COURT FILE NO.: 242/05
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SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Her Majesty the Queen vs. Pasquale Di Franco

BEFORE: Mr. Justice R. Clark

COUNSEL: D. McCaskill, counsel for the Appellant and
N. Keith and G. Bassi, counsel for the Respondent

E N D O R S E M E N T

Introduction

[1] On November 25, 2005, Pasquale DiFranco pleaded guilty before Bigelow J. of the Ontario Court of Justice to two offences contrary to the Occupational Health and Safety Act ["OHSA"], R.S.O. 1990, c. O-1, as amended. On December 7, 2005, the trial judge imposed a fine of $15,000 on each count, and probation for one year. This is a Crown appeal from that sentence.

Facts

[2] On April 26, 2002, three construction workers were on the sixteenth floor of a condominium project on the Toronto waterfront, standing by as concrete was being poured into wall forms. When the forms began to give way all three men jumped onto an adjacent platform, covering an elevator shaft, in an effort to try to prop up the forms to prevent the collapse of the wall. When the cement spilled onto the platform, it collapsed. One worker jumped clear of the platform to safety. Tragically, the other two fell to their deaths at the bottom of the elevator shaft.

[3] The respondent, Mr. Di Franco, was a supervisor for the construction company that designed and built the formwork and poured the concrete for the two buildings in the project. The tragedy occurred because, as was outlined in the Agreed Statement of Facts, the respondent failed to have the formwork inspected by a professional engineer before allowing the cement to be poured and because he had ordered that the platform be constructed using materials that were inadequate to safely support the weight of the three workers, much less the weight of the spilled cement.

[4] Nearly a year after the accident, the respondent was charged, along with others, with offences under the OHSA. Two corporate entities involved in the construction project were also

charged. They, like the respondent, pleaded guilty and received fines of $280,000 and $300,000, respectively. Another person was charged, but the charges against him were withdrawn pursuant to the plea negotiations that resulted in the pleas of guilt by the respondent and the corporations.

Position of the Appellant

[5] The Crown contends that the trial judge erred by failing to impose a custodial sentence in the egregious facts of this case. Mr. McCaskill, counsel for the appellant, argues that the judge's own findings of fact dictated that a custodial disposition was the only fit sentence in the circumstances. That said, with his characteristic fairness, Mr. McCaskill conceded at the outset of oral argument that, given that the respondent has served his sentence and given the lengthy and unexplained delay in perfecting the appeal, it would be difficult to ask the court to incarcerate the respondent at this late stage, nearly six years after the tragic events giving rise to this case. He went onto argue, however, that the appeal is not moot because of the important precedential value of decisions from this level of court in guiding the courts that normally deal with prosecutions under the OHSA. The main thrust of his argument is that strong deterrent sentences, including incarceration, will serve to protect workers by encouraging compliance with the OHSA, and regulations made under it, by persons who might be inclined to ignore these requirements in the absence of such drastic potential outcomes.

[6] The legislation is designed to promote safety in the workplace and the penalties available for breach of the regulations are meant to provide a deterrent to unsafe practices. Mr. McCaskill notes that imprisonment is available precisely so that there will be an effective deterrent against egregious breaches. When, as in this case, an egregious breach results in catastrophic harm, that is the time, Mr. McCaskill argues, when the imposition of a stern penalty will have the most deterrent effect.

[7] Under the OHSA, jail as a sanction is not reserved, Mr. McCaskill asserts, for the worst case and worst offender, as the respondent suggests; rather, it is the maximum sentence that is reserved for that category of offence and offender. Thus, he goes on to argue, if the sanction of imprisonment is not used from time to time, particularly in cases, such as the case at bar, where negligence has led to multiple preventable deaths, the deterrent value of the sanction becomes illusory. That cannot be what the legislature intended, he asserts.

[8] In summary, while acknowledging that considerable deference is owed to sentencing judges, Mr. McCaskill asserts, if ever there were a case in which incarceration was mandated by the facts, it is this case. That said, in failing to impose jail, Bigelow J. erred by imposing a sentence that was manifestly unfit.

Position of the Respondent

[9] The respondent asserts that the appeal should be dismissed for the prosecution's laches in perfecting the appeal, because the delay has caused significant prejudice to the respondent. That is particularly so, counsel asserts, since the respondent has served his sentence, but still has had the prospect of a jail sentence hanging over his head for nearly six years.

[10] If the court is not inclined to dismiss the matter for delay, the respondent further asserts that the appeal is unmeritorious. Although counsel for the respondent quite properly acknowledges the dreadful outcome of his client's negligence, he nonetheless asserts that, on the facts of this case, including, in particular, the remorse demonstrated by his client, this is not a case where jail was the only fit outcome. Mr. Keith asserts that the trial judge properly took account of the facts, including aggravating and mitigating factors, and the applicable principles of sentencing, such that the sentence he imposed demonstrates no error and is fit in all the circumstances of the case.

Discussion

(i) General Principles

[11] Regulatory offences are concerned with attaining public policy objectives as opposed to punishing moral blameworthiness: *R. v. Wholesale Travel Group Inc.*, [1991] 3 S.C.R. 154, at para. 129. Hence, the concept of deterrence is different in regulatory law than in criminal law: *R. v. City of Sault Ste. Marie*, [1978] 2 S.C.R. 1299, at para 125.

[12] Obviously, where the defendant is a corporate entity, the only sanction for breach of the OHSA or its regulations is a fine. The parties agree, however, that, even where the defendant is a natural person, a breach is characteristically dealt with by a fine. That reality notwithstanding, Mr. McCaskill argues that the mere fact that it is rarely used does not mean that incarceration should never be used and, if workers are to be afforded effective protection in the workplace, there must come a time when the tariff is raised to include meaningful incarceral dispositions.

