CITATION: R. v. VADIM KAZENELSON, 2016 ONSC 25
COURT FILE NO.: 13-0000083
DATE: 20160111

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
HER MAJESTY THE QUEEN	)	
	)	Rochelle Direnfeld for the Crown
– and –	)	
	)	
VADIM KAZENELSON	)	
	)	
	)	Louis P. Strezos, Shannon O'Connor and Melissa Austen for Vadim Kazenelson
	)	
	)	
	)	

Reasons for Sentence

MacDonnell, J.

[1] On June 26, 2015, at the conclusion of a judge-alone trial, Vadim Kazenelson was found guilty of four counts of criminal negligence causing death and one count of criminal negligence causing bodily harm. The charges arose from an incident in which five workers employed by Metron Construction Incorporated ("Metron") fell more than 100 feet to the ground when the swing stage on which they were working suddenly collapsed. None of those workers was attached to a lifeline as required by both the law and industry practice. Mr. Kazenelson, Metron's project manager, was with the workers at the time of the collapse. He had taken no steps to ensure that lifelines were available for the workers and that they were used. Mr. Kazenelson is before the court today for sentencing.

A. The Facts

(i) the circumstances of the offences

[2] Throughout the fall of 2009, Metron was engaged in repairing the concrete balconies of the two eighteen-story apartment buildings at 2737 and 2757 Kipling Avenue in Toronto. The work involved chipping away loose or deteriorated concrete, installing wooden forms, and pouring fresh concrete to restore the balconies to their original state. Metron's workers gained access to the balconies by means of motorized 'swing stages' suspended from the roofs of the buildings.

[3] The president and sole shareholder of Metron was Joel Swartz. In the summer of 2009 he retained the defendant Vadim Kazenelson to be the project manager for the Kipling project. Mr. Kazenelson had his own construction company but he had no experience restoring concrete on

high-rise buildings and he had never worked with suspended access equipment such as swing stages.

[4] Mr. Kazenelson hired Fayzullo Fazilov to be his on-site supervisor or foreman for the project. Mr. Fazilov had experience in balcony restoration, both as a worker and as a supervisor. On the Kipling project, Mr. Fazilov had the primary responsibility for supervising the workers, assigning their tasks and ensuring that safety requirements were observed. However, it was Mr. Kazenelson's responsibility, one that he routinely and regularly exercised, to supervise Mr. Fazilov and to instruct him with respect to the tasks to be performed. The evidence clearly established that Mr. Kazenelson was on top of workplace issues, that he monitored what was going on and that he exercised his authority over the workers whenever necessary.

[5] Section s. 217.1 of the *Criminal Code* imposes a legal duty on everyone who has the authority to direct how another person does work or performs a task "to take reasonable steps to prevent bodily harm to that person or any other person arising from that work or task". It was not disputed that in his role as project manager Mr. Kazenelson was subject to that legal duty.

[6] As Christmas approached, the project was behind schedule. The work had been completed at 2737 Kipling but much was left to be done at 2757. Metron had a $50,000 bonus riding on its ability to complete the work by the end of the year. The evidence is that Mr. Kazenelson did not know about the bonus, but he was well aware of the year-end deadline, he knew that it was a matter of great concern to Metron, and he became directly involved in the efforts to meet it.

[7] In the weeks leading up to December 24 the pace of the work on the project had increased. On the evening of December 23, the day before the collapse, Mr. Kazenelson spoke to the workers and asked if they would be able to finish the work the next day. On the morning of December 24, Mr. Swartz attended personally at the work site for a discussion with Mr. Fazilov and Mr. Kazenelson about the work that was left to be done. The plan for the day was for the workers to board the 40-foot swing stage in 'drop 5/6',[1] ascend to the top of the building, and begin pouring concrete. The stage was made up of four ten-foot platforms bracketed together. It was long enough to permit the workers to work on two balconies at a time. As they finished pouring on each floor, the workers were to re-board the stage and lower themselves to the floor below to continue the work.

