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NORTHERN TERRITORY OF AUSTRALIA

LOCAL COURT

No: 21504753

WORK HEALTH AUTHORITY

and

S.KIDMAN & CO LTD

(Sentencing remarks)

CHIEF JUDGE LOWNDES

TRANSCRIPT OF PROCEEDINGS

AT DARWIN ON 16 MAY 2017

Transcribed by:
DTI

HIS HONOUR: The defendant has pleaded guilty to a charge contrary to s 32 of the Work Health and Safety Nation Uniform Legislation Act read in conjunction with s 19(1)(a)(3) of the Work Health and Safety Nation Uniform Legislation Act.

Court has been provided with a statement of agreed facts exhibit 1.

The starting point in this case is an assessment of the seriousness of the failure to comply with the statutory duty to workers that is provided for under that legislation, along with an assessment of the level of the defendant's culpability in the context of the particular facts of the case.

It is clear from the statement of agreed facts that the defendant failed to ensure that adequate controlled measures were in place in circumstances where it was proposed to undertake an inherently dangerous and hazardous task which was indicated by the defendant's employee handbook.

Circumstances of the task that was being proposed to be undertaken in my opinion highlighted the importance of those controlled measures being put in place and the importance of all persons involved in that inherently dangerous and hazardous task standing clear of the operation that was being undertaken.

It is one thing of course for an employer to provide an employee handbook as this defendant did but at the end of the day the employer bears the statutory duty of ensuring that for any given task that is undertaken within the work place appropriate control measures are put in place to avoid a tragic accident of the type that occurred at the station on 8 February 2012.

In the time that I have had available to me to consider this matter, I have formed the view that the defendant should not have worked on the simple assumption that the system that had been followed on the first day would be in fact continued on the second day with a new worker who had arrived at the work site. The accident that occurred in this particular case was avoidable had appropriate control measures been put in place.

I've considered the objective seriousness of the offending and in my view it does not lie at the very low end of the range of offences of this type. However, in my view it is towards the midrange for offending of this type and in arriving at that decision of course I've had regard to the likelihood of a risk of injury or of serious injury and the likelihood that serious injury would be suffered if that risk in fact eventuated. It follows on from what I've said that the culpability of the defendant falls towards the midrange of culpability for offences of this type.

The court must have regard to the maximum penalty in this case, the maximum penalty being 1.5 million dollars. The maximum penalty of course is reserved for the worst type of offence. I fully accept in this particular case that the mother of Mr Arena(?) would consider that this is the worst type of offence because of the tragic consequences.

However, when courts come to consider the worst type of offence they have to consider a whole lot of other considerations and of course the actual harm that was caused by the offence is not the sole exclusive focus of the court although a relevant circumstance. There are other matters that must be taken into account when considering whether or not this is the worst type of offence.

Of course the sentence that the court is to impose today must be proportionate to the gravity and seriousness of the breach of the statutory duty which again as I say had tragic consequences.

The penalty that the court is to impose of course must reflect the need for adequate punishment in all the circumstances. There is a clear need for general deterrents in cases of this type and what that means of course is the court should be seen to impose a penalty which will encourage compliance with statutory duties with a view to avoiding accidents of this type in the future and ensuring as best it can through the penalty it imposes that other companies that are engaging in commercial enterprises like this or any other enterprise of course, make sure that they do the right thing by their employees and put in place the appropriate safety measures.

Of course the sentence today must also take into account the matters that I put in litigation and I'll shortly deal with those but in a case like this the starting point is really the gravity and the seriousness of the breach and all of the other considerations are somewhat secondary to that.

In this particular case, court must have regard to s 5(2)(b) of the Sentencing Act and the court is obliged to consider that the harm which was caused by the offence in this case, in this case the injuries that were suffered by Mr Arena were of a serious nature and clearly fell within the definition of serious injury as prescribed by law.

I've had the benefit of being provided with the decision of Judge Scotting(?) District Court of New South Wales in the matter of Safe Work v Activate Fire Pty Ltd and I found that particularly instructive in terms of the relevance of the actual harm as a consideration in the sentencing exercise.

In this case I have the benefit of a victim impact statement and as would be expected and highlighting the seriousness of this offending is the impact the offences had on Mr Arena's mother. I've read the victim impact statement and I accept entirely that this has had a devastating effect on her as one would expect would.

The plea of guilty in this case can be described in my view as a late plea. The calculation of discounts for late plea are always not capable of being calculated with precision but I consider in all the circumstances of this case an appropriate discount would be 11 percent.

