



Neutral Citation Number: [2021] EWCA Crim 359

Case No: 202100427 B3 / 202100428 B3

**IN THE COURT OF APPEAL (CRIMINAL DIVISION)**  
**ON APPEAL FROM THE CENTRAL CRIMINAL COURT**  
**THE HONOURABLE MRS JUSTICE THORNTON**  
**T20207062**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 16/03/2021

**Before :**

**LORD JUSTICE BEAN**  
**MRS JUSTICE CHEEMA-GRUBB**  
and  
**HER HONOUR JUDGE WENDY JOSEPH QC**

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**Between :**

**REGINA**  
**- and -**  
**(1) AH LTD**  
**(2) MR SJ**

**Respondent**

**Appellants**

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**Jamas Hodiola QC** (instructed by **Corker Binning**) for **AH Ltd**  
**John Cooper QC** (instructed by **Corker Binning**) for **Mr SJ**  
**Oliver Glasgow QC and Kerry Broome** (instructed by **the Crown Prosecution Service**) for  
the prosecution

Hearing date: 4 March 2020  
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**Approved Judgment**

**Lord Justice Bean :**

1. AH Ltd and Mr SJ, a director of the company, are due to stand trial in the Crown Court on 4 October 2021 on charges arising out of the death of a resident at a nursing home owned and operated by the company in 2015.
2. The resident died as a result of serious burns to her legs caused by scalding hot water entering the bath whilst she was being bathed by two carers.
3. The prosecution case is that this death was entirely avoidable and would have been avoided if baths, showers and sinks in the care home had been fitted with Thermostatic Mixer Valves (TMVs) which were regularly checked, serviced and maintained. The bath where the resident received her fatal injuries was fitted with a TMV but it was not the appropriate type of TMV; had not been serviced; and was defective. Additionally, the staff working at the nursing home were not given adequate training or oversight to ensure they cared for residents in a safe way.
4. There are six counts on the indictment. Of relevance to this ruling is Count 2, which alleges that the company failed to discharge a duty contrary to s 33(1)(a) of the Health and Safety at Work Act 1974. The particulars state that the company failed to conduct the operation of the nursing home in such a way as to ensure, so far as was reasonably practicable, that residents were not exposed to the risks of scalding by hot water, in contravention of ss 3(1) and 33(1) of the Act.
5. Count 3 concerns Mr SJ. It alleges that he failed to discharge a duty contrary to s 33(1)(a). The particulars are that that he consented to or connived at the commission of the offence by the company or the commission of that offence was attributable to neglect on his behalf, contrary to s 37(1) of the Act.
6. On 28 April 2020 both applicants pleaded not guilty to all the counts with which they are charged. The matter was listed for a case management hearing on 18 January 2021 at the Central Criminal Court before Thornton J. The parties made a joint application at the outset for that to be a preparatory hearing under s 29 of the Criminal Procedure and Investigations Act (CPIA) 1996 and for the judge to give a ruling as to where the burden lies of proving "reasonable practicability" under s 40 of the 1974 Act. The judge indicated after hearing oral submissions that she would grant the application for a preparatory hearing. No party sought at that point to make any further submissions and she reserved judgment. She handed down a written ruling on 5 February 2021 finding in favour of the prosecution's submissions. The company and SJ seek leave to appeal against her ruling. The Registrar has referred the application to the full court. We heard submissions on 4<sup>th</sup> March 2021.

*The 1974 Act*

7. Section 1 of Part 1 of the 1974 Act sets out the general purpose of the Part. Relevant extracts provide that:
  - "1. The provisions of this Part shall have effect with a view to-securing the health safety and welfare of persons at work;

b) protecting persons other than persons at work against risks to health or safety arising out of or in connection with the activities of person at work...

...

3. For the purposes of this Part risk arising out of or in connection with the activities of persons at work shall be treated as including risks attributable to the manner of conducting an undertaking, the plant or substances used for the purposes of an undertaking and the condition of premises to used or any part of them.”

8. Sections 2 to 7 set out a series of general duties for the achievement of these purposes. Of relevance to the present case is section 3 which provides that:

“3. It shall be the duty of every employer to conduct his undertaking in such a way as to ensure, so far as reasonably practicable that persons not in his employment who may be affected thereby are not thereby exposed to risks to their health and safety.”

9. The primary means of enforcing these provisions is through a system of inspection, with follow up sanctions where appropriate. Various powers are given to inspectors appointed under the Act. They include powers of entry and investigation under s 20.

10. Section 33 sets out the offences that may be committed under Part 1 of the Act, including that:

“1. It is an offence for a person –

- a) to fail to discharge a duty to which he is subject by virtue of sections 2-7.”

