SUPPRESSION ORDERS EXIST IN RELATION TO ASPECTS OF THIS JUDGMENT PURSUANT TO S 205 CRIMINAL PROCEDURE ACT 2011: SEE PARAGRAPH [35].
http://www.legislation.govt.nz/act/public/2011/0081/latest/DLM3360354.html

IN THE DISTRICT COURT
AT NELSON

I TE KŌTI-Ā-ROHE
KI WHAKATŪ

CRI-2021-042-002047
[2024] NZDC 3910

WORKSAFE NEW ZEALAND
Prosecutor

v

STEPHEN GRAHAM BURTON
Defendant

Hearing:	20 February 2024
Appearances:	D Dow and V Veikune for the Prosecutor M J Vesty for the Defendant
Judgment:	20 February 2024

NOTES OF JUDGE D C RUTH ON SENTENCING

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[1] Stephen Graham Burton, you were found guilty of a charge that you faced as one of two. Because the second charge was in the alternative, and having found you guilty on the first of the charges, I was not required to return a verdict on the second charge and that charge has now in any event been disposed of.

[2] The charge upon which you were found guilty is recorded in the charging document and it is described this way: that on or about 28 February 2020 at [redacted] in Nelson you failed to take an action required by the Electricity Act 1992, knowing

that the failure to take the action was reasonably likely to cause serious harm to any person or significant property damage and failed to prevent so far as reasonably practicable serious harm or significant property damage.

[3] There were a number of particulars attached to that charge so as to make it clear what it was that you were being alleged to have done or not done. They are set out as follows:

(a) Stephen Graham Burton failed to correctly test prescribed electrical work, namely the installation of a socket outlet, in accordance with reg 63 of the Electricity (Safety) Regulations 2010 and AS/NZS 3000:2007, knowing that the failure to correctly test the prescribed electrical work was reasonably likely to cause serious harm or significant property damage, and failed to prevent so far as reasonably practicable serious harm or significant property damage. It was reasonably practicable for Stephen Graham Burton to conduct the following tests correctly using the appropriate test equipment:

(i) visual inspection of the work carried out by verifying the correct circuit connections throughout the circuit, including the switchboard and the wall switch used to operate the socket outlet;

(ii) continuity of the earthing system by measuring between the earth terminal of the socket outlet and the switchboard earth bar;

(iii) insulation resistance test;

(iv) polarity test at the installed socket outlet; and

(v) earth fault loop impedance test.

[4] The various elements of the offending contained in those words were what I had to consider and the evidence about them in the judge-alone trial over which I presided.

[5] As a result of considering the evidence very carefully, and being conscious to bear in mind at all times that it was for the prosecution to prove the elements involved in this offending and the need for such proof to be beyond reasonable doubt, I nonetheless found you guilty. That involved an assessment of your own evidence, bearing in mind that you were not obliged to give evidence and in doing so you did not take upon yourself any responsibility of proving anything; the onus remained on the prosecution from the start to the end to prove those elements which I found had been proven to the required standard.

[6] The facts as I found them to be are set out in the judgment that I delivered together with the verdicts. What seemed clear to me was that an initial failure to remove the wall switch plate was pivotal here and was a failure that you admitted, because had you done so you would have seen that the nominal earth wire had been connected in such a way that it was not operating as an earth wire, it was a live wire. It was signified as being alive by having wrapped around it red insulation tape to warn anybody looking at the wiring that it was not an earth wire but a live wire. Had you taken that preliminary very obvious and simple step, which probably required the removal of four or five screws, all of this might well have been avoided because it would have alerted you, as an experienced electrician, that wiring was not as you might have otherwise thought it to be.

[7] What is important about all that is that what happened here was not the result, as you contended at your trial, of some unknown intervener changing the wiring you put in. The wiring as it stood is probably in the state it had been in for many years because the expert evidence at the trial was that wiring in this way was, in times gone by, not uncommon. Thankfully, it is no longer permissible, but had you looked at the wiring you would have seen this. But it means that you cannot be heard to say someone else came in and changed your wiring when the wiring was something you never looked at.