[8] After meeting with Mr. Fazilov, and prior to the work commencing, Mr. Kazenelson and Mr. Swartz both left the site. Mr. Fazilov then boarded the stage at ground level with four of the workers – Dilshod Marupov, Aleskey Blumberg, Vladamir Korostin, and Shohruh Tojiddinov. They ascended to the 18th floor balconies and began to work their way down the building. A sixth worker, Aleksandrs Bondarevs, either accompanied them from the beginning or joined them later in the day.

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[1] The location of a swing stage was identified by reference to the apartment balconies to which it had access. The swing stage that collapsed in this case was suspended over the apartments that were numbered 05 and 06 on each floor, and thus it was said to be located in 'drop 5/6'.

[9] As a matter of law and of industry practice every person working on a swing stage must be protected from the danger of a fall. To comply with that obligation at the Kipling site, Metron employed a 'fall arrest system'. A fall arrest system includes a full body harness with a lanyard that attaches to a vertical lifeline, which in turn is anchored to an independent fixed support on the roof of the building. Only one worker at a time may use a lifeline. Put another way, every person working on a swing stage must be attached to a separate lifeline. The applicable provincial legislation, industry standards, and the training courses provided to the industry by the Construction Safety Association of Ontario (CSAO) make it clear that the requirement that every worker who steps onto a swing stage be protected by a fall arrest system at all times is *the* fundamental rule for the protection of worker safety.

[10] Mr. Kazenelson was well aware of this fundamental rule: he had not only taken the basic training course offered by the CSAO, he had followed it up with a course qualifying him to train others. The evidence is that prior to December 24 the rule was honored at the Kipling job site. Indeed, one worker testified that if either Mr. Fazilov or Mr. Kazenelson had caught him working on a swing stage without being tied off to a lifeline he would have been fired.

[11] Ordinarily, only two workers at a time would have been working on the swing stage in drop 5/6 and therefore only two lifelines would have been required. On December 24, however, the plan was to have up to six or more persons working on the stage and, accordingly, additional lifelines were going to be necessary. Notwithstanding this, at no point on December 24 were there more than two life lines for the swing stage in drop 5/6. It was clear to Mr. Kazenelson after the morning meeting with Swarz and Fazilov that more than two workers were going to be using the stage, but I am not satisfied that he knew that Fazilov was not going to drop additional lifelines for the additional workers.

[12] Mr. Kazenelson did become aware of the situation later that day, however, after the lunch hour, when he returned to the Kipling site. Upon his return, he had the swing stage sent down to collect him so that he could join Fazilov and the others as they continued to work their way down the building. Because the stage had two motors, located at opposite ends of the platform, two workers were required to operate it. Accordingly, when Mr. Kazenelson boarded the stage he had to appreciate that there were only two lifelines. Indeed, when he arrived on the balconies where the concrete was being poured, he asked Mr. Fazilov about the absence of lifelines and Fazilov told him 'don't worry about it'. Notwithstanding this patent breach of the fundamental rule concerning safety on swing stages, Mr. Kazenelson did nothing to rectify the situation. Rather, he allowed the workers to carry on without lifelines. He remained on the balconies for some period of time, either assisting the workers in mixing and pouring the concrete or supervising them as they worked.

[13] By the end of the day, the workers had completed pouring on the balconies on the 13th floor. At that point, Mr. Fazilov, Mr. Kazenelson, and the five workers loaded their tools onto the stage and climbed aboard for the descent to ground level. When Mr. Tojiddinov boarded, he attached his lanyard to one of the two lifelines. That left one lifeline for the six other persons on the stage. No one attached himself to it. Mr. Kazenelson was the last person to board the stage. He stood beside Mr. Tojiddinov and held onto his lifeline. The motors for the stage were engaged and the stage began to descend.