11. Section 37(1) applies to offences by bodies corporate. It provides:

“Where an offence under any of the relevant statutory provisions committed by a body corporate is proved to have been committed with the consent or connivance of, or to have been attributable to any neglect on the part of, any director, manager, secretary or other similar officer of the body corporate or a person who was purporting to act in any such capacity, he as well as the body corporate shall be guilty of that offence and shall be liable to be proceeded against and punished accordingly.”

12. Section 40 deals with the onus of proving the limits of what is reasonably practicable. It provides that:

“In any proceedings for an offence under any of the relevant statutory provisions consisting of a failure to comply with a duty or requirement to do something... so far as is reasonably

practicable... it shall be for the accused to prove... that it was not reasonably practicable to do more than was in fact done to satisfy the duty or requirement.”

13. The offence under s 33(1)(a) is punishable by a maximum penalty of imprisonment for two years or a fine or both.

*R v Davies*

14. The question of whether s 40 imposes an evidential or legal burden on an accused was addressed by this court in its judgment, delivered by Tuckey LJ, in *R v Davies* [2003] ICR 586.
15. Mr Davies ran a plant hire firm. One of his self-employed subcontractors was crushed to death by a reversing JCB. Mr Davies was prosecuted and convicted under ss 3(1) and 33(1). The trial judge directed the jury that there was a legal burden on Mr Davies to prove on the balance of probability that it was not reasonably practicable for him to do more than he had in fact done to ensure safety whilst the JCB was reversing.
16. The Court of Appeal held that the language of s 40 clearly imposes a legal burden (‘it shall be for the accused to prove’). The Court construed the legislative scheme and concluded that:

“The ‘duty cast on the defendant is a ‘duty... to ensure so far as is reasonably practicable’. It is a breach of a qualified duty which gives rise to the offence.

...

This construction of the statute means that section 40 does make some inroad into the presumption of innocence.”

17. The Court acknowledged the significance of this inroad:

“The concern is not that the defendant must disprove an element of the offence, but that he may be convicted while a reasonable doubt exists. In other words, in this case the jury might not have been sure that it was reasonably practicable for the Appellant to do more, but convicted him because he had not satisfied them that he could not have done more. It is therefore for the State to justify such an inroad into the presumption of innocence, which should not be greater than is necessary, justified and proportionate. The Court has to consider whether a fair balance has been struck between the fundamental right of the individual and the general interests of the community, paying due regard to the choice which the legislature has made when striking that balance, particularly where social or economic policy is involved” (§10)

18. In addressing the fair balance the Court considered three questions (§11):

“1)What does the prosecution have to prove in order to transfer the onus to the defence?

2) What is the burden on the accused? Does it relate to something which is likely to be difficult for him to prove, or does it relate to something which is likely to be within his knowledge or to which he readily has access?

3) What is the nature of the threat faced by society which the provision is designed to combat?”

19. The Court concluded that the imposition of a legal burden of proof was justified, necessary and proportionate. Its reasons may be summarised as follows:

- a) The Act is regulatory and its purpose is to protect the health and safety of those affected by the activities referred to in ss 2 to 6 of the Act. Duty-holders are persons who have chosen to engage in work or commercial activity (probably for gain) and are in charge of it. In choosing to operate in a regulated sphere of activity they must be taken to have accepted the regulatory controls that go with it.
- b) The prosecution must prove that the defendant owes the duty (in the case of s 3 to the person affected by the conduct of his undertaking) and that the safety standard (in the case of s 3 exposure to risk to health or safety) has been breached.
- c) The facts relied on in support of the defence should not be difficult to prove because they will be within the knowledge of the defendant. Whether the defendant should have done more will be judged objectively.
- d) If all the defendant had to do was raise the defence to require the prosecution to disprove it, the focus of the statutory scheme would be changed. The trial would become focused on what it was the enforcing authority was saying should have been done, rather than on what the defendant had done or ought to have done, which is what Parliament intended. In complicated, and therefore potentially the most serious cases, the prosecution might face considerable difficulties in assuming this burden of proof where the only relevant expertise was with the defendant.
- e) The defendant does not face imprisonment.

20. The decision in R v Davies was approved by the House of Lords in R v Chagot ([2009] 1 WLR 1). Lord Hope of Craighead said at [30]:

“In my opinion the Court of Appeal reached the right decision in that case, and it did so essentially for the right reasons. But I have difficulty with some of its reasoning in para 26, and with the third sentence in particular... Nevertheless for the other reasons that the Court of Appeal gave in *R v Davies* I would

hold that the placing of a legal burden of proof on the employer in the case of this legislation is not disproportionate. The penalties that may be imposed in an individual have now been increased: see para 15 above. But I do not think that, when account is taken of the purpose that this legislation is intended to serve, this alteration in the law renders what was previously proportionate disproportionate.”

