APPEAL COURT, HIGH COURT OF JUSTICIARY

[2023] HCJAC 31
HCA/2023/000256/XC

Lord Matthews
Lady Wise

OPINION OF THE COURT

delivered by LADY WISE

in

Appeal against Sentence

by

LINBROOKE SERVICES LIMITED

Appellant

against

HIS MAJESTY'S ADVOCATE

Respondent

Appellant: Duguid KC; Rradar
Respondent: A Gray, advocate depute; Crown Agent

17 August 2023

Introduction

[1] On 30 March 2023 at Dumbarton Sheriff Court the appellant company was found guilty after trial of the following charges:

> "(001) between 24 May 2018 and 05 June 2018, both dates inclusive, at Bearsden Railway Station, Station Road, Bearsden, East Dumbartonshire you…being an employer within the meaning of the Health and Safety at Work etc Act 1974 and the after mentioned regulations, did fail to make a suitable and sufficient assessment of the risks to the health and safety of your employees to which they were exposed

whilst they were at work, and any other person not in your employment arising out of or in connection with the conduct by you of your undertaking, for the purpose of identifying the measures you needed to comply with the requirements and prohibitions imposed upon you by or under the relevant statutory provisions in that you fail to make a suitable and sufficient assessment of the risks to the health and safety of your employees engaged in installation of longline public address system equipment and, in particular, did fail;

(a) to adequately identify the risks involved with pulling cables through a conduit at height, having been informed of difficulties encountered by a sub-contractor in a prior attempt to pull said cables;

and

(b) to adequately identify the risks involved with the use of improvised cable dispensing methods;

and, as a consequence thereof, on 5 June 2018, Matthew Mason, then employed by you and engaged in the task of the installation of longline public address system equipment, fell from a step ladder there on to a metal conduit and was fatally injured;

CONTRARY to the management of Health and Safety at Work Regulations 1999 Regulation 3(1) and the Health and Safety at Work etc Act 1974 Sections 15 & 33(1)(c);

(002) on 5 June 2018 at Bearsden Railway Station…you…being an employer within the meaning of the after mentioned regulations, did fail to ensure that work at height was properly planned; appropriately supervised and carried out in a manner which was so far as was reasonably practicable safe in that you did allow your employees to work from a step ladder to pull cables through a conduit there when you had insufficient measures in place to prevent a fall from height or ensure that the surrounding area was free of material which could cause injury in the event of such a fall, and in consequence thereof your employees were exposed to risks to their health and safety, and Matthew Mason, then employed by you and engaged in the task of the installation of longline public address system equipment, fell from a step ladder there on to a metal conduit and was fatally injured;

CONTRARY to the Work at Height Regulations 2005, Regulation 4 and the Health and Safety at Work etc Act 1974, Section 33(1)(c);

and

(003) on 5 June 2018 at Bearsden Railway Station…you…being an employer within the meaning of the after mentioned regulations, did not provide sufficient work equipment to prevent in so far as was reasonably practicable a fall occurring, in that you did fail to provide suitable work equipment to your employees, engaged in the task of the installation of longline public address system equipment there, who were

> required to pull cables through a conduit at height from a set of step ladders which were inappropriate for the purpose for which they were to be used due to the risk of your employees losing their balance when applying force to pull said cables through the conduit, and, in consequence thereof, your employees were exposed to risks to their health and safety, and Matthew Mason, then employed by you and engaged in said task, fell from a step ladder there on to a metal conduit and was fatally injured;
>
> CONTRARY to the Work at Height Regulations 2005, Regulation 6(4)(b) and the Health and Safety at Work etc Act 1974, Section 33(1)(c)."

[2] At an adjourned diet on 15 May 2023 the sheriff imposed a financial penalty of £750,000 which he divided in to two parts; compensation to the deceased Mr Mason's parents in the sum of £200,000 and a fine of £550,000 to be paid by the company.