[14] Unbeknownst to Mr. Kazenelson, the stage had been designed so poorly and manufactured so incompetently that even under normal use it was doomed at some point to collapse. While some of the problems with the stage should have been apparent to a trained eye at the time it was assembled at the work site, and while others should have become apparent to a competent worker conducting regular inspections, I am not satisfied that Mr. Kazenelson's lack of awareness of the problems can be ascribed to negligence. He ought to have appreciated, however, that contrary to industry practice this stage had arrived without a label setting forth its capacity. Without such a label, Mr. Kazenelson had no way of knowing whether the stage was overloaded. The CSAO training course that Mr. Kazenelson took taught its participants that if a stage did not have a capacity label it should not be used.

[15] Within a matter of seconds after the stage began its descent, the brackets connecting the two centre platforms failed, causing the platforms to separate and the stage to collapse. Mr. Kazenelson, who had been holding onto Mr. Tojiddinov's lifeline, managed to scramble onto a 12th floor balcony. Because he was attached to a lifeline, Mr. Tojiddinov was left suspended in mid-air. Mr. Kazenelson pulled him onto the balcony. Fazilov, Blumberg, Korostin, Bondarevs and Marupov, however, were sent hurtling toward the ground, 100 feet below. Miraculously, Mr. Marupov survived the fall, albeit with grievous injuries. The other four men were killed.

[16] Mr. Marupov was 21 years old. He had come to Canada from Uzbekistan three months earlier on a student visa. Mr. Blumberg was 38 years of age. He was married and had been in Canada for four years. Mr. Korostin was a 40-year-old father of two. He had been in Canada for two years. Mr. Bondarevs was a 24 year old single man who had been in Canada for seven years. He was living with his parents and planning to return to school. Mr. Fazilov was 31 years old. He had come to Canada two years earlier. His wife and two young children were still in Uzbekistan.

(ii) the circumstances of the offender

[17] Mr. Kazenelson was born in Sochi, Russia. When he was 14 years old, his family moved to Israel. Upon graduation from secondary school he enlisted in the Israeli military, where he served for some seven years. After leaving the military, Mr. Kazenelson lived briefly in Europe. In 2004, he emigrated to Canada, settling in Toronto. He became a Canadian citizen in 2008. At the time of the offences he was 34 years of age. He is now 40. He has no prior criminal record.

[18] From the time he arrived in Canada Mr. Kazenelson has worked in the construction industry. Since his arrest for the matters before the court he has focused exclusively on residential properties. A number of letters have been filed from persons for whom and with whom Mr. Kazenelson has worked expressing the view that he is honest, hardworking, conscientious and safety-minded. Letters have also been filed that demonstrate that Mr. Kazenelson is a caring member of his community, an active volunteer, a loyal friend, a mentor and a role model.

[19] Mr. Kazenelson is married and has three young sons, aged 10, 8 and 5 years. He is a good and devoted father to his children. His marriage is currently under stress, in large part because of the weight of the criminal process. His wife has a job that requires her to travel out of the country occasionally. Unfortunately, she has also had serious health issues. When she is not available to assist due to her travel commitments or health concerns Mr. Kazenelson is the sole care giver for

the children. In addition to providing for his family in Canada, Mr. Kazenelson provides financial support for his mother, who resides in Israel.

[20] At the conclusion of counsel's sentencing submissions, Mr. Kazenelson was given the opportunity to address the court. He apologized for what happened at the time of the accident and for the role he played in it. He said that he will never forget that day, and that he will live the rest of his life with the pain of what happened. He stated that he respected all of the victims, whom he described as both good workers and good men. He expressed his sorrow for the suffering of the families of those who were killed.

B. The Positions of the Parties

[21] On behalf of the Crown, Ms Direnfeld submitted that the appropriate sentence is a term of imprisonment in the range of four to five years. On behalf of Mr. Kazenelson, Mr. Strezos submitted that the range of sentence to be considered is a period of imprisonment of twelve months to two years. In all of the circumstances, he submitted, the appropriate sentence for Mr. Kazenelson is a period at the lower end of that range – twelve months – to be followed by a term of probation requiring Mr. Kazenelson to go into the community and speak about workplace safety.

