Court File No: 2960-999-07-401-00
at Woodstock, ON
Date: November 14, 2012
Citation: *R. v. Rassaun Steel & MFG. Co. Ltd.*, 2012 ONCJ 705

ONTARIO COURT OF JUSTICE

HER MAJESTY THE QUEEN

Respondent

AND

RASSAUN STEEL & MFG. CO. LTD.

Appellant

REASONS FOR DECISION ON APPEAL

K. Ballweg for Crown
R.D. Simmons for Rassaun Steel

GEORGE J.:

OVERVIEW

[1] The accused, Rassaun Steel & Mfg. Co. Ltd. ("Rassaun") appeals from the conviction under section 25(2)(h) of the Occupational Health & Safety Act ("OHSA") on November 4th, 2011. The count reads as follows:

> That Rassaun Steel & Mfg. Co. Ltd., on or about the 10th day of September, 2006, at the City of Woodstock, in the Southwest Region, in the Province of Ontario, did commit the offence of failing, as an employer, to take every precaution reasonable in the circumstances for the protection of a worker, at a workplace located at 303 Tecumseh Street, Woodstock, Ontario.

[2] The count was further particularized:

The defendant failed to take the reasonable precaution of ensuring that the overhead duct system was adequately supported while it was being demolished or dismantled.

[3] The first trial in this matter proceeded before a Justice of the Peace, over five days, from November 3rd to November 7th, 2008. Prior to commencing that trial two of the originally charged four counts were withdrawn at the request of the Crown. Respecting the remaining two counts, Rassaun was acquitted. This trial decision was overturned on appeal and returned for a new trial.

[4] The second trial occurred over the course of five days - September 9th, September 11th through the 13th, and November 4th, 2011. Rassaun was convicted of the offence noted above, and acquitted of a separate count which alleged Rassaun failed, as an employer, to ensure that the measures and procedures prescribed by the regulations were carried out on a project. This count was particularized using language identical to the count which attracted the conviction.

STATUTORY FRAMEWORK

[5] This Appeal was commenced under Part III of the Provincial Offences Act. Section 120(1) states:

> (1) On the hearing of an appeal against a conviction or against a finding as to the ability, because of mental disorder, to conduct a defence, the court by order,
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> (a) may allow the appeal where it is of the opinion that,
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> (i) the finding should be set aside on the ground that it is unreasonable or cannot be supported by the evidence,
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> (ii) the judgment of the trial court should be set aside on the ground of a wrong decision on a question of law, or
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> (iii) on any ground, where there was a miscarriage of justice; or
>
> (b) may dismiss the appeal where,
>
> (i) the court is of the opinion that the appellant, although the appellant was not properly convicted on a count or part of an information, was properly convicted on another count or part of the information,
>
> (ii) the appeal is not decided in favour of the appellant on any ground mentioned in clause (a), or
>
> (iii) although the court is of the opinion that on any ground mentioned in sub clause (a)(ii) the appeal might be decided in favour of the appellant, it is of the opinion that no substantial wrong or miscarriage of justice has occurred.
>
> (2) Where the court allows an appeal under clause (1)(a), it shall,

(a) where the appeal is from a conviction,
(i) direct a finding of acquittal to be entered, or
(ii) order a new trial.

FACTS

[6] On September 10, 2006 employees of Rassaun were carrying out work at a non-operational foundry in Woodstock, Ontario. Rassaun was hired by the owners of the foundry to remove equipment that was to be sent to another location in the United States. During the course of this work, a large section of the duct work fell onto a worker. He sustained serious injuries.

[7] According to the Rassaun employees who testified at trial, the equipment that was being removed and prepared for transport consisted of fans, conveyors, some process equipment, and shaker cleaners. These same employees testified that this equipment was previously installed by Rassaun in 2004 and there was some indication Rassaun conducted maintenance on this equipment over the years. The duct work, however, was not installed by Rassaun and was done prior to 2004.