The evidence

[3] The sheriff narrates in his report that the contentious area at trial was the opinion evidence given by three expert witnesses. The facts were relatively straightforward. Matthew Mason was 20 years old in 2018. He was a time served electrician. The appellants had taken on a substantial contract which largely involved the installation of public address systems in railway stations. Necessarily that involved running cable through metal conduits, often at a height of 3 metres or thereby. The work at Bearsden Railway Station had been sub-contracted to a separate company, but 11 days prior to 5 June 2018 that company had told the appellants that they had been unable to complete the task. They had fixed the conduit to the wall but said that they had been unable to pull the cable through it. Mr Mason apparently heard this recounted and volunteered to do the job, which offer was taken up by the appellant.

[4] Although the appellant had prepared substantial documents, including those addressing the issue of safe working practices, in advance of the contract commencing, the employees who were tasked with actually doing the work on site were expected to follow

instructions contained in a document given to them shortly before work commenced. This document was known as a "task briefing sheet". The six employees of the appellant, including Mr Mason, who were to work at Bearsden on 5 June had seen such a document. For reasons not established in evidence but against the background of the work having been taken back by the appellant from the sub-contractor a matter of days beforehand, that task briefing sheet was entirely silent about the required work at height, pulling cables through conduits. Any associated risks appeared not to have been assessed.

[5] The accident was captured on CCTV and subsequently viewed by the jury. Mr Mason was a well built, strong young man who was seen to take part in the first element of the job, entailing pulling out the appropriate length of cable from a drum. The cable could only be pulled freely if the drum was lifted off the ground. Mr Mason was then seen to put an extra length of conduit through the drum as if it were an axle for a wheel and to lift the drum off the ground. Once the requisite length of cable was unwound by one of the others, he was seen to put the drum on its end and to put a length of conduit through the hole in the middle of the drum such that a length of it was protruding upwards beyond the drum. None of this would have complied with approved cable dispensing methods, but no system was in place to prevent improvised methods being adopted, which there ought to have been, given the risk obviously created thereby.

[6] There had been a site visit on 4 June 2018 when it was ascertained that the step ladder which had been provided, notwithstanding health and safety executive guidelines warning against the use of step ladders for various tasks to be carried out at height, was too short. What was requested, and supplied, was not a different type of platform, with greater security, but a taller ladder. Again, no risk assessment was carried out.

[7] Work then was carried out off camera, before Mr Mason was seen on the CCTV to climb the step ladder, start pulling the cable and descend when a problem appeared to be encountered. He then disappeared from view and returned, moving the ladder closer to the drum and protruding conduit than it was before, and climbing even higher up the step ladder. He was seen to resume pulling, but there then appeared to be a sudden loss of resistance, and Mr Mason fell backwards off the ladder and onto the conduit, resulting in his death. The cable had been pulled through the conduit after being attached to a "Fish", effectively a long piece of wire or fibreglass which had been pushed through the conduit from the other end and attached to the cable by insulating tape. The "Fish" had not been attached correctly and it became detached from the cable, causing the loss of resistance.

The sheriff's approach to sentence

[8] The sheriff produced a sentencing statement and in his helpful report explains further the approach he took. He states that he both followed the sentencing process guideline issued by the Scottish Sentencing Council and used the English Sentencing Council's Definitive Guideline on sentencing in health and safety matters issued in 2015 as a useful cross-check, as the offences were regulated by UK statute. He began by assessing the levels of culpability and harm. On the basis of the evidence he had heard he concluded that the level of culpability attributed to Linbrooke could be categorised as Medium. He accepted that there was no deliberate breach on the part of the company and no flagrant disregard for the law. He acknowledged that the use of step ladders even in inappropriate circumstances appeared not to have been restricted to Linbrooke but to have been common throughout the industry. The company had not been put on notice as to the risk by any previous expression of concern about this method of working. The sheriff accepted also that

before the general contract had commenced, Linbrooke had taken steps to identify potential hazards including those arising from working at height and to some extent had given guidance as to systems that could be used to avoid a reduced risk. However the sheriff regarded it as critical that by the stage of issuing final instructions in the form of the task briefing sheet they had clearly failed to alert the employees who would actually carry out the work to the risks involved and the need to ensure the correct equipment would be used and be used in the correct manner.