*Submissions*

21. Mr Jamas Hodivala QC, for the company, submits that *R v Davies* should be reconsidered and that it was wrongly decided for four reasons.
22. Firstly, he submits, “reasonable practicability” is an element of the offence, not a defence. Parliament could have legislated for an absolute duty to ensure safety subject to a defence of reasonable practicability, but did not do so.
23. In *AG v Lee Kwong-Kut* [1993] AC 951 the Judicial Committee of the Privy Council, in the advice of the Board delivered by Lord Woolf, set out the correct approach to the compatibility of a reverse burden of proof involving an element of the offence itself. Lord Woolf considered that the offence under consideration comprised three elements, the third of which purported to place the burden of proof on the defendant. He rejected the AG’s contention that the third element was a “special defence”. In finding this third element was incompatible with the presumption of innocence, Lord Woolf stated:

“Some exceptions will be justifiable, others will not. Whether they are justifiable will in the end depend upon whether it remains primarily the responsibility of the prosecution to prove the guilt of the accused to the required standard and whether the exception is reasonably imposed, notwithstanding the importance of maintaining [the presumption of innocence]. The less significant the departure from the normal principle, the simpler it will be to justify an exception. If the prosecution retains responsibility for proving the essential ingredients of the offence, the less likely it is that an exception will be regarded as unacceptable... ..

The court can ask itself whether, under the provision in question, the prosecution is required to prove the important elements of the offence; while the defendant is reasonably given the burden of establishing a proviso or an exemption or the like of the type indicated by Lawton LJ [in *R v Edwards*]. If this is the situation [the presumption of innocence] is not contravened.”

24. Mr Hodivala argues that Tuckey LJ conducted none of this analysis in *Davies* and was wrong not to do so. Tuckey LJ paid “due regard” to Parliament’s election to impose a reverse burden (see at [27]), which it is submitted is an approach that was subsequently disapproved in *Sheldrake v DPP* [2005] 1 AC 264 at [31]. Furthermore, Tuckey LJ did not consider Lord Hope’s analysis of the three categories of

presumption in *R v DPP ex p Kebilene* [2000] 2 AC 326. Had he done so, he would have concluded that s.40 of the 1974 Act inflexibly requires the defendant to prove an element of the offence and therefore violates the presumption of innocence.

25. Secondly, having correctly identified “reasonable practicability” as an element of the offence in *Davies*, Tuckey LJ confusingly then referred to it throughout his assessment of proportionality as a “defence”: see [13], [20], [21], [22], [26], [28] and [29]. This blurring of the distinction between elements of the offence and a defence was a significant error in the Court’s assessment of s.40 and its compatibility with the presumption of innocence.
26. Thirdly, Tuckey LJ placed significant weight on the conclusion the s.3 HSWA 1974 offence was a “regulatory offence” rather than a “truly criminal” offence: see *Davies* at [15] – [17].
27. A distinction between “regulatory” offences and “truly criminal” offences is arbitrary and ought no longer be sustained. In 2010, the Law Commission referred to the distinction as “familiar but misleading” and provided examples to demonstrate the arbitrary nature of these labels: see Law Commission Consultation Paper No 195: Criminal Liability in Regulatory Contexts at 3.43-3.50. Instead, the Law Commission drew a principled distinction between criminal conduct and regulatory conduct based on the procedure in a contested case. The modern approach is to eschew the perceived triviality of the proceedings as a basis for “chipping away at a fundamental principle of the criminal law”: *DPP v Wright* [2010] QB 224 at [61] per Sir Anthony May P.
28. The distinction between “regulatory crime” and “true crime” is an arbitrary basis upon which to undermine the presumption of innocence. Placing a burden of proof on a defendant who pleads ignorance of relevant facts within a regulated activity is proportionate: *R v Johnstone* [2003] 1 WLR 1736 at [53]. It does not follow that the placing the legal burden of proof on a defendant to prove the existence of an element of the offence comprising an objective state of affairs, is proportionate.
29. Fourthly, the modern practicalities of investigating and prosecuting health and safety cases do not render proportionate a legal burden of proof on the defendant.
30. Mr Hodiola submits that s 40 of the 1974 Act should be “read down” to impose no more than an evidential burden on the defendant for the following reasons:
  - a) Parliament is unlikely to have addressed its mind to the compatibility of s 40 with Article 6(2) of the ECHR when enacting the 1974 Act;
  - b) Section 40 is an element of the offence. There is insufficient justification for departing from the usual principle that the prosecution should prove this issue;
  - c) “Reasonable practicability” relates to an objective state of affairs, rather than a defendant’s knowledge or belief in that state of affairs;
  - d) The requirement for an accused to discharge an evidential burden regarding the reasonable practicability of measures would not impact on the focus of the trial in any way;