C. Discussion

[22] Section 718 of the *Criminal Code* provides, in part, that the fundamental purpose of sentencing "is to contribute… to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of [six] objectives." Those objectives include the denunciation of unlawful conduct, deterrence of the offender and others who might be similarly tempted, separation of the offender from society where necessary, rehabilitation, and the promotion of a sense of responsibility in the offender. The objectives set forth in s. 718 sometimes pull in different directions. Which objectives will ultimately prevail will be a case-specific determination. Section 718.1 provides that whatever sanction is selected "must be proportionate to the gravity of the offence and the degree of responsibility of the offender." Further, pursuant to s. 718.2(b), a court that imposes a sentence must take into consideration the principle that "a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances".

[23] It has not been suggested that a term of imprisonment is required in order to deter Mr. Kazenelson from committing further offences, to protect the public by separating him from society, to promote a sense of responsibility in him, or to assist in his rehabilitation. He was of good character prior to the accident and he has continued to be of good character in the six years since. He is hardworking, devoted to his family, and involved in his community. He is quite unlikely to commit further criminal offences of any kind, and he is remorseful. Notwithstanding that, it is common ground that a term of imprisonment is necessary to adequately denounce Mr. Kazenelson`s conduct and to deter other persons with authority over workers in potentially dangerous workplaces from breaching the legal duty set forth in s. 217.1 of the *Code* to take reasonable steps to prevent bodily harm from befalling those workers.

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[24] While the parties agree that imprisonment is required, they are a distance apart with respect to how long the term should be. Making a determination in that regard requires that all of the circumstances be considered.

[25] In assessing Mr. Kazenelson's degree of responsibility for what happened on December 24, 2009, it must be acknowledged that he was not involved in the sequence of events that led the workers to board the stage without fall protection at the beginning of the day. He only became aware of the situation when he returned to the job site in the afternoon. In a sense, he inherited a problem that was created by his foreman, Mr. Fazilov.

[26] The defence submitted that two further circumstances are also of importance in the moral blameworthiness calculus. First, it was noted that all five victims were aware of the rules with respect to fall arrest protection and of the risks involved in not following those rules. It was pointed out that there is no evidence that pressure was brought to persuade any of the workers to accept those risks. Second, it was submitted that a significant contributing cause of the deaths and injuries that were suffered by the workers was the faulty design and manufacture of the swing stage and that Mr. Kazenelson could not be expected to have been aware of those defects.

[27] In the course of final submissions at trial, both of those circumstances were submitted to be intervening acts that severed the chain of legal causation, insulating Mr. Kazenelson from liability for the tragic results of the collapse. While I rejected that submission, I accept that contributory negligence that is insufficient to sever the chain of causation may be relevant to an assessment of an offender`s moral blameworthiness for the purpose of sentencing: *R. v. Nette*, 2001 SCC 78, per L'Heureux-Dube J. at paragraph 49. Properly characterized, however, both of the circumstances pointed to by the defence are more accurately described as an absence of an aggravating feature rather than as the presence of a mitigating one.

[28] Had the workers not been aware of the dangers of working without lifelines, or had they been ordered to work without them, the blameworthiness of Mr. Kazenelson's breach of duty would undoubtedly have been greater. However, to mitigate the breach on the basis of the victims' awareness of the danger or the absence of overt coercion would ignore the reality that a worker's acceptance of dangerous working conditions is not always a truly voluntary choice. It would also tend to undermine the purpose of the duty imposed by s. 217.1 of the *Criminal Code*, which is to impose a legal obligation in relation to workplace safety *on management*.