[9] So far as harm was concerned, the sheriff took into account both the seriousness of the harm risked by the employer's failure and the likelihood of that harm arising. He considered that the seriousness of the harm risked (falling from the top of a tall ladder) should be categorised as level A while the likelihood fell into the category of medium. That resulted in placing the offences as harm category 2 with reference to the English guideline. He was prepared to proceed on the basis that the number of employees exposed to risk of harm was a low one. However, the offences had resulted in the most significant cause of actual harm. While Mr Mason might have made unwise decisions, that was not something taken into account in the sentencing process. It had been the company's legal duty to take care to ensure that safe systems of work were not merely nominally in place but were being followed on a day to day basis.

[10] The sheriff then considered the size and financial strength of the appellant company's business, as required by the English guidelines. He concluded that Linbrooke's annual turnover exceeded £50 million over the 3 year period ending March 2019, 2020, and 2021, although he now accepts that the figure was marginally below £50 million However, he had also been provided with draft accounts for the year ending 31 March 2022 which remained in draft form only because the outcome of these proceedings required to be

incorporated into them. The draft showed a projected annual turnover of £60.6 million for the year ending March 2022. Positive remarks from the directors in their strategic report were noted. Taking account of the draft produced an average annual turnover over the four year period in excess of £52 million. The sheriff categorised Linbrooke as a large company, albeit at the lower end of that category. He considered that the guidelines pointed him towards a range of fines between £300,000 and £1.5 million with a suggested starting point of £600,000. He indicated that his starting point would be at the upper end of the range and fixed that at £1 million. There were no aggravating factors to increase the fine from that starting point but there were a number of mitigating factors. These included the absence of any previous convictions and an exemplary health and safety record by the company until Mr Mason's death; the company's philosophy and aim of assisting former armed forces personnel to return to civilian life and acquire a trade, which had met with considerable success; the genuine and ongoing distress at all levels of the company in relation to Mr Mason's death; the steps taken immediately by the company to avoid any repetition of the accident; and the full cooperation with the investigating agencies. In light of those mitigating factors and the whole circumstances the sheriff reduced the penalty to £750,000. It was largely because of submissions made by both Crown and defence that the financial penalty imposed was likely to complicate the pursuit of civil claims arising from the accident that the sheriff decided to divide the sum into the two parts mentioned above.

Submissions for the appellant

[11] On behalf of the appellant, senior counsel made clear at the outset that, should the appeal succeed to any extent, the company would not wish any reduction to be made to the compensation order of £200,000 to be paid to the parents of the deceased. While it was a

matter for the court, the company was keen that the payment to the family would not be eroded. There were three main issues raised in argument. First, it was contended that the deceased's contribution to the accident ought in the particular circumstances of this case to be taken into account. Secondly, the assessment of the appellant company as a large one for the purposes of the English guideline was challenged. Thirdly, the sheriff had wrongly increased his final harm assessment by twice taking into account that death resulted in this case, rather than at a single stage of the exercise.

[12] On the first matter of the deceased's contribution, it was submitted that Mr Mason had attached the "Fish" wire to the cable in a wholly inappropriate manner, presumably because it was quicker. If he had attached the wire to the cable correctly the amount of weight that could have been sustained would have been 80kg but because of the way he performed the task it could sustain only 15kg. The process he used for unreeling a stretch of cable was unauthorised and a device had been available that he could have used. It was the deceased's use of a piece of conduit by holding it up almost "like a weight lifter", that rendered the whole process within range of the lethal obstacle that Mr Mason himself had placed inside the barrier area at the foot of the ladder. While it was acknowledged that it would be rare for the individual's fault to be taken into account in a case of this sort, in the particular circumstances of this case Linbrooke could not reasonably have foreseen that Mr Mason would behave in the way he did. Accordingly, the court should, unusually, take this matter into account. In doing so, the court should view the available footage and various animations prepared for the company and played to the jury.

