IN THE DISTRICT COURT
AT HASTINGS

I TE KŌTI-Ā-ROHE
KI HERETAUNGA

CRI-2018-020-001803
[2019] NZDC 16605

WORKSAFE NEW ZEALAND
Prosecutor

v

THE HOMEGROWN JUICE CO LTD
Defendant

Hearing:	14 August 2019
Appearances:	S Backhouse for the Prosecutor L Castle for the Defendant
Judgment:	14 August 2019

NOTES OF JUDGE B M MACKINTOSH ON SENTENCING

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[1] Thank you very much for the very thorough and helpful submissions that have been filed by both counsel in respect of this case.

[2] We are here today because The Homegrown Juice Company has pleaded guilty under the Health and Safety at Work Act 2015 to breaching its duty to ensure so far as reasonably practicable the health and safety of workers and in this it is of Mrs Manpreet Kaur. Sadly, and tragically on 14 June last year Mrs Kaur, aged 23 died as a result of what has been described as positional asphyxia essentially by being drawn into the GN24 hy-filling machine at her work having had her clothing caught on the crescent shaped hooks of the moving machine.

[3] The approach to sentencing in cases like this is provided by *Stumpmaster v Worksafe New Zealand* and basically there are four steps to be followed.[1] Firstly, to assess the amount of reparation to be paid to the victim. Secondly, to fix the amount of fine by reference to the guideline bans and the aggravating and mitigating features. Thirdly, to determine whether or not there are any further orders required under the legislation and fourthly, to make an overall assessment of the proportionality and appropriateness of imposing the sanctions under the first three steps.

[4] Turning to the facts of the matter, Mrs Kaur was an employee of The Homegrown Juice Company. Her main role was operating this machine, a GN24 machine which undertook filling and capping of bottles. Now according to the summary of facts there were no safe operating procedures for that machine. It was a relatively new machine on site and had been brought in from overseas to replace an older machine. I understand the workers were told not to enter the machine when it was running and to use the jog mode to change the spaces from behind the side door. It was imported, and it was not certified or assessed by a New Zealand engineer, although the engineers and the manufacturers had been involved in the instillation and the initial training in relation to it.

[5] On 10 October 2016 Worksafe visited the premises and it was apparent that the GN24 was not interlocked. An improvement notice was not issued at that point in time, but a subsequent email was sent advising that there was to be a requirement for interlocks on the GN24. There were some subsequent interactions and discussions let's say with the manufacturers to comply and it was anticipated that the interlock would be installed in late 2016. Unfortunately, that was not actually done as I have said not through any belligerence on behalf of the company at all but it simply either just slipped through the cracks or it just did not happen as was intended. In the meantime, a typed sign was put on the machine which specified it was not to be opened while operating but by the time of the incident it had fallen off.

[6] I understand there had been some training in relation to the use of this machine. It is not entirely clear what that was or what follow-up there had been from the initial

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[1] *Stumpmaster v Worksafe New Zealand* [2018] NZHC 2020.

oversight when it was being installed by the manufacturers. On 14 June 2017 Mrs Kaur started work at 4.00 pm. Towards the end of the shift at about 2.00 am she commenced cleaning the GN24. She attempted to remove the spacers or the washers by entering the machine through the front access doors. The machine was operating at the time and she was drawn in when caught on the crescent shaped hook points either by her overalls or by a bracelet or both. Tragically her arm was pulled across her throat, she was asphyxiated and died at about 2.15 am.

[7] The hazard involved in this incident was, of course, the entrapment or entanglement between the rotating filling drums and the exit points of the rotating pick pens. The exposure to risk arose as a result of relying on administrative controls as opposed to engineering controls such as interlocks and guarding. As a result the workers were exposed to risk and hazards several times each day during the cleaning and general operations. There was, as is accepted, the failure to ensure the health and safety of the workers.

[8] The defendant accepts that it was reasonably practicable for the company:

(a) To have engaged a competent person to undertake a systematic risk assessment and to determine the appropriate controls with reference to the AS-NZ4024 or equivalent standards in respect of the hy-filling machine.

(b) Preside safe plant for workers by installing appropriate guarding and interlocks on the hy-filler.

(c) Developed, implemented and communicated and monitored a safe system of work which included but was not limited to:

(i) The installation and use of effective lockout system.