[29] Further, the fact that the collapse of the stage was not due to fault on the part of Mr. Kazenelson does not lessen his blameworthiness. While the Crown's theory was that Mr. Kazenelson's negligence played a role in the collapse, that theory was rejected. The findings of criminal negligence against Mr. Kazenelson were based solely on the breach of duty inherent in his failure to ensure that the workers did not use the swing stage without lifelines. Had Mr. Kazenelson known that the stage was about to collapse, the blameworthiness of his conduct would have been significantly amplified, but the fact that from his point of view the collapse was unexpected is merely a feature of the facts.

[30] In my reasons for conviction, I said that "while efforts were being made to meet the deadline, those efforts had no impact on whether the work was being carried out in a safe manner, *at least not before December 24*."[2] I later stated: "[T]here is no evidence, *apart from what occurred on December 24*, that corners were being cut in order to meet the deadline"[3] [emphasis added to both excerpts]. For the purposes of rendering verdicts, it was unnecessary to decide whether the looming deadline played a role in Mr. Kazenelson's failure to act on December 24 once he became aware that the workers were working without lifelines. For the purpose of assessing the extent of his moral blameworthiness, however, that question needs to be addressed.

[31] The evidence is that although Mr. Kazenelson was not told about the $50,000 bonus that Metron would earn for meeting the deadline, he was very much aware that there was a deadline and that his boss, Joel Swartz, was intent on meeting it. Mr. Kazenelson had been directly involved in the efforts to achieve that goal and he was clearly interested in getting the project completed within the next week. Prior to December 24 the pressure to meet the deadline had not resulted in corners being cut in relation to safety. In particular, prior to that date Mr. Kazenelson (and for that matter, Mr. Fazilov) had insisted that the rules with respect to lifelines be followed. Why, then, were those rules not enforced on December 24?

[32] When he returned to the job site on the afternoon of the 24th, Mr. Kazenelson specifically adverted to the absence of lifelines: he asked Mr. Fazilov about it and Fazilov told him not to worry. The need for additional lifelines had arisen because six workers were using the swing stage rather than the usual two, and the reason why there were six workers was the push to get the job completed by the deadline. To have ordered that the work cease until additional lifelines were dropped would have interfered with that effort. It would have put the deadline even further out of reach. The only reasonable inference is that it was to avoid that result that Mr. Kazenelson made the otherwise inexplicable decision to allow the workers to continue to work in manifestly dangerous conditions.

[33] In other words, this is not a case in which Mr. Kazenelson's liability for criminal negligence is based on a failure to advert to an obvious and serious risk to the lives and safety of his workers. Rather, it is a case where he *did* advert to the risk but decided that it was in Metron's interest to take a chance. As a consequence of his decision to put Metron's interests ahead of his duty to protect the safety of the workers under his authority, four men died and a fifth suffered grievous harm.

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[34] As indicated earlier, s. 718.2(b) of the *Code* provides that "a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances." In that regard, the defence made two submissions. First, it was argued that the non-custodial sentences received by Joel Swartz, the president of Metron, and Patrick Deschamps, the president of the company that manufactured the swing stage, should be taken

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[2] At paragraph 51
[3] At paragraph 107(ii)

into account. Second, it was argued that the sentence of 4 to 5 years imprisonment sought by the Crown cannot be supported on the basis of the sentences imposed in other criminal negligence cases.

[35] There is no merit in the first of those submissions. Neither Mr. Swartz nor Mr. Deschamps was found guilty of any offence contrary to the *Criminal Code*, let alone the offence of criminal negligence causing death. Mr. Swartz pleaded guilty to four counts under the *Occupational Health and Safety Act*, none of which was concerned with the failure to ensure that lifelines were used by the workers. He was fined a total of $90,000. Mr. Deschamps pleaded guilty to two counts under *Occupational Health and Safety Act*, both of which were concerned with defects in the swing stage. He was fined a total of $50,000. In my opinion, the principle of parity codified in s. 718.2(b) is not engaged by the penalties imposed on those two men for breaches of a provincial statute.