[13] In relation to the size of the company and its relationship with the fine imposed, counsel submitted that, even if Linbrooke could, strictly speaking, be categorised as a large company, it was a comparatively small competitor in a field where the other players were

many times larger. The sheriff had accordingly reached a conclusion about the company's financial circumstances and ability to pay a fine in a way that was disproportionate. Three recent decisions to support this point were referred to. First, was a decision published by COPFS on 9 May 2023 in relation to the Fife based company Mowi Scotland Limited. Following a plea of guilty to health and safety breaches at Inverness Sheriff Court on that date arising from a fatal accident at a fish farm, the company had been fined £800,000. The salmon farming company involved was a very large one. Secondly, in the case of *HMA* v *R J McLeod* a sheriff at Glasgow had fined that company £800,000 on 14 April 2023 after the company had failed suitably to assess the risks of unauthorised persons gaining access to a construction site. This had resulted in children making their way through insecure fencing into the construction site, one of whom died from drowning in flowing water at the foot of a manhole. The company had pled guilty to failing to take measures to control the risk of children gaining access to the site. The company involved in that case had a turnover of about four or five times that of the appellant company. Finally, reference was made to a news report involving the energy firm BP which was fined £650,000 after a worker died when he plunged from an offshore platform into the sea. On 19 July 2023 a sheriff in Aberdeen had imposed the fine stating that, while it had been an isolated incident of the company failing to have suitable control measures in place for open gratings on a north sea platform, given that a man had died the fine on a profitable company such as BP required to have "some economic impact".

[14] Senior counsel submitted that these decisions supported a contention that, while each case required to be carefully considered on its own facts, the sheriff had erred in considering it proportionate to impose a fine of £750,000 on a much smaller company than those involved in those decisions. The appellant was a railway engineering company

formed by two individuals with admirable intentions. It was not in the same category as the companies referred to and was only very technically in the "large" category referred to in the English guideline. There was said to be a relationship between the chronology of the case, which had involved the postponement of a number of trial diets and the financial circumstances of the company. Had the case been brought to trial on the original intended dates, the company's draft accounts for 2022 would neither have been relevant nor applicable. The average turnover for the previous three years would have resulted in the appellants being categorised as a medium company, albeit at the higher end of that category.

[15] The third and final contention was that the sheriff double counted Mr Mason's death. The sheriff's approach and his application of the English sentencing guideline was not open to criticism in relation to his assessment of culpability as medium and the risk of harm as level A with a medium likelihood of harm, resulting in a harm assessment of category 2. However in selecting the figure of £1 million as a starting point, before reductions for mitigation, the sheriff stated that he sought to distinguish between cases in which a fatality had occurred and non-fatal cases. In his sentencing statement he recorded that it was because such a difference should be drawn that his starting point was towards the upper end of the range. He had moved up from the starting point in the range by 66% purely because a fatality had resulted. However the distinction between fatal and non-fatal cases had already been factored into the calculation at the stage of judging the seriousness of the harm risked and the assessment at level A under reference to the English sentencing guideline. The sheriff had accordingly fallen into error by revisiting the issue to increase the starting point by the amount he did. This was particularly the case given that the appellant company was very much on the margin between "large" and "medium" for the purposes of the guideline. By ignoring the contribution of the employee, treating the appellant company

as if it was of a much greater size and failing to recognise that the death had already been taken into account, the sheriff had imposed a level of fine far beyond what was proportionate.

[16] The appellant company continued to acknowledge that the incident had resulted in the terrible death of a very young man. It had built "Mason's wall" in his memory and had made substantial contractual death in service payments. It was noteworthy that the company continued to enjoy good relations with the deceased's family.

Decision

[17] The court has given careful consideration to the submissions made and has viewed the CCTV and animated footage of the incident and the working practices under scrutiny. We have concluded that this is not the type of exceptional case in which the employee's actions should have a bearing on the level of financial penalty. While Mr Mason was a time served electrician he was only 20 years old. He was working with colleagues. He appears to have adopted an improvised method of reeling the stretch of cable with which he was working. However, the accident happened because he fell from a ladder. The appellant company was found guilty of charges that reflected their failure to assess the dangers of employees carrying out such work at height and using improvised methods. The second and third charges narrate the failures of supervision, of taking steps to prevent a fall from height and of providing suitable and safe work equipment. It cannot be said that the accident was not reasonably foreseeable in light of those failures; on the contrary Mr Mason's accident was a consequence of them. Accordingly, we reject the first of the arguments presented on behalf of the appellant.

