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IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
Strand
London, WC2A 2LL

Tuesday, 16 January 2018

B e f o r e:

LORD JUSTICE TREACY

MR JUSTICE WARBY

HIS HONOUR JUDGE BIDDER
(Sitting as a Judge of the CACD)

R E G I N A
v
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Mr I Bridge appeared on behalf of the **Appellant**

Mr T Green appeared on behalf of the **Crown**

J U D G M E N T
(Approved)

LORD JUSTICE TREACY:

1. This is an appeal against sentence brought by leave of the single judge. The appellant was convicted at Lincoln Crown Court on 17 May 2016 of an offence contrary to section 3(1) of the Health and Safety at Work Act 1974 which imposes a duty on an employer to conduct its undertaking in such a way as to ensure, so far as reasonably practicable, that persons not in its employment are not thereby exposed to risks to their health and safety.

2. On 19 September 2016, the appellant was sentenced to pay a fine of £550,000 and ordered to pay £166,217.86 towards the costs of the prosecution.

3. The matter arises from a very serious injury caused to a ground worker, Vincent Talbot, when a section of excavated trench he was working in collapsed on him, breaking his leg in six places.

4. Mr Talbot was in hospital for four days and was totally bed-bound for about three months. He was in a great deal of pain. Thereafter he remained in casts for six months. Some four years after the accident Mr Talbot was still being referred for constant pain and continues to have fragments of bone working their way out through his skin. He had been on crutches for 18 months and has constant memories of the accident. His mobility is significantly affected in that he cannot run, hop or kick a ball. There is a loss of 10 degrees of knee flexion and 40 degrees of ankle movement.

5. Mr Talbot had had savings which had lasted six months. He then had to move house and live off support provided by his family. The accident has had a profound

effect upon him.

6. The appellant company was sub-contracted by the principal contractor, Kier May Gurney (KMG) on behalf of the client, Lincolnshire County Council Highways Department. The contract was to excavate a trench replacing pipes in Fleet Street, Holbeach, Lincolnshire. The appellant in turn, and without the knowledge or written approval of KMG, sub-contracted for digging and groundwork to Lawless Civils Ltd. Work began on 5 March 2012 and involved digging a trench and then laying and joining together sections of a six metre lightweight plastic pipe.

7. The accident took place on 9 March 2012. Workmen were using a single drag box during the pipe laying. A drag box is a reinforced and strutted box which sits inside the trench and can be moved along the trench by dragging. If workers stay inside the box they cannot be injured by a trench collapse. Accordingly, the demands of safety were such that workers should remain inside the box at all times and should not enter parts of the excavated trench outside the drag box. Mr Talbot stepped outside the drag box in order to level a piece of pipe when the trench collapsed. The use of a single drag box optimised the temptation to workers to speed their work up. Had multiple drag boxes been used, the temptation and the risk would have disappeared.

8. The judge found that to some extent Mr Talbot was the author of his own misfortune in stepping outside the drag box. The judge had presided over a three week trial in which liability had been hotly contested. In convicting, the jury clearly accepted that use of a single drag box was the primary cause of an unsafe system of work which had exposed Mr Talbot and others to a risk of injury.

9. Prior to passing sentence, the judge received extensive written and oral submissions from the prosecution and the appellant. Again, there was significant dispute between the parties requiring the judge to make his own findings. The judge took ample time to consider the submissions before handing down sentence some weeks later, accompanied by a detailed document setting out his reasoning. On that occasion the judge also considered rival written submissions as to costs before determining them in the course of the sentencing hand down. No oral submissions were made as to costs, the appellant having declined the opportunity to do so.

10. The judge's detailed sentencing remarks made a number of findings of fact as to which he was satisfied to the criminal standard:

(i) the appellant had sub-contracted the work without the prior knowledge of Lincolnshire County Council or KMG;

(ii) there had been no proper site induction at all;

(iii) there had been no risk assessment document put in place before the work started. Such a document had been created retrospectively after the accident to put paperwork in order;

(iv) a method statement which the judge found was in any event inadequate was only signed by ground workers after the accident, although it purported to have been signed on the day the work commenced;

(v) a "permit to dig" document was not in place when it should have been signed and it had not been appropriately signed;

(vi) Mr Lawlor of Lawless Civils Ltd was not a qualified main site supervisor and had not been qualified to do the job entrusted to him. He was not on site at the time of the accident. The appellant had carried out no checks to satisfy itself as to Mr Lawlor's competence;

(vii) the provision of a single drag box created a foreseeable risk that a ground worker might step outside it and risk death or very serious injury when otherwise he would have been safe.

