and by 2018 employed over 100 people. Jonathon Gaskell was the Managing Director and owned 75% of the company's shares. He controlled the appellant through a small management team which changed over time.

5. Waste material was sifted and the paper and cardboard retrieved was taken to a BOPA 456 baler. The baler comprised a hopper which fed the material into a compaction chamber and was usually operated in automatic mode. When enough material was loaded into the baler chamber, a horizontal hydraulic ram would compress the material into a standard sized bale. The bales were then pushed under a device known as a dromat which had four hydraulically-powered needles that would descend, picking up the baling wires from underneath and draw the wires around the bale before tying them off and cutting them.

6. In December 2010 the machine was primarily operated by Tony Griffin (who has since died). He was an experienced baler operator who had been trained in the machine by engineers who installed it in 2005. It was a second-hand unit that had been

manufactured in 1990. Griffin was not an engineer and he did not carry out preventative checks on interlocks or guards. He did undertake visual checks and would note any deficiencies on a daily check sheet. The check sheets were logged onto a spreadsheet and routinely emailed to Jonathan Gaskell, Paul Jukes (who was the general manager at the time) and Michael Cunliffe who worked as a fitter. Those deficiencies would be dealt with on an ad hoc basis by Cunliffe.

7. Zbigniew Galke assisted Griffin in operating the baler. He was one of a number of Polish nationals employed by the appellant. Only a couple of them were able to speak or read English, one to whom would be used to translate basic instructions. The baling machine would frequently get blocked, often at least once a shift.

8. At 11 am on 23 December 2010, Galke had been working on the baler when it became clogged. He opened the main chamber door and went inside. Whilst still inside the chamber, the machine activated and the hydraulic ram crushed Galke's lower body and amputated his leg. Other employees went to help, but none initially knew how to reverse the machine. Galke was eventually extracted from the chamber but was pronounced dead later that day.

9. A joint investigation took place between the police and the Health and Safety Executive. It was established that the condition of the baler machine had been allowed to deteriorate over a number of years. There had been no planned system of maintenance or inspection; only an ad hoc system of inexpensive repairs. The most serious fault was that the safety interlock switches for the baler machine had been deliberately bypassed. The switch which controlled the access door to the main baling chamber was found to be inoperable. The wire connecting the switch to the control panel had been damaged. Instead of tracing the fault and replacing the wire, Cunliffe installed a new wire on the control panel and by doing so short, circuited two relay channels with the result the machine could be operated when the door was open. That sub-standard repair was directly causative of the fatal accident.

10. Cunliffe had informed Gaskell and Jukes of his intention to bypass the interlock switch in an email dated 22 October 2010. A new switch was ordered on 23 December 2010, immediately after the fatal accident. Other safety interlock switches on the same machine were found to be defective or had been bypassed. Those faults were found to have been longstanding. The fault to the door sensor had been reported on a daily basis on the check sheet sent to Gaskell and Jukes from October 2010 until the date of the incident in December 2010.

11. The appellant company had also failed to apply risk assessments and safety operating procedures. They had documents as required by law available for inspection, but failed to implement the procedures. In early 2010 Gaskell provided Jukes with risk assessment

and safe operating procedures from another company, which were adopted, putting the company's name on them. No employee spoken to saw the document and many employees would have been unable to understand them in any event as they were not translated into Polish. There was no risk assessment or safety procedure to deal with safety when the baler broke down or needed to be unblocked.

12. Health and Safety management supervision was described as non existent and several employees described dangerous practices as being "routine". The Health and Safety Executive issued improvement and prohibition notices which required the appellant company to reinstate the baler to a proper condition and ensure that all employees were given written instructions regarding its safe use.

13. In January 2011 repair to the baler was undertaken by an independent engineer, Mr Torenbeek who replaced the defective and bypassed safety switches. Other worn or broken parts were replaced and the machine deemed safe to operate. The prohibition order was lifted and the baler resumed service. However, many of the underlying problems caused by the lack of maintenance remained. No system of preventative maintenance was put in place and similar problems resurfaced. When a problem required an engineer, Mr Torenbeek patched up the machine and got it running again. Between 2011 and 2015 Mr Torenbeek visited the company nine times, usually to deal with a baling issue. Mr Torenbeek often found that the guard to the baler had been disabled. On each occasion he reported the matter to the company. In December 2013, at Torenbeek's request, his company emailed the production manager at the appellant, Mr Gilbertson, to inform him that the guarding on the dromat had been disabled and should be put back in operation. On Torenbeek's next visit in March 2014 he found that the guard was still disabled or had been disabled again. His company again notified Gilbertson and informed him that it should be rectified urgently.