[18] As to the second of the three arguments, we consider that the sheriff was correct to categorise the company as a large one for the purpose of gaining assistance from the English Guideline to check the broad range of fines that might be appropriate. The circumstances in which there were delays to the trial did not justify the exclusion of the most up to date material available in assessing the company's turnover. Two of the trial postponements were granted on joint motion of the Crown and defence. In any event, the difference between the turnover of the company in the years prior to 2022 and the draft accounts for that year was not so significant as to alter the broad range of fines that might have been appropriate in this case. The English Guidelines are not to be applied mechanistically (*Scottish Power Generation Limited* v *HM Advocate 2017* JC 85, at paragraphs 35-37*)* and categorising the company as a large one was only one part in an exercise that has several steps, including standing back and considering the whole circumstances. In any event, as the sheriff explains in his report, the relevant accounts of the company for the three year period ending 31 March 2021 suggest an average annual turnover of £49.9 million. While that figure is just under the £50 million figure that would, if the English Guideline is used, take the company into the large category, the draft accounts to 31 March 2022 illustrate that turnover had risen to £60.6 million. We bear in mind that the purpose of taking account of a company's financial position is to ensure that the level of fine meets, in a fair and proportionate way, the objectives of punishment, deterrence and the removal of gain derived thought the commission of the offence. As the English Guideline puts it, the fine must be:

> "sufficiently substantial to have a real economic impact which will bring home to both management and shareholders the need to comply with health and safety legislation."

In the present case, the size and financial circumstances of the company were such as to merit a very significant fine to meet the sentencing purposes and the sheriff did not err in looking at the range of figures he did.

[19] That said, we consider that there is merit in the third argument advanced by senior counsel on behalf of the company. The tragic consequences of the company's health and safety legislation breaches were taken into account by the sheriff, quite properly, at the stage of assessing the seriousness and likelihood of harm. The established fact that the offences were a significant cause of actual harm were factored in at an early stage of the process of assessment. Thereafter, having categorised the company as a large one in light of its turnover to identify the range of possible fines and the starting point within that of £600,000, the sheriff sentencing statement records that:

> "Given that the range encompasses a wide spectrum and that a difference must be drawn between non-fatal and fatal cases, my starting point is towards the upper end of the range"

as the explanation for the starting point of £1 million (reduced from a possible £1.2 million give that the company was only just in the large company category). We have concluded that the selection of a figure so much higher than the starting point for a large company would justify does appear to include an element of double counting of the fact that death occurred. In any event, it has resulted in a final outcome that appears disproportionate in all the circumstances.

[20] While each case must inevitably turn on its own facts, we note that in the *R J Macleod* case, Sheriff Jackson KC was careful not to take the tragedy of a child's death into account twice, albeit in the context of considering whether there were aggravating factors. In many of the cases in this area, including some of those to which we were referred, a company accepts responsibility for a death and pleads guilty at the earliest opportunity. While that

did not occur in the present case, that is reflected in the absence of a discount once the penalty has been fixed. In the present case, there were a number of mitigating factors, all of which were correctly taken into account by the sheriff. But for the reasons given, the starting point was too high and we have decided that we ought to remedy that by quashing the sentence and substituting a lower figure.

[21] With the exception of this single error, the sheriff's approach to assessing the appropriate financial penalty was sound. Using the principles summarised in *Scottish Sea Farms Ltd* v *HM Advocate* 2012 SLT 299 at paragraph 18 and using the relevant English guidelines as a cross check, we consider that the total financial penalty would have been £800,000, had it not been for the mitigating factors. Taking those into account, we reduce the total to £600,000. We acknowledge the company's wish that the family receive the compensation ordered. Accordingly, we will not interfere with the Compensation Order of £200,000 but we will quash the fine of £550,000 and in its place impose a fine of £400,000. The appeal is allowed to that extent.