(ii) A safe operating procedure covering all aspects of the machines operation, routine and non-routine.

(iii) A system to ensure that appropriate guarding was in place and remained in place during cleaning and other operations rather noting there was no guarding. Having undertaking the above steps then provide training and instruction to workers in respect of all aspects of the hy-filler and its safe use while cleaning.

[9] I note also that remedial steps were taken. It was quite some process. It was not straight forward, I understand it, to get the machine compliant and to have procedures, processes and mechanisms in place but it has been certified now by New Zealand engineers. In the remedial steps taken post-incident included that the 12 doors were interlocked by guarding, emergency stop switches and reset buttons were also installed if the interlocking or emergency stops were activated, the two side doors adjourning the unscrambler where the spacers were originally supposed to be changed also had interlocking installed, the spacers are now changed by stopping the machine when opening the doors and removing them from the side door and this process is set out in a new SOP, or standard operating procedure, devised with the assistance of Worksafe and engineers after the incident.

[10] I turn now to the issue of reparation. It is always difficult in these cases to put an actual figure on reparation but clearly in cases involving workplace death there is a range that the Courts have looked to and from there drawn the reparation awards to be made. The assessment of emotional harm is undertaken essentially by reference to the victim impact statement. I have considered the victim impact statement made by Mr Singh, the widower. He is concerned about his privacy, so I make an order that nothing from his victim impact statement is to be published in the media.

[11] The prosecutor has referred helpfully to a large number of cases where reparation is awarded in cases involving workplace fatalities. The range appears to be

somewhere between roughly $80,000 and up to $120,000. In this case there is not too much argument really between the parties as to where it sits. The prosecution is saying it should be an aware of around $100,000 should be made. The defence submitting an award of somewhere around $85,000 should be made. I have been referred to a number of cases. Here we are dealing with as principally one victim, Ms Kaur, there were no dependents. In my view an appropriate aware is one of $90,000.

[12] As far as the consequential and economic loss is concerned in terms of reparation it is accepted in this case that there will be further economic loss in relation to the shortfall between the ACC payments and also in relation to actual expenses . It is agreed that an amount of $8919.11 can be awarded to cover those payments insofar as the actual expenses that were concerned

[13] Furthermore, it is accepted that an ACC top-up is appropriate to top up the loss of income from the amount of 60 percent to 80 percent of Mrs Kaur's salary. The total loss that is available has been calculated at $47,473.15 and this is accepted. The issue in relation to that is whether or not there ought to be some discount from that lump sum allowed because the other option for payment is for it to be paid weekly or fortnightly over the five year period. It seems to me that there is a considerable advantage in having a lump sum payment made and I am prepared to discount 10 percent for the lump sum payment, so that takes us back to the award would be $42,716.22.

[14] The next matter I have to consider is the assessment of the fine by making a culpability assessment and taking into account the relevant factors in s 22 and s 154 of the relevant legislation. As far as the assessment of the fine is concerned that requires consideration of a number of factors. Firstly, regarding the risk and potential for ongoing illness or injury. Entrapment or entanglement issues pose a well known risk. The catching of cloth in the manner that Mrs Kaur's clothing was caught could result in death, in fact that is what happened. In the result the risk of death or serious injury from entrapment or entanglement in machinery is a credible outcome and in this case was self-evident.

[15] Secondly in regard to the degree of departure from prevailing industry standards there was a degree of departure in that regard and in fact it took some time for the equipment finally to be brought up to standard. The defendant ought to have known that the failure to guard and install appropriate locks would expose workers to a risk of entanglement. The company had been made aware of guarding issues by Worksafe and there had been an identified need for interlocks. The way that that had been handled by Worksafe was by advice. There had been no more stringent action taken by them such as issuing any notices or effectively shutting down the machinery. I understand that Worksafe have a number of ways in effectively educating, advising and assisting companies to comply. In this case there clearly was an intention to install the guards but unfortunately somehow, they seem to have gone on the back burner and the actual arrangements for that to be done slipped through the cracks. At the relevant time there were no effective controls in place for this particular machine. The defendant does accept through its plea that it was reasonably practicable to have done that and it accepts that it was reasonably practicable to take the steps that I have already referred to in terms of the charge that has been pleaded to.

[16] Thirdly as far as the cost to eliminate this risk is concerned, in this case it was negligible, and the company accepts that, so there was no reason for that to play any part in any consideration and in fact I do not believe it did. I think this is a situation where as has been accepted really by it, the company, that it simply slipped through the cracks and did not happen.