14. While proceedings in relation to the fatal accident were underway, Torenbeek informed Health and Safety Executive Inspectors that the guards were still being disabled. Three inspectors attended the company's premises on 16 July 2015 and could see that the baler was in operation while the dromat guard was raised. One inspector asked that the guard be fully lowered and the machine started. It became clear that the baler was not capable of running with the guard door closed. One employee, Darak Ratacak, then attempted to use a screwdriver to force the actuator near the switch, but was told to stop. The inspectors asked him how he was able to run the machine so with the guard up. He took magnets from a box spanner and stuck them onto the switch when the guard was raised. This allowed him to power the machine. When the magnet was removed the machine stopped.

15. A prohibition notice was issued preventing the machine being used because the appellant failed to ensure the guards and protective devices were not easily bypassed or disabled.

16. The appellant wrote to the Health and Safety Executive to explain that the machine had

developed a problem with the balers not being tied properly. It was claimed that on 16 July 2015, when the three Health and Safety Inspectors attended, the machines was being observed by Ratacak who was a machine operative and a member of the maintenance team. The letter said that he had defeated the interlock with a magnet because he wanted to observe the machine operating a single bale with the guard up. It was asserted that it had been in controlled circumstances in accordance with regulations. This explanation was not accepted. It was said the only reasonable inference was that senior management, at the very least, failed to prevent the use of the interlock bypass to avoid loss of productivity.

17. The appellant company and Gaskell pleaded guilty to the second offence on 16 July 2018, the day of trial. Those pleas were entered on the basis that the condition of the machine had fallen into a dangerous state on three occasions. During the hearing the judge indicated he would treat the circumstances of the second offence as an aggravating factor of the first.

18. Mr Galke's wife provided a victim impact statement in which she spoke of the dreadful loss to the family. At the time she and the children remained in Poland while he worked in the United Kingdom. Mrs Galke has since died.

19. In sentencing the judge considered the Definitive Sentencing Guideline for Health and Safety Offences. He regarded culpability in relation to the first offence as being high due to the ongoing failures over a sustained period, lack of training and supervision, risk assessments and safety operating procedures and the repeated comprehensive bypassing of safety devices and a failure to act on reported defects. The seriousness of harm was level A because of the risk was of death and the offence fell within Category 1. A number of workers were exposed to potential harm and the offence caused significant actual harm which necessitated an uplift within the range. The judge determined that the aggravating factor of the circumstances of the second case should also result in an additional uplift.

20. At the time of sentence the company had a turnover of £17 million and therefore fell into the medium category, which cover businesses with turnovers between £10 million and £50 million. The starting point for a Category 1 offence was £950,000, with a range of between £600,000 and £2.5 million. The appropriate starting point for the appellant, the judge found, was £750,000, increased to £900,000 to reflect the harm caused and increased to a further £1.1 million to reflect the aggravating features of the second case.

21. The judge considered the mitigation and heard submissions about the company's financial position based on an accountant's letter. For the accounting year ending March 2018 the provision for liabilities in the sum of £542,000 had been made. A valuable contract had been cancelled and some credit facilities had been lost. There had been substantial capital investment since 2011 of approximately £7.5 million. The company had supported

various charitable ventures. The judge had read a statement from Norman Cobley which produced figures for expenditure on the baler, including maintenance, since 2010, and a statement from the current Operations Manager had also been provided. At the time of sentence, the financial picture for the appellant was as follows. It had a turnover of £17 million, a gross profit figure of £2.6 million and a pre-tax profit figure of £339,000.

22. The judge made a downward adjustment to reflect the mitigation, leaving a figure of £950,000, reduced to £712,500 after 25 per cent credit to reflect that the appellants pleaded guilty at the Plea and Trial Preparation Hearing and then further reduced it to £700,000. The appellant company was also ordered to pay £99,806.57 costs. As already stated, Jonathan Gaskell was sentenced to eight months' imprisonment.

23. Mr Andrew Thomas QC advanced a number of grounds of appeal on behalf of the appellant, both in a skeleton argument and in oral argument today, each addressing why in his submission the appellant's fine was manifestly excessive.

