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IN THE COURT OF APPEAL

CRIMINAL DIVISION

[2021] EWCA Crim 1681

CASE NO 202100389/A3



Royal Courts of Justice
Strand
London
WC2A 2LL

Friday 22 October 2021

Before:

LORD JUSTICE COULSON
MR JUSTICE JEREMY BAKER
THE RECORDER OF THE ROYAL BOROUGH OF KENSINGTON AND CHELSEA
HIS HONOUR JUDGE EDMUNDS QC
(Sitting as a Judge of the CACD)

REGINA
V
NESTLE UK

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MR J COOPER QC appeared on behalf of the Applicant

MR C HASSALL QC appeared on behalf of the Crown

J U D G M E N T

LORD JUSTICE COULSON:

Introduction

- 1 On 5 January 2021 in the Crown Court at Bradford, the applicant pleaded guilty to one count of failing to prevent access to dangerous parts of machinery, contrary to regulation 11 of the Provision and Use of Work Equipment Regulations 1998, and section 33(1)(c) of the Health and Safety at Work Act 1974.

- 2 On 13 January 2021 the applicant was sentenced by His Honour Judge Gibson (“the judge”) to a fine of £640,000. The applicant renews its application for permission to appeal against the size of that fine following refusal by the single judge. Although this is a renewed application, the Health and Safety Executive have been represented by Mr Hassall QC. The court should express its gratitude at the outset both to him and to Mr Cooper QC for their submissions, and the restrained and realistic way in which those submissions were advanced this morning. In particular, Mr Cooper made a number of fair points in relation to the sentencing exercise undertaken by the judge, and has assisted in our understanding of the law and the background to this sentence.

Background Facts

- 3 At about 10.45 in the morning of Saturday 13 February 2016, Mr Andrew Jones suffered a significant injury whilst working at Nestle's factory in Halifax. He was an experienced technical operator in the part of the factory making After Eight Mints. At the time of the accident, he had been employed by Nestle for more than three years.

- 4 There had been a problem with the operation of a conveyor belt used in the manufacture of

those mints. Mr Jones was monitoring the operation of that conveyor belt because it kept slipping. He was crouching at the side of the machine where he could observe the conveyor belt running over the first of three rollers. There was no guard at that location. Mr Jones' right hand was holding an emery cloth. He said the cloth got dragged into the roller and it took his arm with it. He was trapped by the rollers within the machine until he was eventually released by paramedics.

5 Mr Jones suffered a compound fracture of his right ulna and radius. He underwent surgery. The fractures were reduced with pins and plates and he was discharged from hospital after three days. He was away from work for four months. He continues to suffer residual weakness in his right arm which is also heavily scarred.

6 The original indictment contained one count, alleging breach of section 2(1) of the Health and Safety at Work Act 1974 ("the 1974 Act"). This places a general duty on employers to ensure, so far as is reasonably practicable, the health, safety and welfare at work of their employees. It is therefore concerned with a wider liability than the regulatory offence which was subsequently added to the indictment. It is right to note that that later count had been raised with the applicant in correspondence by the Health and Safety Executive from very early on in the process, but it was not added to the indictment until later.

7 Nestle sought to stay the original proceedings as an abuse of process. This was as a result of the delay, given that the incident had occurred in 2016. On 29 May 2020, before the application to stay had been dealt with by the court, the prosecution circulated an amended indictment which added the count under regulation 11 of the 1998 Regulations, and the

consequential breach of section 33 of the 1974 Act. The applicant did not indicate what plea it might enter to that count if the indictment was amended. Instead, the applicant pursued its application for a stay. That was dismissed on 2 December 2020, although the judge indicated that it was something that he would keep under review at the trial itself. The judge also offered the applicant the opportunity of seeking an adjournment of the trial which was due on 5 January 2021.

- 8 On 21 December 2020 the applicant indicated its consent to the amendment and also indicated that it would plead guilty to the new count. On 5 January 2021 (which would otherwise have been the first day of the trial) the applicant formally pleaded guilty to the new count and a ‘not guilty’ verdict was recorded in respect of the offence under section 2 of the 1974 Act.

The Sentencing Hearing

- 9 The sentencing hearing took place on Wednesday 13 January 2021. The judge conducted the exercise by close reference to the relevant sentencing guideline. It is entitled "Health and Safety Offences, Corporate Manslaughter and Food Safety and Hygiene Offences". The particular part of the guideline with which we are concerned expressly addresses (and deals together with) breaches of section 2 of the 1974 Act and regulatory offences charged as breaches of section 33(1)(c) of the 1974 Act.