[8] It has further repercussions though because given the state of the actual wiring, the tests that you claimed to have carried out, albeit with by and large the right equipment, means that the readings you said you obtained from those tests were in fact impossible. That was the evidence from the experts that I accepted. The reality of

course is, and I think this is irrefutable, that you did not carry out those tests. Had you done so, you would have realised that something was seriously amiss in the wiring. That failure makes it absolutely nonsensical for you to suggest that some unknown person for some unknown reason must have interfered with your wiring.

[9] You were not charged with anything that suggested you were fraudulent in the entries that you made about the various readings, including in your diary, but it is not without note that having made those entries and having recorded the findings and readings that you contended for, one cannot help but be somewhat sceptical of why those readings (impossible as they were) have been recorded in the way that you did. You seem to me to have shown an indifference to your responsibilities under the Act and Regulations.

[10] One aspect in that regard which occurred during the trial and which sits in my mind, and I doubt I will ever forget it, is when you were confronted with a document that was a prework site safety certificate. It was clearly dated the day after you say the work was carried out. The very nature of the document required that you complete it before any work was started. When Mr Dow confronted you with that during the course of the trial, your response indicated that given your long experience in the trade you knew what the requirements of the job were and that it really did not matter that the document was completed the day after rather than prior to the work commencing. That was but one example of what I referred to in the course of my judgment as an apparent lackadaisical attitude to your bookkeeping because it also transpired that you were sending out certificates of compliance that were also on their face incorrect, something you blamed upon an IT programming problem. Mr Burton, in this day and age, that is about the same as saying "the dog ate my homework". It is nonsense. You had a responsibility to those who were entitled to rely upon the accuracy and reliability of your documentation.

[11] Your attitude to all this stands in stark contrast to the many glowing references and testimonials about not just you as a person but as to your work, and I find it difficult to reconcile what seems to me to have been a very serious abdication of your responsibilities and duties here with those glowing reports. The reality is that only certain persons in our community are permitted to carry out electrical work and to do

so involves obtaining from the appropriate authority a licence. That is a privilege, but what goes with it are responsibilities and obligations to ensure that when dealing with such an obviously dangerous factor such as electricity, those who are the end users of your electrical work are able to rely upon it as being safe for them to use. That can only be achieved if there is strict compliance with all of the regulations, including only issuing correct certifications to which I have referred to in the course of these sentencing remarks.

[12] The fact of the matter is that you were not charged with causing Mr Johnston's death (this is not a manslaughter case for example) and it means that his death, while of course very significant, is not able as a matter of law to take the forefront of this sentencing exercise. I am required to sentence you upon the charge and my findings about the elements of that charge in the course of my decision. That will sound a little odd, certainly to the victims of this case for whom the only relevant factor is the death of their loved one, but I am constrained by law and I make it as clear as I can that I must sentence you on the basis of what I have found you guilty of. I also make the point that nothing that I do in this Court can ever come anywhere near making up for the death of a loved one. In the circumstances, the Court is simply not equipped to do so. That does not mean that the Court does not feel a huge degree of sympathy for the victims who have so courageously read victim statements out, not just to you but to people who are here to support you, and they have my heartfelt thanks for having done so. It is an important part of our system that victims are heard, and I hope you were listening because what was said has a real ring of truth about it.

[13] You come to the Court with no previous convictions or any record of any appearances before any court, and you have, as I have indicated, glowing testimonials that I have commented upon but I acknowledge their presence.

[14] What I am required to do in a case involving matters of health and safety in a workplace is to determine first of all questions of reparation, then look at the starting point that should be imposed for the culpability relating to the offending as I find it to be, and deducting from that starting point any discounts to which you might be entitled. I then have to stand back and look at the whole picture and arrive at a realistic amount for reparation. Some reparation will be directed towards emotional harm,

some for actual out of pocket loss and some for consequential loss which has been spoken of, particularly in the victim impact statements. The end point that I arrive at then will present me with a further and final question as to how the sentence should be imposed in terms of its format.