[8] The conveyor being worked on at the relevant time was approximately 6 feet wide, 20 feet long, and 8 feet high. The purpose of this conveyor was to shake sand castings free from the moulded brake drums and to move the parts along the system. The conveyor and fan were connected by a system of duct work that brought air up from the shaker, through the ducts and then down to the fan. A piece of L-shaped duct was attached to the fan assembly.

[9] The L-shaped section was comprised of two parts - one section was 31 feet long (which was connected to the fan), while the other piece was 22.5 feet and was connected to an elbow. The trial court was told the duct work itself was 38 to 40 inches in diameter and weighed approximately 2,000 lbs. The elbow piece of the ducting was supported by what was called a 'saddle clamp' fixed to the ceiling and 'knee brace' support which was connected to a column.

[10] Engineer Roger Jeffreys testified that the shape of the L-duct section needed three points of support for it to be adequately supported. He further testified that the vertical cable, saddle clamp and column support were the original three points of support. His evidence was that at some point the weight shifted and the vertical cable was not being used as a support, and that the duct work was then using the fan assembly as a support. There had been evidence of a sand build up within the duct work.

[11] Several witnesses testified that the duct work was supported by their own support system, isolated from the equipment. Witnesses Max Morrison and Michael Saunders testified that equipment is not made and installed in order to support duct work, and that this kind of equipment had to be able to be replaced, repaired

and maintained.

[12] Rassaun employee Michael Butler, who was the individual injured, testified that the elbow duct piece, which emanated from the 'sock' that connected the duct work to the conveyor, had to be detached to remove this piece of equipment. Mr. Butler went onto indicate that this elbow piece was connected to the ceiling by way of a vertical cable.

[13] On the date in question, Mr. Butler had moved the conveyor and was walking under the L-shaped duct at the same time that another employee, Jesse Verbinnen, was unbolting the duct end that was connected to the fan assembly. Without warning, as Mr. Verbinnen was removing the bolts, the duct collapsed and fell onto Mr. Butler. The injuries consisted of a fractured skull, crushed right side of pelvis, cracked left side of pelvis, collapsed lung, broken scapula, several broken ribs, broken thumb, and torn aorta.

[14] There was no evidence that any of the welds were inspected prior to this work being done. The evidence of witness Dave McInnis was that "to inspect the welds in the plant would have taken years".

ISSUES RAISED BY APPELLANT

[15] Did the learned Justice of the Peace commit an error in making no finding respecting the acts reus of the offence?

[16] Did the learned Justice of the Peace err in making no finding that the overhead duct system was being demolished or dismantled? This question relates directly to the first question above, and to the central issue, which was whether or not the overhead duct system was adequately supported while it was being demolished or dismantled. Counsel for Rassaun suggests two things - first, that in order to sustain a conviction the presiding Justice of the Peace needed to make a specific finding of fact regarding this essential element of the offence. Second, that based on the evidence presented, it was not open for the court to make such a finding.

[17] Did the learned Justice of the Peace err in permitting the 'expert engineering report' to be introduced without having the Crown qualify the author as an expert?

[18] Did the learned Justice of the Peace make inconsistent findings of fact when it was determined that the project was to "remove machinery" (see pages 8-10 of trial decision), but then convicted on the charge that Rassaun was demolishing or dismantling a duct system?

[19] Did the learned Justice of the Peace make findings of fact which were not supported by the evidence? This question bears upon the court's consideration respecting the actus reus and to the question of whether or not there was

dismantling or demolishing of the duct system? Counsel for Rassaun articulates this as the Justice of the Peace erring in finding that the Crown had met their onus beyond a reasonable doubt - in that the particulars in question, specifically that the Appellant was demolishing or dismantling an overhead duct system, was not supported by the evidence. In this regard, counsel for Rassaun refers specifically to page 24 of the trial decision which contains no reference to the particularized behaviour. A portion of that passage reads as follows:

> "…..in that it failed to take every precaution reasonable in the circumstances for protection of a worker, by failing to ensure that the overhead duct system was adequately supported."