[36] With respect to the second submission, both parties acknowledge that the assistance that the sentencing precedents can provide is somewhat limited. In *R. v. Linden*, [2000] O.J. No. 2789, the Court of Appeal doubted whether there is actually is a sentencing range to be found for offences of criminal negligence:

> The cases demonstrate that criminal negligence causing death can be committed in so many different ways that it defies the range-setting exercise. The cases do not demonstrate a range, only a series of examples that are driven by the almost infinite variety of circumstances in which this offence can be committed. As counsel for the appellant submitted, cases can be found in the reformatory range and there are even examples of suspended sentences.[4]

[37] The assistance provided by the sentencing precedents referred to by the parties is also constrained by the fact that in none of those cases was the finding of criminal negligence based on a breach of the duty imposed by s. 217.1 of the *Code*. In that respect, the case at bar appears to be one of first impression.

[38] Notwithstanding those limitations, eleven of the cases to which the parties have referred do have some precedential value in relation to sentencing for criminal negligence causing death. Seven of those cases were concerned with criminally negligent driving behaviour (*R. v. Laine*, 2015 ONCA 519, *R. v. Lam*, [2003] O.J. No. 4127 (C.A.), *R. v. Persaud*, [2002] O.J. No. 1883 (C.A.), *R. v. Linden*, *supra*, *R. v. Tschetter*, 2009 ABPC 291, *R. v. Ubhi*, [1992] B.C.J. No. 1581 (C.A.), and *R. v. Nusrat*, 2009 ONCA 31). The sentences in those cases ranged between 20 months (*Persaud*) and 7½ years (*Ubhi*).

[39] The four non-driving cases are *R. v. Lilgert*, 2013 BCSC 1329, *R. v. Singh*, 2014 ONSC 6960, *R. v. Tayfel*, 2008 MBQB 101, and *R. v. Pitre*, 2015 NBQB 44. Like Mr. Kazenelson, the defendants in those cases were first offenders, each was of good character, and each had an unblemished background. In *Lilgert*, the defendant's negligent operation of a ferry caused it to run aground and sink, resulting in the deaths of two passengers. The defendant was sentenced to

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[4] at paragraph 2

four years imprisonment for two counts of criminal negligence causing death. In *Singh,* the offender was convicted of, *inter alia*, one count of criminal negligence causing death and one count of criminal negligence causing bodily harm arising from his operation of a rooming house contrary to the requirements of the *Fire Code*. He was sentenced to imprisonment for three years. In *Tayfel,* the defendant was convicted of one count of criminal negligence causing death and four counts of criminal negligence causing bodily harm arising from his negligent operation of an aircraft. He was sentenced to a term of imprisonment of two years less one day. In *Pitre*, the operator of a nursing home failed to call 911 in a timely fashion for an elderly resident. The defendant was sentenced to 8 months imprisonment for one count of criminal negligence causing death.

D. Conclusions

[40] It is common ground that the paramount objectives of sentencing in this case are denunciation and general deterrence and that to achieve those objectives a sentence of imprisonment is required. The more difficult question is how long the term of imprisonment should be.

[41] Apart from his breach of duty in this case, Mr. Kazenelson is unquestionably a person of good character. As *Lilgert*, *Singh*, *Tayfel* and *Pitre* demonstrate, that is not an unusual feature of criminal negligence cases. In any event, in *R. v*. *Lacasse*, 2015 SCC 64, Justice Wagner stated that the objectives of deterrence and denunciation "are particularly relevant to offences that might be committed by ordinarily law-abiding people." He stated that "it is such people, more than chronic offenders, who will be sensitive to harsh sentences". He noted that in *R. v*. *Proulx*, 2000 SCC 5, Chief Justice Lamer had said that "arguably, such persons are the ones most likely to be deterred by the threat of severe penalties".[5] I do not understand those comments to mean, however, that an offender's prior good character is to be used as a basis for imposing a greater penalty than would be imposed on an offender with less than admirable antecedents.

