[2005–06 Gib LR 266]

HARRISON v. MORENO (Inspector of Factories)

SUPREME COURT (Dudley, A.J.): June 9th, 2006

Employment—safety—sentence—sentence for failure to carry out risk assessment of premises, contrary to Management of Health and Safety Regulations 1996, reg. 7(1), resulting in personal injury, subject to limitation on totality of sentence when charged with other related offences arising out of same act—not to exceed maximum for principal offence of which convicted

The appellant was charged in the Magistrates' Court with (a) failing to undertake a suitable risk assessment of his premises contrary to reg. 7(1) of the Management of Health and Safety Regulations 1996; (b) failing to appoint a person to assist in undertaking compliance with the relevant statutory requirements contrary to reg. 10(1) of the Regulations; and (c) failing to provide a suitable guard rail to prevent the fall of materials contrary to the requirements of the Factories Ordinance.

The appellant was in charge of a construction site on which he stacked 2 pallets each containing 15 boxes of tiles. Whilst the pallets were being unloaded, they fell on to a metal barrier which collapsed under their weight, and then on to a lady pushing her baby in a pram on the pavement below. Thanks to the prompt action of the mother, the baby escaped injury and she herself only sustained minor injuries.

In proceedings brought by the Inspector of Factories, the appellant pleaded guilty and the Magistrates' Court imposed a fine of £15,000 in respect of the first charge but no separate penalty in respect of the others. The maximum fine for any offence under the 1996 Regulations was £20,000 and £500 for any offence under the Factories Ordinance.

On appeal against sentence, the appellant submitted that the sentence was excessive and wrong in principle. Since the three charges were based on a single culpable act, the proper approach should have been to work from the premise that £20,000 was the maximum possible fine for the most aggravated example of a breach of the Regulations. Mitigating factors should then be considered and the Magistrates' Court had failed to do so adequately, leading to an excessive fine.

Held, quashing the fine and substituting a lesser one:

The fine was excessive, as the Magistrates' Court had failed to give proper weight to the mitigating factors present. It had properly dealt with the three charges together for sentencing purposes, since they arose out of

the same culpable act. But since £20,000 was the maximum fine possible for a breach of any of the regulations, that would only be appropriate for an offence showing the most serious aggravating features, such as death or serious injury resulting from the breach, a failure to heed warnings, or the running of risks specifically to make money. Mitigating factors would be an early guilty plea (which there had been in this case), the taking of steps to remedy deficiencies (the foreman had been replaced, since the breach had partly been caused by workmen failing to follow specific unloading instructions) and a good safety record (which was true of the appellant as he did not usually engage in this kind of work). The only factor which should have operated in the minds of the justices in this case was the serious danger caused by the breach—and it was clearly a serious danger, injury being averted only by the rapid response of the mother. Nonetheless, the fine of £15,000 was clearly excessive and one of £6,000 would be substituted (paras. 5–9).

Case cited:

(1) *R.* v. *F. Howe & Son (Engrs.) Ltd.*, [1999] 2 All E.R. 249; [1999] 2 Cr. App. R. (S.) 37; [1999] I.R.L.R. 434; [1999] Crim. L.R. 238; (1998), 163 J.P. 359; 95(46) Law Soc. Gaz. 34, followed.

Legislation construed:

Management of Health and Safety Regulations 1996, reg. 7:

> "(1) Every employer shall make a suitable and sufficient assessment of—
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> . . .
>
> (b) the risks to the health and safety of persons not in his employment arising out of or in connection with the conduct by him of his undertaking,
>
> for the purpose of identifying the measures he needs to take to comply with the requirements and prohibitions imposed upon him by or under the relevant statutory provisions."

reg. 10(1): "Every employer shall, subject to subregulations (2) and (3), appoint one or more competent persons to assist him in undertaking the measures he needs to take to comply with the requirements and prohibitions imposed upon him by or under the relevant statutory provisions."

R.A. Triay for the appellant;
K. Colombo for the respondent.

1 **DUDLEY, A.J:** The appellant, described as a "building material manufacturers agent," but for present purposes the person in charge of a construction site at Glacis Road, entered guilty pleas in the Magistrates' Court to three counts involving breaches of the Management of Health and Safety at Work Regulations and the Factories Ordinance. In essence these are (i) a failure to undertake a suitable risk assessment of the risks

to the health and safety of the public; (ii) a failure to appoint a person to assist in undertaking measures needed to comply with relevant statutory requirements; and (iii) failing to provide a suitable guard rail so as to prevent so far as possible the fall of persons or materials.

2 On February 13th, 2006 the justices of the peace imposed a fine of £15,000 in respect of the failure to undertake the risk assessment with no separate penalty being imposed in respect of the other offences. It is that sentence which is the subject of the present appeal.

3 The facts of the case are relatively simple. The appellant had on uneven ground stacked two pallets, each containing some 15 boxes of tiles. On September 20th, 2005, when the pallets were being unloaded, they collapsed onto a metal barrier, which under the weight in turn collapsed on to a pedestrian walking along the pavement below the fence. The pedestrian, a lady pushing a pram with her 10-month-old child, managed to prevent her child from sustaining any injury although she sustained some injuries to her own left shoulder, arm and torso. Fortunately, the injuries were, I am told, minor in nature.

4 It is common ground that in respect of the breaches of the Management and Health and Safety Regulations the maximum sentence that can be imposed is £20,000 in respect of each offence, whilst in respect of the breach of the Factories Ordinance, the maximum sentence which can be imposed is of £500.

5 Whilst pleas were entered in respect of three distinct informations, the factual matrix of the offence discloses one culpable act, in essence allowing the pallets to collapse. In the circumstances, the approach ought to be to start from the premise that the maximum total financial penalty which could properly be imposed is £20,000. Of course, a maximum fine should be reserved for offences of the most serious kind which can be contemplated.

6 Mr. Colombo provided me with a number of English authorities which are illustrative of the sentences which are imposed by the courts in England and Wales. These, however, are of very limited assistance. Whilst counsel were unable to take me to the specific English statutory provisions, it can be gleaned from *R.* v. *F. Howe & Son (Engrs.) Ltd.* (1) that in England and Wales when dealt with summarily breaches of the Health and Safety at Work Act can attract a maximum fine of £20,000 whilst in the Crown Court the level of fine is unlimited. In some contrast, in this jurisdiction, there is no provision for offences under the Management of Health and Safety at Work Regulations to be dealt with other than summarily.

7 Notwithstanding that our sentencing regime differs, it is useful to take account of the factors referred to in *R.* v. *F. Howe & Son (Engrs.) Ltd.* by

Scott Baker, J., for whom aggravating features included death or serious injury resulting from the breach; a failure to heed warnings and a risk run specifically to save money. Mitigating features are said to include a prompt guilty plea; the taking of steps to remedy the deficiencies and a good safety record. Other relevant factors to be taken account of are the degree of risk and danger created and the effect of the fine on the business.

8 In the context of the present case, particularly relevant was the degree of danger created. That life was not lost that day was undoubtedly down to chance and the quick reflexes of the mother. Fortunately, the injuries were minor. It is said for the appellant—and I accept it—that the incident occurred partly consequent upon the limited size of the site and employees' failure to unload in accordance with specific instructions. It was also said for the appellant that the foreman was replaced, and that since then there have been no further incidents; that the appellant has a good safety record—albeit because construction is not his normal line of business—and that guilty pleas were entered at the earliest possible opportunity.

9 In all the circumstances of the case, the sentence was manifestly excessive and the appeal is allowed. The fine of £15,000 is quashed and is substituted by one of £6,000.

Order accordingly.