- 10 Accordingly, at Step 1 the judge concluded that this was a case of medium culpability. The parties were agreed that, as to harm, this was a Level B case. As to the likelihood of harm the judge found that there was a medium likelihood of harm. He found that two additional

factors were in play: the number of workers exposed to the risk and the fact that the offence was a cause of significant harm. Those findings allowed him either to move up a harm category within the guidelines, or substantially move up within the category range.

- 11 Moving on to Step 2, the judge had to address starting points, uplifts and the size of the applicant's business. He said:

"So I move next to step two, the starting point in the category range. The defendant company has an annual turnover of approximately £1.6 billion... In other words, £1.675 billion in the last year for which accounts are available.

Its turnover is much more than that of a large organisation within the meaning of the Guideline, a large organisation being one with a turnover of £50 million. For a large organisation within the meaning of the Guideline with medium culpability and harm category 3, the starting point would be a fine of £300,000 with a range of £130,000 to £750,000.

In the circumstances of this case I would not move up a harm category, but I would move up within the category range towards but not right to the top of the range, so for a large organisation to at least £500,000.

As the defendant company is a very large organisation within the meaning of the Guidelines a further significant uplift to the fine to reflect this factor is necessary, although I bear in mind I must not adopt an overly arithmetic or simple linear approach."

- 12 Although it is not entirely clear from those remarks, it is common ground between the parties (and has been confirmed again this morning), that the increase in the starting point indicated by the judge from £300,000 to £500,000 was the result of the uplift to reflect the two additional factors which he found and to which we have already referred, namely the number of employees affected and the failure to guard being a significant cause of actual harm.

- 13 In his sentencing remarks the judge then noted as a factor increasing seriousness that the applicant had a conviction for a previous similar offence, namely a failure to guard, which had resulted in a fatal accident. Then factoring in the sheer size of the applicant's turnover (it was 30 times the size of the sample large organisation used in the guidelines), the judge took as his starting point for the fine (before mitigation) the notional figure of £1 million.
- 14 The judge then considered the mitigating factors, including the applicant's co-operation with the investigation and its response to the accident to Mr Jones. The judge said that this reduced the notional amount to £800,000. The judge then made a further reduction of 20 per cent to reflect the applicant's late guilty plea and that reduced the fine still further to the sum of £640,000, the fine imposed.

The grounds of appeal

- 15 On behalf of the applicant, Mr Cooper identified three potential grounds of appeal. The first arises out of the applicant's case that some fault attached to Mr Jones. It is their case that he was not simply observing the rollers in action but was attempting to clean fondant off the roller with the emery cloth. They say it was that which caused him to be in the position of being exposed to the moving parts. There was some expert evidence from a Mr Mottram to that effect. The applicant's complaint is that the judge appeared to resolve this dispute against the applicant without requiring any formal evidence, and the applicant argues that that error was then compounded by the judge's decision to apply an uplift in respect of actual harm.
- 16 The second ground of appeal is that the judge should not have reduced the credit for the

guilty plea from 33 per cent (which is of course the standard discount for an early guilty plea) to 20 per cent in the particular circumstances of this case.

17 The third ground of appeal is that the judge failed to have regard to the fact that the offence to which the applicant had pleaded guilty was a strict liability offence. The complaint is that the judge's approach to sentence appeared to be based on obligations owed by a defendant under broader health and safety legislation and not by reference to the strict liability offence in the present case.

18 We deal with those three grounds of appeal in turn. However, it is convenient to do so by reference to the various stages of the exercise envisaged by the sentencing guideline which, as we have said, the judge was at such pains to follow. Although the guideline talks about there being just two steps, on analysis each of those steps involves a number of different stages. Accordingly, we analyse the points raised by Mr Cooper by reference to those various stages.

Stage 1: Culpability

19 At stage 1 the judge found that the applicant's culpability in this case was medium. None of the three grounds of appeal seek to challenge that finding, but for the avoidance of doubt we consider that the judge's categorisation was correct. At the sentencing hearing, the prosecution asserted that culpability was high because the guarding of dangerous parts of machinery is a recognised standard in the industry and a specific regulatory requirement. The applicant contended that culpability was low because significant efforts were made to address the risk and there had been no prior warning or circumstances indicating a risk to

health and safety.