[17] As far as the culpability issue is concerned the company highlights the following points:

(i) The machine was in fact purchased to replace an existing machine which had had no doors.

(ii) It did not appreciate the need to have it assessed once it was installed in New Zealand.

(iii) It did intend to produce a written SOP and to carry out an assessment of the guarding but it was not completed at the time of the incident.

(iv) The manufacturer had stated that the machine would meet the European Union standards and that the company had believed (incorrectly) this meant it was designed to a higher safety standard beyond that which was required in New Zealand and did not need any further evaluation by a New Zealand engineer.

(v) The company, incorrectly, considered that the new machine with its enclosed doors, safety switch and toggle (which was a significant improvement on the previous machine) reduced the risks posed by entrapment and entanglement.

[18] The company has accepted its failures to engage an expert, to undertake a risk assessment on the machine and for its lack of knowledge about the applicability of the New Zealand and Australia standards to the machine. The company submits that this is not a situation where the risk was appreciated but ignored. The company knew what improvements were required but thought these were not urgent and that the machine did not pose such a serious risk to employees. To a certain extent whilst, I temper this by what I have already said, but that the company submits that this approach was accepted by Worksafe who had examined the machine and that there had been no further follow-up by them, not that they are necessarily obliged to. The company reiterates the fact that the machine was not effectively guarded was as a result oversight and not actually necessarily unwillingness.

[19] I have been given a number of cases by counsel and as I have said to both of them it is always difficult in these cases to compare apples with apples so to speak but the most comparable case it seems to me is that of *Worksafe New Zealand Limited v Easton Agriculture* where a lone workers death resulted after an interaction with an unguarded plant and there was an exposed nip point that was the cause of the fatality in that particular case.[2] In terms of assessing the culpability band it is not disputed

[2] *Worksafe New Zealand Limited v Easton Agriculture* [2018] NZDC 2003

that this case sits within the high culpability band starting at $600,000. The issue is whether or not it should really sit closer to the midpoint. The prosecution are arguing that it should have a start point of somewhere around $800,000 and the defence essentially are saying that it should be somewhere around about $600,000.

[20] In *Worksafe New Zealand v Easton Agriculture* the start point there as I understand it was $800,000 for a variety of reasons. Other cases that have been given to me by the defence for example are *Worksafe New Zealand v Stevens & Stevens Limited* which had a starting point of $600,000 where the defendant accepted responsibility for basically providing an inadequate map of hazards from an orchardist.[3] The employee drove around and ended up rolling a vehicle and died.

[21] It seems to me that in this case guarding is fundamental. It is accepted that the culpability in any event is high. In my view I take a starting point of $700,000 for the fine. As to discounts there is no dispute that there is entitled to be five percent for prior good record, co-operation five percent, remedial steps taken five percent. I note significant steps have been taken in that regard. That the company is remorseful, that is evidenced also by its plea. The issue arises whether or not more than five percent discount should be given for the fact that essentially there is reparation that is available to be paid. The company has insurance and the reparation orders made by this Court will be paid. Ordinarily a discount of five percent would be made for that. I am told by counsel that an offer had been made earlier to provide some of the reparation to the victim but that had been declined.

[22] I am conscious that this case, for a number of reasons, waiting for other decisions to be made and just matters of timing, has taken some time to be determined and I understand that that would have also caused additional difficulties to the victim and it is significant in my view that at least an offer was made to provide some reparation to the victim prior to the Court order in fact being made. That being the case I am prepared to give a discount here for 10 percent for that.

[23] From a starting point of $700,000 I will be deducting a total of 30 percent for mitigating features. That is $210,000. That gets back to $490,000, less 25 percent for

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[3] *Worksafe New Zealand v Stevens & Stevens Limited* [2018] NZDC 9987

guilty plea which is accepted, that is a further $122,000.50, that gets us back to $367,000.50. That will be the fine together with the reparation order of $90,000, the other awards that I have already referred to of $8,919.11 and $42,716.22 for consequential and economic loss plus $1500 for solicitor's costs. When I consider these awards and the fines I have to decide whether or not they are overall proportionate and appropriate. I am satisfied that that is the case and that will be the orders of the Court.

B M Mackintosh
District Court Judge