[20] Did the learned Justice of the Peace commit an error by discussing and placing relevance on a 'lack of training' on the part of Rassaun employees who were working at the site, as this was not an allegation contained in the charging count? The essence of this argument is the Appellant was not, nor could it have been in the circumstances, aware that this was a part of the case to meet.

[21] Did the learned Justice of the Peace make unsupported determinations on the preferred approaches, reasonableness, and feasibility of inspecting the welds at the site? The substance of this appeal ground relates to the lack of evidence speaking to industry standards on this subject, as well as, at least to this question, the apparent silence in the evidence from experienced workers who were directly involved in this case.

RESPONDENT CROWN POSITION

[22] The Crown's position, succinctly put, and as set out in their written materials is:

> This is a strict liability offence. The Crown is required to establish that the duct system fell while it was being demolished or dismantled. The court found that this is what had occurred. The Appellant did not establish a defence of due diligence. The Appellant was properly convicted.

[23] Its position stresses the applicable standards of review, which on questions of law is correctness - and respecting findings of fact, whether there was a palpable and overriding error. The court is urged to read the trial court's judgment as a whole, and to not focus, as they suggest the Appellant would have me do, on discrete passages of the reasons for decision. This is indeed the appropriate manner in which to assess a trial court's reasons when they are under review.

[24] The Crown contends that the evidence clearly established the actus reus of the offence charged and that the burden then properly shifted to Rassaun to establish a due diligence defence, which they did not.

ANALYSIS

Did the learned Justice of the Peace err in permitting the 'expert engineering report' to be introduced without having the Crown qualify the author as an expert?

[25] This ground relates to the admission into evidence a report, which at trial was referred to as the 'P.O.W. Report'. This report was obtained by the Appellant as they were required to do under the provisions of the OHSA. They were statutorily compelled to obtain it, as it was a necessary step in order to reopen the site to complete the work they had started.

[26] Section 67 of the OHSA reads:

> 67(1) In any proceeding or prosecution under this Act,
>
> a) a copy of an order or decision purporting to have been made under this Act or the regulations and purporting to have been signed by the Minister or an inspector;
>
> b) a document purporting to be a copy of a notice, drawing, record or other document, or any extract therefrom given or made under this Act or the regulations and purporting to be certified by an inspector;
>
> c) a document purporting to certify the result of a test or an analysis of a sample of air and setting forth the concentration or amount of a biological, chemical or physical agent in a workplace or part thereof and purporting to be certified by an inspector; or
>
> d) a document purporting to certify the result of a test or an analysis of any equipment, machine, device, article, thing or substance and purporting to be certified by an inspector,
>
> is evidence of the order, decision, writing or document, and the facts appearing in the order, decision, writing or document without proof of the signature of official character of the person appearing to have signed the order or the certificate and without further proof.

[27] This report was understandably a sensitive issue for the Appellant. The report suggested that before the collapse the duct work was supported in two places only; that the welds were poor; and that there was a build up of sand in the duct.

[28] The Appellant contends the presiding Justice of the Peace erred in admitting this report as the author Jason Ropchan was not properly qualified as an expert. The Appellant argues that in having the report prepared, it was never their intention to call Mr. Ropchan as a witness. In her ruling, at page 63, the Justice of the Peace states:

> "…I do not see this person being qualified as an expert. I do not see it as expert evidence, but I see it as opinion evidence, and under opinion

> evidence, it would be admissible under section 67(1)(b) of the Act, and the Court will give it the weight that the Court thinks should be given to it, but I think it goes to weight at the end of the day, but the document is admissible."