11. The grounds of appeal can be summarised as follows:

(i) the judge reached conclusions on the evidence which exceeded his discretion and were not supported by the evidence;

(ii) further, or alternatively, the judge's factual conclusions were at best of marginal relevance to issues which required determination under the guidelines and in particular in relation to culpability;

(iii) looked at in the round, the level of fine imposed was too high. It amounted to a fine and costs totalling approximately double the annual profit before tax made by the company;

(iv) moreover, the costs award was unreasonable and disproportionate given the nature and length of the trial. Particular criticism was made of time spent in preparation for both trial and sentence.

12. Having regard to the relevant guideline, the judge had assessed overall culpability as high, whereas the appellant contends that it was low. As to the seriousness of

harm/risk, that was accepted to have been at Level A, representing a risk of death or very serious injury. The likelihood of such harm occurring was assessed by the judge as medium, whereas the appellant contended it should have been low.

13. The company's accounts for the year ending 31 January 2015 showed a turnover of £35 million with a gross profit of £3.8 million, an operating profit of £659,000, and a profit before tax of £349,000 - representing about 1 per cent of turnover. These figures represented an improvement on the previous year when turnover was just under £30 million. The three years of accounts presented all showed profits resulting from a turnover of about £30 million to £35 million. The company's turnover would place the company within the guideline for a medium-sized organisation.

14. The judge's finding within the tables based on turnover at step 2 of the guideline led him to place this case as a high culpability case in harm category 2 with a starting point of £450,000 and a range from £220,000 to £1.2 million. The appellant contends that this case, properly analysed, is a low culpability case falling into harm category 3, giving a starting point of £14,000 with a range from £3,000 to £60,000.

15. We turn to the guideline in order to test the judge's analysis. We begin by noting that the judge made his factual findings having had the benefit of seeing and hearing a contested trial where factual issues were strongly contested and upon which the jury reached a unanimous conclusion. The judge then, for the purposes of sentencing had the benefit of extensive submissions which he took time to consider before delivering a reasoned judgment, referring to those submissions in turn and setting out his findings. This court will be very slow to interfere with challenges to

decisions made by a well-informed first instance judge in circumstances such as these. After all, he had the advantage of seeing the various witnesses give evidence and obtaining a feel for the case. His overall conclusion was that the appellant's submissions did not properly reflect the evidence which the court had heard and he went to the trouble of summarising the evidence which had resulted in his characterisation of culpability as high.

16. The use of a single drag box to do the work created clear exposure to danger to workers through collapse of the trench. That failure, coupled with the absence of proper site induction, combined to create an unsafe system of work which fell well short of the appropriate standard. Whilst the unauthorised sub-contracting to Lawless Civils Ltd did not of itself create risk, the fact that Mr Lawlor was named as site supervisor when, on his own admission, he had not supervised before and had no qualifications for doing so, and when the appellant had carried out no checks to satisfy itself as to his competence, also represented a serious failure. It had been acknowledged by the defence expert that the competence of a supervisor was critical to a single drag box scheme. This is not a case, in our judgment, where the failings were minor or where there were systems in place to ensure safety which were not adequately adhered to. The combination of factors in this case represented a serious failure and in our judgment it was properly categorised as amounting to a case involving high culpability.

17. Turning to harm, it was common ground that the seriousness of the harm risked was at level A, the highest level. As to the likelihood of harm, it was accepted that there was a foreseeable risk of Mr Talbot stepping outside the drag box and that trench

collapses were not infrequent events, which is why drag boxes are used. The use of a single drag box created a temptation and opportunity for Mr Talbot to do what he did. The judge rightly distinguished between equating foreseeability of harm with a high likelihood of it occurring. In the particular circumstances of this accident, where the risks of working in unsupported or inadequately supported trenches are well known, a finding of a medium likelihood of harm cannot be criticised.