I now move on to consider matters that Mr Crawley put to the court in the sentencing exercise today, weight should be given to the defendants cooperation with the work safe authorities, similarly weight should be given to the defendants response in relation to work practices which were dealt with in Mr Crawley's

submissions and weight also to be given to the defendants person response to Mr Arena's death though I note that the subject to a qualification that was indicated this morning that Mrs Booth(?) had to initiate the initial contact and I take that into account.

As for the change of ownership on the approach of the new owners, my view and one which I've held on prior occasions is that is it the corporation that has breached the statutory duty. The corporation must be held accountable for that breach. And just because there is a change of ownership that doesn't detract in any way from the corporate liability. In any event, it would appear on the evidence before me that the new owners were fully aware of this pending matter.

However, the fact that the new owners have a safety conscious approach is commendable and in my view, that of course is a matter that should also be weighed in the sentence that I will impose today.

I've been provided with comparable sentences. The whole point of the uniform national legislation was to try and ensure consistency in the sentencing process. That harmonisation was seen as something that would encourage consistency.

It's very difficult to discern from the comparable finds that have been provided to the court that there is in fact consistency but I guess part of the problem is that one does not always have all of the sentencing remarks for these comparable sentences and it may well be that if one had that then one might be able to understand why there is that range of sentences and it's quite a wide range, the disparity in the sentences and the apparent inconsistency.

It probably would be more helpful, though I'm not saying that this should be uniformly done because it's an enormous exercise but if one had the benefit of all of the particular aspects of a particular case one might be able to discern a common theme that runs through all of these but that, in my view, would impose a very high burden on prosecution but I am just trying to highlight some of the problems with the harmonisation process.

I think that working from a very, very high ideal but very difficult to actually put into practice. So at the end of the day, it really falls back to adopting the normally sentencing approach of dealing with a matter on its individual facts and largely unassisted by the comparable finds.

So, having regard to all of those considerations my starting point in this matter would have been a fine of \$225,000. But affording the defendant the 11 percent discount that fine is reduced to \$200,000. I think my calculations are right. It might be a few dollars and cents out but I've rounded it off to that figure.

Is there anything further Ms Chalmers?

MS CHALMERS: Your Honour, we would obviously ask for the formal order in relation to costs in favour of the complainant. What's proposed is that the parties will

liaise in relation to quantum if there could be liberty to apply in the event that an agreement can't be reached.

HIS HONOUR: Alright.

Mr Crawley?

MR CRAWLEY: I did indicate yesterday your Honour that that would be an order that the defendant would agree to and I am more that content for the order to be made that yes the defendant pay the prosecutions costs with liberty to apply as to quantum in default of agreeing.

HIS HONOUR: It's been a long time since I've fined a company. A victim levy attaches doesn't it? But I'm trying to think what the current victim levy is.

MR CRAWLEY: All I can say sir, I don't know either, other than by looking at the decision of the Rock Tour(?) matter there was a \$150 victim levy imposed on that. That was last year in June.

HIS HONOUR: That was against the corporation though wasn't it?

MR CRAWLEY: That was a corporation.

HIS HONOUR: I think corporations bear a heavier victim levy than individuals, I'm sure they do.

MR CRAWLEY: Your Honour, I must have got it wrong then. I can't assist, your Honour.

HIS HONOUR: Well, I'm sure the Registry will impose that in any event there's always been an argument that even if the court doesn't do it the Registry can because it's an administrative exercise.

MR CRAWLEY: I'm content for it to be noted sir that the defendant will pay the victim levy in accordance with the formula.

MS CHAMBERS: And your Honour I don't have the relevant legislation to hand that actually establishes the actual levy applicable, I apologise for that.

HIS HONOUR: I think the whole idea was a corporation should bear a heavier levy than individuals which probably makes sense.

This is important, I am going to order a transcript of my sentencing remarks to be provided to prosecution and defence. I'm not sure I can actually provide a transcript of the submissions.

MR CRAWLEY: I understood your Honour said that yesterday and I think we've actually already put in an order for it so I won't trouble your Honour to worry about that.

HIS HONOUR: I record a conviction. I impose a fine of \$200,000. Defendant to pay the costs of the prosecutions with liberty to apply on quantum in default of agreement.

Is there anything else I need to address?

MS CHAMBERS: Sorry your Honour, what was discussed in court yesterday was costs of the investigation and prosecution.

HIS HONOUR: Okay. Costs of the prosecution and investigation.

MS CHAMBERS: Thank you your Honour.

HIS HONOUR: Yes, I make that addition.

ADJOURNED