[29] Although it is appreciated the general rule is that only persons who are qualified by some special skill, training or experience can be called upon to give their opinion upon a matter, and even though the subject matter of this case was not simple and is an area which would typically require a qualification, I am unable to accept that this decision requires appellate intervention. I say this for two reasons. First, section 67 of the OHSA appears to allow for the admission of a document such as this. Crown counsel referred the court to the decision of ***R. v. Dana Canada Corp [2008] O.J. No. 4487***, a 2008 Ontario Court decision which admitted documents in a scenario similar to this. At paragraph 19 of that decision, the court indicates as follows:

> If counsel for the defendant corporation requires an adjournment to prepare for the engineer's report or any other report, or to call either the engineer for the purpose of cross examination or to call any other evidence in response to that report, I will grant the adjournment.…Finally, I note that I, acting as judge alone, can instruct myself as to the permissible uses with regard to each piece of evidence and there should be no issue of prejudicial effect.

[30] I am prepared to adopt this reasoning. It makes sense and is practical. In Rassaun's instance, no prejudice was occasioned, and their counsel was given all opportunity to make fulsome submissions on the issue, and was permitted to prepare for and conduct a cross-examination of the report's author. Any procedural unfairness that could have occurred was avoided. The presiding Justice of the Peace was cognizant of the Appellant's concerns, and as was done in ***Dana***, instructed herself properly as evident at page 63 of her decision.

Remaining Grounds (actus reus, due diligence, findings unsupported by evidence, training)

[31] The remaining grounds of appeal, as articulated earlier, can be dealt with collectively. They all, for the most part, centre on three key questions. First, did the Crown establish the actus reus of the offence, as particularized? Second, were findings made that were unsupported by the evidence? Third, was the defence of due diligence misapplied? Many of the facts intertwine and are equally relevant to all questions posed.

[32] The Appellant argues that the charging count was particularized in the information in such a way that the Crown was burdened with proving that the 'overhead duct system was not adequately supported while it was being demolished or dismantled'.

[33] The Appellant was contracted to remove equipment which was intended to be taken to another location in the United States. In her reasons, the learned Justice of the Peace finds that this was the purpose. With that context, was there a finding by the court that the ductwork was being dismantled or demolished, and was there evidence to support such a finding? The latter question is critical as even if there was no finding expressly indicated, if there was evidence to support such a finding, there is no overriding error.

[34] The court did not expressly set out a finding. As to the existence of evidence on this point, I conclude it was not open for the court to make such a finding. The trial reasons seemingly exhibit an understanding of the facts that were presented, which leads to the court's conclusion that there is a distinction between 'equipment' and 'duct work'. This distinction being drawn should have necessarily led to the conclusion that the duct work was not being dismantled or demolished. I would say as well that, even though the trial court dismissed the other count before it, ultimately concluding that the duct work was not a 'structure' under the regulations, I believe it would have been more properly considered a structure than a piece of equipment.

[35] In response to this, the Crown points to one specific part of the reasons, namely that which is found at page 19:

> The court is of the opinion that having regard to the evidence that the duct system did not….fail only because of one unforeseeable event, namely the sand build-up, but a number of contributing factors, including the poor welds, the absence of a third area of support, namely the slack cable, which was dismantled, the elbow, which removed and the weight having shifted, the unbolting of the fan assembly, which ended up being the third area of support.

[36] The finding made here, which is supported by the evidence, is simply that the slack cable was dismantled in order to remove the fan assembly. It was a part of the process necessary to remove this equipment. It is evident in the way the defence was conducted that this was the focus. It is trite to say that an accused must know the case it needs to meet, and can only rely upon the particulars as set out in the Information. In the Supreme Court of Canada's decision in ***R. v. Saunders [1990] 1 S.C.R. 1020*** Justice McLachlin states at paragraph 5:

> It is a fundamental principle of criminal law that the offence, as particularized in the charge, must be proved. In ***Morozak v. The Queen***, at p. 37 this Court decided that once the Crown has particularized the narcotic in a charge, the accused cannot be convicted if a narcotic other than the one specified is proved. The Crown chose to particularize the offence in this case as a conspiracy to import heroin. Having done so, it was obliged to prove the offence thus particularized. To permit the Crown to prove some other

> offence characterized by different particulars would be to undermine the purpose of providing particulars, which is to permit "the accused to be reasonably informed of the transaction alleged against him, thus giving him the possibility of a full defence and a fair trial".