18. That would lead a sentencer to put the case into harm category 2. The guideline then requires the court to consider further factors and, if necessary, adjust the harm category initially reached. First, the court must consider whether the offence exposed a number of workers to the risk of harm. In the present case there were three additional workers named in the indictment who had been exposed in the same way as Mr Talbot.

19. Secondly, the court has to consider whether the offence was a significant cause of actual harm. In this case it was, since Mr Talbot's serious injuries were directly related to the failures already described. In this context the fact that Mr Talbot was to some extent the author of his misfortune does not materially affect the position. The guideline itself states that:

> "Actions of victims are unlikely to be considered contributory events for sentencing purposes. Offenders are required to protect workers or others who may be neglectful of their own safety in a way which is reasonably foreseeable."

The use of a single drag box had created a situation whereby a worker might well step into an unprotected area of the trench.

20. Since both of these additional factors apply, the court must move up within the category range at step 2 or move up a harm category. Our analysis therefore supports the judge's conclusion that this case fell within the guideline for a medium-sized company shown to have committed a high culpability offence at harm category 2, with a starting point of £450,000. That categorisation and figure are reached without moving up the range at step 2 to account for the fact that others were exposed to the risk of harm and that Mr Talbot had sustained significant injury with ongoing consequences for him. Those matters would move the fine, based on turnover at step 2, well up the range from £450,000. We note that the appellant's arguments do not appear to have taken account of this aspect of the case.

21. Step 2 also requires the court to take into account aggravating and mitigating features. The appellant has taken issue with the judge's findings as to documentation set out above and has sought to characterise post-accident regularisation of that paperwork as merely reflecting the truth of what had happened. We do not accept that criticism. The judge clearly found that the failure to have relevant documentation in properly prepared form prior to commencement of work was of a piece with his observations as to the absence of on-site induction. We have already noted the example of the method statement which was signed later by workmen bearing a date which gave the impression that that document had been signed on the day the works commenced. The judge was entitled to treat this aspect of the case as an aggravating feature. Again this would lead to an increase from the starting point.

22. There was undoubtedly mitigation available to this appellant. There could of course

be none for any guilty plea, nor for the reasons stated could Mr Talbot's error constitute mitigation. However, this company had been in business for about 35 years and had no previous convictions. There had been no accidents during that period, although the company worked within a dangerous environment. In the previous year, over 200 miles of trench had been dug without accident. No employee had been injured in the previous 35 years and the judge described the appellant's safety record as "exemplary". The company employed six full time health and safety staff. The judge felt able to describe this accident as a one-off incident.

23. Steps 3 and 4 enable the court to step back and look at matters in the round, including a consideration of whether a fine based on turnover properly takes into account the financial circumstances of the offender. The grounds of appeal suggest that the judge failed to apply this sort of review in ensuring that the fine was proportionate to the overall means of the offender. The judge referred in his sentencing remarks to steps 3 and 4, and the fact that the appellant's profit before tax represented 1 per cent of turnover.

24. Step 3 of the guideline states as follows, in part:

> "In finalising the sentence, the court should have regard to the following factors:
>
> • The profitability of an organisation will be relevant. If an organisation has a small profit margin relative to its turnover, downward adjustment may be needed. If it has a large profit margin,

upward adjustment may be needed..."

25. The word "may" in the penultimate sentence quoted is significant. Mr Green, on behalf of the Crown, pointed out that the company's accounts consistently show key performance indicators based on turnover, gross profit margin and net assets and that in each of the years of account provided an improving trend is demonstrated. Profit before tax was therefore, in his submission, a less important factor in the context of this case and the overall assessment of this company's financial position. We consider that there is some force in that point.

26. The guideline goes on to note that the court may allow time for payment, if necessary over a number of years. This appellant sought a period of one year in which to pay the sums ordered. There was no suggestion that the sum could not be paid within that time. It has emerged this morning that the fine and costs have not been paid because the appellant has been under a misapprehension that the payment of those sums was suspended pending the outcome of the appeal. That is clearly wrong and those sums, subject to the outcome of this appeal, must be paid forthwith.