20 The judge concluded that, although the applicant had made a substantial effort to identify the risks posed by the machinery, in particular by undertaking specific assessments in 2009 and 2013, those assessments were of limited value because the applicant had not asked for the assistance of its own operatives when undertaking them. It appears that they were entirely carried out by third parties. Moreover, a moving part of the inner workings of the machinery was exposed and was unguarded in the place where the working of the roller could be observed by a crouching employee. For those reasons therefore the judge said that the applicant's culpability was medium. We agree.

Stage 2: Seriousness of Harm Risked

21 Both sides agree that this was a Level B case and it was on that agreed basis that the judge sentenced the applicant.

Stage 3: Likelihood of Harm

22 The judge concluded that this was a case where there was a medium likelihood of harm. Again, the prosecution said that the likelihood of harm arising was high because there was no physical isolation of the risk, and that this was because the risk itself had not been properly appreciated. Mr Jones did not override any safety measures because there were none. The applicant, on the other hand, said that the likelihood of harm was low because Mr Jones had been trained to a high level and the system involved a look-out procedure.

23 The judge, as we have said, concluded that the likelihood of harm was medium. Going

beneath the conveyor belt to observe the belt being drawn through the rollers was not a standard task. There had not been a similar accident in the previous seven years but, despite that, the source of the risk had in fact been accessed by Mr Jones.

- 24 Again, it does not appear to us that the grounds of appeal touch on the judge's finding that this was a case with a medium likelihood of harm, but to the extent that they do, we again consider that the judge's conclusions were correct.

Stage 4: The Two Additional Factors and the Possible Uplift

- 25 The conclusions that the seriousness of harm was Level B and that there was a medium likelihood of harm meant that, by reference to the guidelines, the relevant harm category was Harm Category 3. But the next stage in the process was for the judge to consider whether two additional factors applied because, if one or both did apply, then the court had to consider either moving up a harm category or substantially moving up within the category range.

- 26 The first additional factor is whether the offence exposed a number of workers to the risk of harm. The judge found that it did. He said:

"It must be the case that the failure to guard the relevant parts exposed other employees to the same risk of harm I have already identified."

The first additional factor was therefore made out.

- 27 The second additional factor was whether the offence was a significant cause of actual harm. The guideline expresses the applicability of this factor in this way:

"Consider whether the offender's breach was a *significant cause* of actual harm and the extent to which other factors contributed to the harm caused. 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."

A significant cause is defined in the guideline as one which "more than minimally, negligibly or trivially contributed to the outcome. It does not have to be the sole or principal cause."

28 As to this second factor, the judge said that the failure to guard was a significant cause of the harm to Mr Jones. He noted that:

"Had the relevant part of the machine been guarded, Mr Jones' injury would not have been sustained."

He found expressly that, even if Mr Jones had been using the emery cloth to clean the roller (which was the applicant's case), it was immaterial because, as the guideline said, the actions of victims were unlikely to be considered contributory events for sentencing purposes.

29 On this basis, the judge found that both additional factors were in play. He said this meant that he had to consider either moving up a harm category or substantially moving up within a category range at Step 2 in the guidelines. As we have said, the judge chose the latter course, increasing the starting point of the fine from £300,000 to £500,000 as a result of these two additional factors.

Ground 1 of the Appeal: The Uplift

30 As we have indicated, the applicant complains about this uplift on the basis that there was an issue as to precisely what Mr Jones was doing at the time of the accident, and the judge's conclusion, without hearing evidence on the point, meant that the uplift was unfair.

31 One difficulty with this first ground of appeal, which has been highlighted this morning, is precisely how the challenge to what Mr Jones was doing came about. It appears from the papers that the prosecution case, which was based on Mr Jones' evidence that he was standing by the machinery with a cloth in his hand observing the conveyor belt when the cloth was caught in the rollers, was accepted by the applicant. The point about the potential fault on Mr Jones' part appeared to arise only during the applicant's mitigation, which may explain why there was no evidence on the point. That is obviously an unfortunate dispute to have arisen so late in the day. However, there is no need for us to resolve it because, in our view there are two answers to this first ground of appeal in any event.

32 The first is that, as we have said, the judge found two additional factors were present here, both in relation to the number of workers being exposed to risk and that the failure to guard was a significant cause of actual harm. Accordingly, in circumstances where there is no challenge to his finding that there was a risk to a number of workers, the uplift was always in play. In other words, because there is no challenge to that first additional factor, it must mean that the judge was justified in making an uplift from the £300,000, regardless of the outcome of ground 1 which is solely concerned with the second factor, namely actual harm.