24. The first ground was that the judge's approach to the second offence was unlawful or breached a legitimate expectation, in that the judge had indicated he would impose no separate penalty for the second offence but would treat it as an aggravating feature of the first, but in the event effectively imposed a substantial additional fine.

25. We do not agree. The judge was fully entitled to reflect the whole of the appellant's offending in the sentence imposed for the first offence. The resulting sentence was in no way unlawful and indeed was well within the range provided in the relevant sentencing guideline. Further, far from breaching the appellant's legitimate expectations, the judge did exactly what he said he would do, namely reflecting the second offence by regarding it as an aggravating factor in and increasing the sentence for the first offence accordingly.

26. The second ground is that the increase of £200,000 was in any event excessive. Again we do not agree. The appellant's culpability in respect of the further offending was particularly high given that the appellant had overridden a safety mechanism over a number of years where similar offending had already caused a fatal accident. There was undoubtedly a continuing failure to maintain the machine, and although the basis of plea was that it was only three occasions on which that gave rise to a risk of injury, that was three occasions too many. Such further conduct was a seriously aggravating factor and fully justified an increase in the region of 25 per cent within the applicable range, prior to adjustments. As the judge held, it was a cynical overriding of safety features for the purpose of maximising profit.
27. The third ground is that the judge did not take into account the significant delay between the first offence and sentence, said to be particularly prejudicial because increased revenues exposed the appellant to increased fines. However, the delay between the appellant's pleas to the first offence in 2015 and sentence was largely due to its further offending, and then its delay in pleading guilty until the day of trial. In any event, the

purpose of the sentencing guidelines is to assess the financial penalty appropriate at the date of sentencing, and furthermore, part of the appellant's argument, to which we will turn, is that regard should be had to its present low profitability in assessing the appropriate fine.

28. The fourth ground is that the judge did not give any or sufficient credit for the double impact of the sentence, Mr Thomas submitting that Jonathon Gaskell was punished twice as an individual and also as a 75 per cent shareholder in the company. Whilst that may have been an argument open to Mr Gaskell and may have factored into his sentence, we do not consider that the appellant can complain of double punishment.

29. The fifth ground is that the judge failed to have sufficient regard at stage 3 of the sentencing process of the guidelines to the economic effect on the appellant, taking into account the fact that its net assets and profitability were low in comparison to its turnover and that it has been exposed to significant losses and liabilities due to these offences. It is said that at this stage the judge should have taken into account the fact that a director and shareholder of a company was being imprisoned and therefore the need to bring home to management and shareholders the need to comply with Health and Safety legislation had been amply fulfilled by such a sentence.

30. However, the nature of the offending in this case, both the original offence giving rise to a wholly avoidable and tragic death and the subsequent cynical continuing failure to put the machine into a safe condition, in our judgment demanded a fine of the size imposed by the judge. Close examination of the company's accounts show that its profits before tax, and indeed after tax, were somewhat higher than that which was set out by Mr Thomas in his grounds of appeal, although we fully accept that that was an accidental omission no doubt because dividends had been taken off the figures before he stated them. In 2014/15 and 2015/16 net profits were in excess of £400,000 and in 2016/17 were almost £400,000. During the last four years the shareholders have been paid in the region of £700,000 in dividends. In those circumstances, standing back, as required at stage 3, we do not consider that the judge was wrong to decline to make a greater deduction than that which he did make, namely of £200,000. We consider that it is not arguable that the total financial penalty of £800,000 was disproportionate to the company's assets or profitability.

31. The sixth ground is that the judge, in giving credit of 25 per cent, failed to apply the 2007 Guidelines on Reduction for Guilty Pleas in force when the company pleaded guilty to the first offence in 2015 at the plea and trial preparation hearing. We accept that there is force in that submission and that the appellant should have had credit in the region of 30 per cent. For that reason, we quash the fine of £700,000 and replace it with one of £650,000 to reflect the proper degree of credit. To that extent the appeal is allowed.

32. As the first offence was on an indictment which was committed to the crown

court December 2010, there should have been a surcharge of £15. As we have otherwise reduced the sentence, it is appropriate to order that that surcharge be applied.

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

Lower Ground, 18-22 Furnival Street, London EC4A 1JS
Tel No: 020 7404 1400 Email: rcj@epiqglobal.co.uk