[15] In that regard, the Sentencing Act 2002 requires that I consider a number of factors. It requires that I consider the culpability of the defendant, they require that I decide whether this is conduct that should be denounced, certainly I have to make sure that a person who is found guilty is held accountable, I have to take into account aspects such as remorse, and whether the offending could have been avoided.

[16] One of the things that the Court is mandated to do is to impose the least restrictive sentence that is possible, but also being appropriate and sufficient to meet the justice in the particular case. They are the tasks that I now embark upon.

[17] I have the benefit of a pre-sentence report which tells me that you presented to the report writer as remorseful in the sense that you knew Mr Johnston and you say that you wanted to explore the restorative justice process. Ms McAlpine is somewhat sceptical about that and feels that it is odd that you should come to that realisation only some weeks prior to this sentencing day.

[18] The report writer acknowledges, unsurprisingly, that because you are first offender you do not have rehabilitative needs, for example as might a person who comes to the court with alcohol or drug problems which is so often what we deal with in this Court, you are not in that category. The overall sentence recommendation of the probation officer is, or certainly includes, reparation and home detention, but also a term of imprisonment.

[19] I have also the benefit of written submissions both from Mr Dow for the prosecution and from Mr Vesty for the defence. I have read and considered those in depth and to paraphrase rather than going through each lot of these submissions, the position that the prosecution takes is that this is a serious case, not just because of the disastrous outcome but because it represents such a significant failure to adhere to the requirements that are imposed upon you as a registered electrician.

[20] The position that Mr Dow takes is that on the basis of cases which have gone on before there could be a number of payments sought against you, something in the order of $150,000 for emotional harm, and consequential loss that derives from a shortfall in the ACC system over and above what Mr Johnston would have been entitled to. This has been assessed by an accountant to be about $81,000. There are other consequential losses which are referred to and in the end there is a suggestion that there should be emotional harm reparation awarded in the sum of approximately $150,000 and an amended amount for consequential losses of $90,000, which when added to the $150,000 gives a total of $240,000. I will return to that aspect in a moment.

[21] As to the starting point in terms of the punishment or punitive aspect of this sentence, Mr Dow relies upon a number of combined points. He refers, as I have, to the simplicity and obviousness of the examination of the wiring behind the wall switch plate. He also says that the evidence really only bears one meaning, and that is that there was no testing carried out as required because the readings that you contend were obtained were deemed impossible by the experts. That expert evidence was not challenged by any defence expert evidence. Mr Dow submits that, in combination, this was a serious departure from your obligations.

[22] Your refusal to accept that you have done anything wrong, I suspect is the genesis of your ridiculous story about there being some intervener altering the wiring to create the dangerous wiring which resulted. As I have indicated, the facts in this case simply mean that any such claim by you is untenable.

[23] The need for deterrence is emphasised by Mr Dow and he says, contrary to Mr Vesty's submission, that it is absolutely essential that those who obtain certificates and licences allowing them to carry out this sort of work, must only hold those certificates and licences, if they are prepared to stick to the rules and regulations absolutely. It seems to me that if there are others in the electrical industry prepared to act with similar disregard to their statutory obligations as I have found you did on this occasion that state of affairs has to be stopped and stopped immediately. I agree that general deterrence, not deterrence of you because I agree with Mr Vesty it is unlikely you will be doing this sort of work again, but for others who might think they can cut

corners, should understand that the Court will act and act decisively against such practices.

[24] Mr Dow submits that whatever the start point is that I should be hesitant to grant any deduction for matters such as remorse, or in this case matters relating to your good character. There is no doubt that your character is an important factor here and I accept what Mr Vesty says that there is good authority for the proposition that a fall from grace is a matter that is to be taken into account and it is also not something that is relegated to cases which are perhaps trivial, it can be a factor in even serious offending. I accept those principles are well-founded.