33 Secondly, we consider that the judge was quite entitled to uplift for actual harm. We agree with the judge that it is irrelevant for this part of the sentencing exercise whether Mr Jones was crouching down observing the operation of the roller or was attempting to clean the roller. As the judge himself noted, in either case it was the failure to guard the open parts of the machinery that was a significant cause of the harm suffered by Mr Jones. Had the relevant part of the machine been guarded Mr Jones' injury would not have been sustained. That is true whatever it was he was doing.

34 During the course of his helpful oral submissions, Mr Cooper made a new point in support of ground 1, by reference to the words "reasonably foreseeable" in the section of the guideline which we have set out in paragraph 27 above. His argument was that, in this case, the issue as to what Mr Jones was doing and where he was standing was relevant to the issue of reasonable foreseeability.

35 We do not accept that submission. We think it is based on a misreading of the guideline. The reference to "reasonably foreseeable" is not a reference to the accident or the culpability of the employee; in our view that phrase in that sentence is simply confirming that the conduct of the employee will generally be irrelevant to the sentencing exercise because it is reasonably foreseeable that the employee will be neglectful of his or her own safety. It is the way in which the employee is 'neglectful of their own safety' which is reasonably foreseeable.

36 In consequence, the last sentence is simply confirming the previous two sentences of the

guideline (cited at paragraph 27 above) referable to a significant cause of actual harm. The paragraph is designed to ensure that a sentencing judge does not, save in an exceptional case, have any regard to questions such as blame or fault on the part of the employee. That reading of the paragraph confirms that the question of what it was that Mr Jones was doing was not relevant for the purposes of this sentencing exercise.

37 On this basis, the judge was entitled to move up within the category range as a result of the likelihood of actual harm. He was entitled to do that without needing to resolve any factual dispute as to precisely what Mr Jones was doing at the time of the accident.

38 For those two reasons therefore, we reject ground 1 of the appeal. The judge's uplift from £300,000 to £500,000 was in our view amply justified.

Stage 5: Calculating the Size of the Fine

39 At the levels of culpability and harm identified by the judge, the guideline indicated that, for a company with a turnover of £50 million (and before any uplift), the starting point was £300,000. As we know, for the reasons we have just identified, the judge increased the starting point to £500,000. The judge then had to address the fact that the applicant's turnover was something like 30 times the amount taken in the guideline as an example. Moreover, that part of the exercise was expressly required by the guideline itself. The relevant page of the guideline contains a box in bold type at the top which reads as follows:

"Very large organisation
Where an offending organisation's turnover or equivalent very greatly exceeds the threshold for large organisations, it may be necessary to move outside the suggested range to achieve a proportionate sentence."

40 On the basis of that significant difference between the applicant and the large organisation used as the example in the guideline, the judge again moved up within the category range. Taking that into account, and the applicant's previous conviction for a fatal accident due to machinery being unguarded, the judge concluded that, before considering mitigation, the right figure for the fine would be £1 million, i.e. twice the starting point of £500,000 arrived at by way of the uplift referred to above.

41 Mr Cooper did not make any criticism of that doubling of the starting point. He also accepted during the course of argument that that doubling was in reality the primary reason for the size of the fine in this case. Going on from there, no criticism is made of the reduction of £200,000 to reflect mitigation, which brings us down to the figure of £800,000, which was the figure the judge took before applying the credit for the guilty plea.

Stage 6: Discount for Plea

42 As explained, the judge allowed a reduction of 20% to reflect the guilty plea entered on what would otherwise have been the first day of the trial. We note that in ordinary circumstances a guilty plea entered on the first day of trial will usually generate a discount for plea of around 10 per cent.

Ground 2 of the Appeal: Full Credit

43 It is now said on behalf of the applicant that the judge should have allowed full credit for the guilty plea. It is right to note that, during the course of his submissions to the judge, Mr Cooper did say that "Technically I think the credit should be full". But he went on to

acknowledge what he called "the complicated history" of the proceedings and said that he was leaving it to the judge to determine the appropriate level of credit. It might be said that that is what the judge then did.