27. It appears that the judge decided not to make any adjustment from the figures he had reached by the end of step 2 to take account of matters at steps 3 and 4. In so doing he must have been satisfied that such an adjustment was not necessary.

28. Matters have taken a slightly unusual turn. The Crown has produced, during the currency of this appeal process, the appellant's accounts for the year ending 31 January 2016. Those accounts show an increase in turnover to £52 million and

a profit of £477,000. Those accounts were approved by the Board on 25 April 2016 and submitted to Companies House on 6 November 2016, about 10 days prior to the date upon which oral sentencing submissions were made to the judge and about six weeks prior to the passing of sentence in this case.

29. We record some surprise that those later accounts were not put before the court. The higher turnover figure shown would have moved company size from medium to large within the guideline, with a significant increase in starting point. At the very least, had the judge chosen to maintain the case within the medium-sized range, it would have had the effect of moving the level of fine up within that range.

30. The failure to put those accounts before the court appears to us to fall short of the requirement at step 2 that an offender should provide comprehensive accounts for the last three years so as to enable the court to make an accurate assessment of its financial status. It would not be unduly cynical to observe that had the 2016 accounts shown a significant downturn in the company's position, that would have been likely to have been drawn to the court's attention by the appellant.

31. We will proceed today on the basis that the 2016 accounts do nothing to suggest that an adjustment under steps 3 and 4 of the guideline was required. Mr Bridge, on behalf of the appellant has rightly apologised for his failure to ensure that the sentencing court had up to date accounts. The guideline at page 6 makes clear that the primary obligation in producing comprehensive accounts lies with the offender. That is not to discharge the prosecutor from an obligation of scrutiny of materials which are provided on behalf of an offender. By the time the judge came to sentence the last set of accounts was well out of date. It behoved the prosecutor at

the very least in this case to have drawn the judge's attention to the fact that the deadline for filing private company accounts is nine months after the end of the accounting year and, in this case, the relevant date would have been 31 October 2016, by which date no accounts had been filed.

32. Had that matter been drawn to the court's attention by the prosecutor, then it may well have been that further enquiry would have been made by the judge and/or that the appellants would have been spurred into providing the latest accounts in accordance with their duty. However, those events did not occur and we draw attention to the position so that others may derive benefit from our experience in this case.

33. The judge concluded that the starting point for a fine was £450,000. He adjusted upwards to £600,000 to reflect the aggravating features and the injury to Mr Talbot. He then reduced that figure by £50,000 to reflect mitigation, thus reaching the final figure of £550,000 by way of fine.

34. We do not think any criticism can be made of the judge's figure of £600,000 as being too severe in the circumstances. However, in our view this was a case where there was powerful mitigation and we have come to the conclusion that the reduction of £50,000 did not adequately reflect its force. It failed properly to take into account an exemplary health and safety record over 35 years and the judge's own description of this accident as a one-off incident within that context. In our judgment, giving appropriate weight to this mitigation would reduce the fine to £500,000.

35. We turn finally to the question of costs. Detailed schedules had been submitted and the judge had the benefit of written submissions about them. The essence of the criticism is that the judge's order was unreasonable and disproportionate. We note that both KMG and Lawless Civils, who had pleaded guilty at the Magistrates' Court stage of proceedings, were also the subject of costs applications and that the judge took care to apportion costs incurred between each of them and this appellant.

36. The judge made a modest reduction in the sum claimed against KMG and none in the case of Lawless Civils. He approached the question of costs correctly by asking himself whether the costs claimed were just and reasonable. He noted that the costs incurred in relation to the appellant arose from the fact that it had fully contested the matter in a highly robust and combative matter. That will inevitably have had the effect of increasing costs. Notwithstanding the submissions made to him, the judge found that the amount claimed against the appellant was reasonable and so awarded that sum.

37. Although the levels of costs claimed are high, we are not persuaded that the judge was in error in this respect or that he exceeded the bounds of discretion available to him. The outcome of this appeal, therefore, is that it is allowed for the reasons already given, by reducing the fine imposed from £550,000 to £500,000. The order for costs will remain in place.

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