[25] So then as to the starting point for reparation, there is general agreement that the amount for emotional harm should be $150,000, but as to the significant further reparation of around $90,000 it is necessary that I stand back and ask whether this is realistic. The last thing the Court wants to do is impose sums of reparation in circumstances where it simply raises expectations in the minds of victims that they might receive the monies ordered when the reality is they probably will not, and so it is better to impose a more realistic amount in the knowledge that it can be paid.

[26] Here, Mr Burton has amassed a sum of $50,000. I have listened to Mr Dow's criticism about the timing of that and there may well be merit in what he says, but what I am dealing with is the fact that $50,000 is offered by Mr Burton for immediate payment.

[27] As to the balance, Mr Vesty has suggested that it would be difficult on the information that we have for Mr Burton to be expected to make payments by instalments of the nature that would be required to pay what is no doubt a perfectly appropriate sum. The reality is that at his age it is unlikely that Mr Burton will be able to find work, certainly not at the level that he would have enjoyed prior to this incident.

[28] However, it is now known that there are some assets which were initially thought not to be available but which, as a result of some work behind the scenes, I am now able to bring to bear. The overall proposition from Mr Vesty is that the court should impose the sum of $150,000. Of that sum, $50,000 should be made payable to

the victims Ms McAlpine and Jaimie Johnson immediately. Mr Vesty submits that the further sum suggested of $100,000 represents the outer limit of what can be provided, in terms of Mr Burton's circumstances. It seems to me that that is the most realistic outcome.

[29] So then, what is the starting point? The maximum penalty available here is two years' imprisonment. This is undoubtedly a very serious case of its kind, as I have been at pains to point out. Mr Dow suggests a starting point of between 20 and 22 months, Mr Vesty suggests something around 18 months. My view is that a starting point of 20 months is the appropriate starting point.

[30] That starting point needs no further adjustment because there are no aggravating features of the offending not already factored in. The only factor that I then have to grapple with is this aspect of good previous character.

[31] Here, balancing the good and the bad with Mr Vesty suggesting that a discount from the starting point of 25 per cent should be granted, I agree with Mr Dow that it has to be something less than that for all the reasons he has put forward, particularly the failure by Mr Burton to accept any responsibility for his offending. I consider that 20 per cent is the correct discount. That means that when 20 per cent is deducted from 20 months, the end point is one of 16 months. That is a sentence where I am entitled to consider sentences other than a full-time custodial sentence.

[32] Mr Burton is a first offender. Although it is not impossible that I send him to prison, I do not think that that will gain anything. He has no rehabilitation needs. He is not, as things now stand, a danger to the community and it is my view that home detention is the appropriate outcome. I also take the view that home detention is a significant deterrent to those who are minded to cut corners because the starting point will always be imprisonment and they may not be people for whom the remission to home detention is necessarily available to them.

[33] For those various then, Mr Burton, you will be subject to home detention for eight months. You will serve that at the residence of the address shown in the pre-sentence report. You are to go there immediately after you have your paperwork

given to you. You will remain there until a probation officer and a person from the monitoring firm arrives to install the monitoring equipment. You will remain at the premises in terms of the home detention sentence which will be set out in your paperwork.

[34] You will be ordered to pay a total of $150,000 towards emotional harm and consequential loss factors. You will pay the first $50,000 of that within seven days of now. You will pay the remainder by way of the following:

(a) The boat which is currently owned by a trust where you, your wife and an accountant are the trustees and settlors. That boat when it is sold will result in a further $100,000 being paid to the victims within 28 days of the settlement of the sale of that boat.

(b) In the meantime, and until that boat is sold, you will pay by instalments of $3,175.18 per month. The first payment will be on 31 March. The payments including the $50,000, shall be paid into the court where it will be then disbursed to the victims.

[35] The address that was referred to where the incident took place at [redacted] here in Nelson is the subject of permanent suppression.

Judge DC Ruth
District Court Judge | Kaiwhakawā o te Kōti ā-Rohe
Date of authentication | Rā motuhēhēnga: 28/02/2024