44 Accordingly, Mr Cooper needs to show that in some way, when considering as a matter of his discretion the amount of the discount for plea, the judge erred in arriving at a figure of 20 per cent. That is a high hurdle. The judge had to consider the whole of the complicated history of the case. He did so and arrived at a deduction of 20 per cent.

45 In our view, that was a fair figure, taking into account that history. The judge was right to say that the delay in indicating a guilty plea to the regulatory charge was a tactical device on behalf of the applicant. The applicant plainly wanted to know what would happen to its abuse argument before indicating any plea to the proposed amended indictment. That was a strategy which the applicant was quite entitled to adopt, but in those circumstances, they allowed a delay to occur.

46 The issue really comes down to this. Can the applicant say that it pleaded guilty at the first opportunity, so as to obtain full credit? In our view, because of the delay between May to December, the applicant cannot say that. In those circumstances we do not consider that the judge was even arguably wrong to apply a reduction of 20 per cent.

47 On that basis of course, having worked through the sentencing guidelines, having taken note of what was disputed and what was not, and resolved the issues in the same way as the judge, we arrive at the *prima facie* position that the fine of £640,000 was appropriate in

all the circumstances of this case.

Ground 3 of the Appeal: The Strict Liability Offence

48 However, Mr Cooper had a third ground of appeal, to the effect that the judge should have had regard to the fact that this was a strict liability offence under the regulations and therefore a breach of section 33(1)(c) of the 1974 Act, rather than a breach of section 2 of the Act. In support of this argument, Mr Cooper relied on *R v Whirlpool Ltd* [2017] EWCA Crim 2186 and *R v Electricity North West Ltd* [2018] EWCA Crim 1944. The simple suggestion was that a strict liability offence like this should attract a lesser fine than a fine imposed for a wider breach of the 1974 Act.

49 We deal briefly with those two authorities. We have not found them to be of any particular assistance. The issues in *R v Whirlpool Ltd* were very different to those which arise here, and the judgment in that case principally grappled with the age-old problem in these cases of a company with a substantial turnover but poor profitability. *R v Electricity North West* is of little assistance for other reasons. There the judgment was largely concerned with a conviction appeal which was ultimately unsuccessful. The dispute about the size of the fine in that case arose from the acquittals on two of the three relevant counts before the jury. The Court of Appeal found that the fine imposed at first instance essentially ignored those acquittals. We note that in that case, in which Mr Cooper appeared for the defendant, his submission that the judge should not have applied the guideline at all was rejected. More significantly for present purposes, Mr Cooper fairly accepted that he could not point to anything in the judgment in that case which provided any express support for his submission that in some way the sentencing exercise should

distinguish between strict liability and other, wider offences.

50 In our view, introducing into a sentencing exercise like this questions of strict liability or concepts of foreseeability, is unnecessary and undesirable. The guideline, so it seems to us, deliberately eschews all such complexities. It makes no reference to them at all. It expressly applies equally to offences charged under section 2 and under section 33 of the 1974 Act, without any attempt at distinction. In our view the guideline sets out a clear approach for a judge to adopt which applies to all relevant breaches.

51 Furthermore, it seems to us that, to the extent that, in any given case, there is a differential to be made for sentencing purposes between strict liability and other offences, this would be relevant on any consideration of culpability, the first stage of the sentencing exercise envisaged by the guideline. In this case, we have already addressed and endorsed the judge's finding that this was a medium case of culpability.

52 Of course, we recognise that the guideline is just that. It is not a straitjacket and it should not prevent a judge from sentencing by reference to the real culpability and risk of harm involved in any given breach. But in our view the guideline does not do so. Indeed, in our view, questions of culpability and risk of harm are front and centre in the sentencing exercise envisaged by the guideline. If the judge follows the guideline, he or she is going to be considering the actual facts of the offending in question. So, contrary to Mr Cooper's submission on this point, we consider that the guideline ensures greater regard to the specific circumstances of the particular case in question, not less.

- 53 Standing back, we consider that this sentencing exercise properly applied every stage of the relevant guideline. The judge carried out a comprehensive exercise by reference to each of the stages identified in the guideline and arrived at a fine which reflected actual culpability, likelihood of risk of harm and the turnover of the applicant. It was that last matter which primarily dictated the ultimate size of the fine, but that too is an essential part of the sentencing guideline and the judge was bound to follow it.
- 54 For all these reasons, and again acknowledging our gratitude both to Mr Cooper and to Mr Hassall for their submissions today, this renewed application for permission to appeal against the size of the fine in this case is refused.

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

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