[13] The fact remains, however, among the many thousands of prosecutions under the OHSA since its enactment, the parties were only able to find fewer than two dozen where the sentence has involved imprisonment for a natural person. Moreover, as respondent's counsel points out, those dispositions were for conduct that was willful as opposed to merely negligent. The small number of cases, taken together with what his counsel correctly characterizes as a significant distinction between the negligent behaviour in this case and the intentional flouting of the OHSA leading to a custodial sentence in those cases, supports, to my mind, the respondent's position that the concept of deterrence has a very different complexion in regulatory law than in criminal law. That proposition is strengthened further, in my view, by the fact that when the legislature increased the maximum fine that could be imposed on a corporation, they did not change the maximum imprisonment that could be imposed upon a person. As Carthy J.A. observed in *R. v. Ellis-Don Ltd. et. al.* (1990), 1 O.R. (3d) 193, (Ont.C.A.), the failure on the part of the legislature to increase the available term of imprisonment "makes it even more evident that the deterrent influence…is intended to be in the pocketbook." That suggests to me that imprisonment, while it is clearly available in exceptional cases, is meant to be a sanction that is seldom employed.

(ii) The Case at Bar

[14] Against that backdrop, it is clear from his remarks at p. 72 of his Reasons for Sentence, in which he refers to the seminal case of *R. v. Cotton Felts* (1982), 2 C.C.C. (3d) 287, (Ont. C.A.), that Bigelow J. was alive to the aforementioned distinction between general deterrence as it is

understood in the criminal context and in the realm of regulatory statutes. Further, Bigelow J. carefully considered the conduct of the respondent. He found various aspects of that conduct to be "seriously aggravating", including "the nature of the negligence" and found that "[t]he failures are serious and constitute a high level of negligence." Likewise, he clearly took account of the impact of the tragic results of the respondent's conduct on the families of the deceased as reflected by his having permitted the widow of one of the deceased workers to read a victim impact statement into the record, even though there is no provision for that to happen under the Provincial Offences Act.

[15] Bigelow J. also carefully considered, however, as he was obliged to do, the significant mitigating factors in the case including:

(i) that the respondent had no record;
(ii) that the parties agreed that the respondent had been a responsible employee for twenty-five years without any incidents prior to the events giving rise to the charges;
(iii) that the respondent had demonstrated remorse, in particular by his early guilty plea;
(iv) that "the impact on [the respondent] ha[d] already been significant";
(v) that the respondent continued to work in the construction industry after the tragedy without any further incident;
(vi) that the respondent was prepared to take educational courses respecting safety in the workplace; and
(vii) that the respondent had strong family support.

[16] I note that Bigelow J. addressed his mind, at page 73 of his Reasons, to the OHSA cases involving custodial dispositions and distinguished them on the basis that they were imposed in situations involving either an apparent lack of remorse on the part of the defendant or where there was what he referred to as "a pattern of failures to comply with regulations." Further, he was plainly aware, as he stated immediately thereafter, of the availability of imprisonment for offences under the OHSA. He was also aware, however, that incarceration should be a last resort and, although he does not say so explicitly, obviously, as an experienced judge, he would know that that is particularly so in the case of a first offender.

[17] In that behalf, I am mindful of the words of Rosenberg J.A., in *R. v. Priestly*, 110 C.C.C. (3d) 289, (Ont. C.A.), at 295, that "[t]he duty to explore other dispositions for a first offender before imposing a custodial sentence is not an empty formalism which can be avoided merely by invoking the objective of general deterrence." That was said in the context of a criminal case; given the distinction between the concept of general deterrence in the criminal law and regulatory law contexts, it seems to me that the passage applies *a fortiori* respecting the sentencing of an offender for a regulatory breach, even where the results are, as in this case, profoundly tragic.

[18] There is no question that this was a needless tragedy. Two men are dead, who need not have died had the respondent fulfilled his obligations under the OHSA regulations. That said,

although when measured against the enormity of their loss, a fine and a period of probation may seem an inadequate outcome to the family and friends of the deceased, having considered objectively the facts, the applicable law and the trial judge's reasons, I cannot say that there is any error in principle apparent to me in the sentence Bigelow J. imposed. Furthermore, in my respectful view, the sentence is not manifestly unfit.

[19] If I am wrong in holding that Bigelow J. committed no error and that the sentence was not unfit, I nonetheless agree with Mr. Keith that to incarcerate the respondent now, a month shy of six years after the events giving rise to the charges, when he has completed his sentence, would, in all the circumstances, be unfair. Indeed, as noted above, Mr. McCaskill, while not going quite that far, conceded that a court would quite properly be reluctant to vary a sentence to a custodial one at this late date.

Result

[20] In the result, I agree with the reasons of Watt J., as he then was, on the earlier motion to dismiss the appeal for want of perfection, that the appeal is neither frivolous nor without merit. I also agree with counsel for the Ministry of Labour that, in order to accomplish the goal of worker and workplace safety the OHSA seeks to achieve, the imposition of a period of imprisonment must be, and must be seen to be, a viable and realistic option for some violations of the statute or its regulations. I further agree with counsel that it is an option that must not be reserved only for that rarest of combinations, the worst case and worst offender. Having said that, in my respectful view, this was not a case where imprisonment was the only fit outcome. For the foregoing reasons, therefore, I would dismiss the appeal.

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R. Clark J.

DATE: March 7, 2008