[42] The search for the appropriate sentence in this case must be guided by the fundamental principle that the penalty be proportionate to the gravity of the offences and the degree of responsibility of the offender. In *Lacasse*, Justice Wagner observed that "the more serious the crime and its consequences, or the greater the offender's degree of responsibility, the heavier the sentence will be. In other words, the severity of a sentence depends not only on the seriousness of the crime's consequences, but also on the moral blameworthiness of the offender."[6] In *R. v*. *Linden, supra*, the Court of Appeal noted that sentences for criminal negligence causing death tend to be driven by individual factors, "especially the blameworthiness of the conduct", and that "the more that the conduct tends toward demonstrating a deliberate endangerment [of others] the more serious the offence and the more likely that a lengthy prison term will be imposed."[7]

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[5] at paragraph 73
[6] at paragraph 12
[7] at paragraph 3

[43] The seriousness of the offences committed by Mr. Kazenelson and their consequences cannot be doubted: four men lost their lives and a fifth suffered devastating and life-altering injuries. It must be remembered, however, that Mr. Kazenelson played no role in the sequence of events that led the victims to board the stage at the beginning of the day without fall protection. It must also be said that Mr. Kazenelson's breach of duty was not part of an ongoing course of negligent conduct in relation to fall protection – under Mr. Kazenelson's watch, working on a swing stage without a lifeline was something that could get a worker fired. And while the fact that the workers were not coerced into working without lifelines and that the collapse of the stage was due to the negligence of someone else do not mitigate the blameworthiness of Mr. Kazenelson's breach of duty, they are features of the facts to be taken into account in characterizing the overall gravity of his conduct.

[44] On the other hand, Mr. Kazenelson's breach of duty was more than a momentary lapse. While the evidence was in conflict with respect to how long he was with the workers prior to the collapse, it was at least half an hour and it may have been up to two hours.[8] From the moment he joined them, he was aware that they were working 100 feet or more above the ground without lifelines. His duty to take steps to rectify this dangerous situation was fully engaged, and it remained engaged for some time. He not only did nothing, he permitted all six workers to board the stage together with their tools, and he did so in circumstances where he had no information with respect to the capacity of the stage to safely bear the weight to which it was being subjected. As I have pointed out, this is not a case where the finding of criminal negligence rests on a failure to advert to a risk to the lives and safety of the workers – Mr. Kazenelson adverted to the risk, weighed it against Metron's interest in keeping the work going, and decided to take a chance. That is a seriously aggravating circumstance in relation to the moral blameworthiness of his conduct.

[45] A consideration of all of the circumstances can lead only to the conclusion that a significant term of imprisonment is necessary to reflect the terrible consequences of the offences and to make it unequivocally clear that persons in positions of authority in potentially dangerous workplaces have a serious obligation to take all reasonable steps to ensure that those who arrive for work in the morning will make it safely back to their homes and families at the end of the day.

[46] After anxious consideration, I have concluded that a sentence in the range proposed by Mr. Strezos would be inadequate to satisfy the paramount objectives of denunciation and deterrence. In my opinion, the sentence that would be proportionate to the gravity of Mr. Kazenelson's offences and his degree of responsibility is a term of incarceration of 3½ years imprisonment on each count. Those sentences will be served concurrently with one another.

[47] Pursuant to s. 487.051 of the *Criminal Code*, the Crown seeks an order authorizing the taking of samples of bodily substances for DNA analysis. Criminal negligence causing death or

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[8] I am aware that in cross-examination Mr. Chernikov revised his earlier estimate and said that it may have been only 15 minutes. As I noted in my reasons for judgment on June 26, Mr. Chernikov's revision was not credible.

bodily harm is a secondary designated offence for the purposes of s. 487.051. Having considered all of the matters set forth in s. 487.051(3) I am not satisfied that it is in the best interests of the administration of justice to make the order sought by the Crown, and accordingly I decline to make that order.

MacDonnell, J.

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