- e) As has been amply demonstrated by the volume of prosecution material generated in this case, the Health and Safety Executive has adequate powers to fully investigate the facts relating to a potential breach of the legislation;
- f) When the 1974 Act was passed, there were no adverse inferences available pursuant to ss 34 and 35 of the Criminal Justice and Public Order Act 1994. Similar reasoning resulted in the Court of Appeal revisiting the reverse burden of proof relating to corruption in *R v Webster* [2010] EWCA Crim 2819 at [22] – [24];
- g) When prosecuting health and safety cases, the prosecution will inevitably set out in its opening and/or closing what further steps it suggests should have occurred. Defendants are routinely cross-examined about why they did or did not take particular measures. In virtually every health and safety prosecution there are expert witnesses from both the prosecution and defence who assist the jury with the issue of reasonable practicability. This case is no exception and placing the legal burden of proving reasonable practicability upon the Crown would not inevitably result in it being unable to prove its case;
- h) A defendant can be convicted and sentenced to imprisonment for up to 2 years despite the fact the jury is not sure of guilt. Consistently with the “golden thread” the defendant should receive the benefit of that doubt. Allowing the innocent to go free does not undermine the regulatory regime.
- i) Reference to accident statistics in the workplace, should they be relied upon in support of a reverse burden, do not assist the Crown as other legislative provisions regarding public safety function with the Crown bearing a legal burden of proving the elements of the offence. For example, in 2018, 160,597 people were injured in road traffic accidents. However, the Crown bears the legal burden of proving the offences of causing death or serious injury by dangerous driving (ss.1 and 1A of the Road Traffic Act 1988), careless driving and causing death by careless driving (s.2B and s.3ZA of the Road Traffic Act 1988).

*Submissions: the individual defendant*

- 31. Mr John Cooper QC, as well as adopting the submissions of Mr Hodivala, made further points in relation to his client who of course, unlike the company, is liable to imprisonment on conviction. He argues that when *Davies* was decided a custodial sentence could not be imposed in respect of an offence under ss 3 and 37 of the 1974 Act. Custodial sentences were introduced by the Health and Safety Offences Act 2008.
- 32. Mr Cooper also referred us to the decision of the Supreme Court in *Baker v Quantum Clothing* [2011] UKSC 17, which was considered in a criminal context in this court in a judgment delivered by Hughes LJ in *R v Tangerine Confectionery Ltd* [2011]



EWCA Crim 2015. We are bound to say that we could not see how the latter case assisted the argument.

33. Mr Cooper noted that since the decision in *Davies* the Health and Safety Executive has introduced notices of contravention issued by inspectors; and, in order to issue such a notice, an inspector must be satisfied that reasonably practicable measures were not in place. However, since a notice of contravention, is, as Mr Cooper accepted, not a necessary prerequisite for a prosecution, it is difficult to see that this is a relevant point either.

#### *Discussion*

34. For all the elegant and carefully argued criticisms which Mr Hodivala made of *Davies*, we think that the short and simple answer is that given by Mr Oliver Glasgow QC for the prosecution, namely that the House of Lords expressly approved the decision in *Davies* in the speech of Lord Hope of Craighead in *Chargot*. This may have been *obiter* in the limited sense that the question of law of general public importance on which leave was given to appeal to the House of Lords in *Chargot* was not exactly the same point as that which is before us in this case. Nevertheless the approval of *Davies* in *Chargot* is clear and, in our judgment, binding. There is nothing disproportionate in the reverse burden imposed on defendants by s 40 of the Health and Safety and Work Act 1974.
35. As regards Mr Cooper's client, the individual defendant, the introduction of a maximum sentence of two years imprisonment by the 2008 Act had already occurred by the time that *Chargot* was before the House of Lords, but it did not deter the House from giving its approval to *Davies*. In those circumstances it is simply not open to either a trial judge or this court to hold that *Davies* was wrongly decided.
36. We would add that even if the case of *Chargot* had never reached the House of Lords, we would have had great difficulty in accepting that *Davies* was decided *per incuriam*. But it is not necessary to develop this point, nor to consider the authorities on the limited circumstances in which this court can depart from one of its own previous decisions.

#### *Conclusion*

37. For these reasons we refuse permission to appeal from the clear and carefully reasoned ruling of Thornton J, which in our view was unarguably correct.