[37] As indicated earlier, this ties into the remaining questions raised, which relate to the suggestion the trial court made other findings that were not supported by the evidence. The defence contends these inappropriate findings were critical in the ultimate decision, and without them, a finding of guilt would not have been possible. As I analyze this, I am mindful of the fact that the Justice of the Peace was required to consider the defence of due diligence, particularly here as the Appellant was arguing that the accident was not reasonably foreseeable.

[38] In ***R. v. Ontario Food Terminal Board [2004] O.J. No. 4075***, at page 62, due diligence is described as:

> …..the level of judgment, or a measure of prudence, care, determination, activity or assiduity, as is properly to be expected from, and ordinarily exercised by, a reasonable and prudent person under the particular circumstances. It is not measured by any absolute standard but depends on the relative facts of the particular case. However, in deciding whether the defendant has been duly diligent in protecting workers, the trier of fact has to evaluate the defendant's conduct in relation to the foreseeability of the harm or hazard to determine if the defendant had conducted itself properly.

[39] Two things strike me from this passage, and beg two essential questions. First, what would a company comparable to Rassaun, who industry observers agreed were competent and reasonable, do differently in these circumstances? Was, what ultimately happened, foreseeable?

[40] To the first question, the transcript doesn't disclose evidence on this point nor does it contain testimony from anyone I believe could competently speak to 'industry standards'. I find instructive the court's comments in the unreported case of ***Her Majesty the Queen v. Southwestern Manufacturing Inc***., where it notes the many factors that have been identified as important in assessing due diligence:

1. The nature and gravity of the adverse effect.
2. The foreseeabiity of the effect, including abnormal sensitivities.
3. The alternative solutions available.
4. Legislative or regulatory compliance.
5. Industry standards.
6. The character of the neighbourhood.
7. What efforts have been made to address the problem.
8. Over what period of time and promptness of response?
9. Matters beyond the control of the accused, including technological

limitations.

10. The skill level expected of the accused.
11. The complexities involved.
12. Preventative systems.
13. Economic considerations.
14. Actions of officials.

[41] Understanding an appeal court's function, which is not to substitute for a decision they disagree with, I am not to re-decide or re-adjudicate factual points. Deference must be given to trial courts as this is necessary for our system to function properly. If, for instance, there was competing evidence at trial as to what was or wasn't foreseeable; or if there was competing evidence as to what the industry standards were, even if I were to disagree with the trial court, such findings are not to be interfered with. In this case, however, there was no basis upon which to conclude this was a foreseeable risk. As to the sand build up within the duct work, the evidence was that that build up should not have occurred and could not have been expected. Experienced witnesses offered uncontradicted evidence that it was not practical or reasonable to inspect all of the welds as it would have taken years to do so. But for the poor weld and the sand build up, this accident would not have occurred. The lack of support and the shifting of the weight occurs only because of the build up and poor welds. This is the indisputable conclusion to be drawn from the evidence. Based upon the evidence presented at trial, it was not open for the court to conclude otherwise.

[42] These comments are equally applicable to the trial court's conclusion that a lack of training on the part of Rassaun's workers may have contributed to the accident, or that certain training would have assisted in identifying risks or implementing safeguards. There simply was no evidence to support either proposition, which in the result amounted to a misapplication of the due diligence defence.

Order

[43] The concerns identified herein amount to findings that were unreasonable, not supported by the evidence, and which cannot be saved by any curative proviso.

[44] The appeal is allowed, and an acquittal will be entered.

November 14, 2012
Date

Justice Jonathon C. George