In the Court of Appeal of Alberta

Citation: R v Precision Diversified Oilfield Services Corp, 2017 ABCA 47

Date: 20170208
Docket: 1603-0251-A
Registry: Edmonton

Between:

Her Majesty the Queen

Applicant

- and -

Precision Diversified Oilfield Services Corp.

Respondent

Reasons for Decision of
The Honourable Madam Justice Sheila Greckol

Application for Leave to Appeal
(Docket: 121375455S1)

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I. Introduction

[1] The Trial Judge convicted Precision Diversified Oilfield Services Corp. ("Precision") under sections 2 and 9 of the *Occupational Health and Safety Act*, RSA 2000, c O-2 [*OHSA*] for failing to ensure the safety of its workers: ***R v Precision Drilling Canada Ltd***, 2015 ABPC 115, 2015 CarswellAlta 1017 ("Trial Decision"). The Trial Judge conditionally stayed the section 9 conviction according to the rule in ***R v Kienapple***, [1975] 1 SCR 729, 44 DLR (3d) 351. The Summary Conviction Appeal Judge ("Appeal Judge") set aside the convictions and ordered a new trial: 2016 ABQB 518 ("Appeal Decision"). The Crown applies under section 19(1) of the *Provincial Offences Procedure Act*, RSA 2000, c P-34 for leave to appeal the Appeal Decision.

[2] The Crown seeks leave to appeal two questions:

1. Did the Appeal Judge err in law by requiring the Crown, as part of the *actus reus* of the offence, to negate due diligence or prove negligence?

2. Did the Appeal Judge err in law in her interpretation and application of the due diligence test?

II. Factual Background

[3] On December 12, 2010, a team of Precision employees was removing an oil drill string from a well located near Grande Prairie. The average length of each pipe making up the drill string was 9.3 meters; two lengths of pipe were removed from the hole at one time. To do this, two employees manually worked the drill string as it emerged through the drill table while a driller operated the machinery from a console. As found by the Trial Judge, at para 45, ". . . the pre-accident procedure required the floorhands to be in the rotary table danger zone and to bend in co-ordination with each other to manually remove the slips which hold the drill stem at the point at which the driller lifts the drill stem." During this process, the drilling pipe suddenly spun out of control while the two employees were in the rotary table danger zone. Part of the apparatus struck one of the floorhands, Frazier Peterson, in the head. None of the witnesses who testified saw exactly how the incident occurred. They found Mr. Peterson hunched over on the opposite side of the floor. Mr. Peterson was severely injured and died the following day. The driller, who may have been in the best position to testify as to what occurred, did not testify as a witness, as explained by the Trial Judge (Trial Decision, paras 29-31):

> 29 . . . The Crown's information was the driller could not be subpoenaed as he was working in the USA. I was told no more than that. The driller was central to what actually happened. The primary fault is said to rest with him. Did he put on the rotary

> table brake? Did he forget to take it off? Did he give his floorhand an "all clear" erroneously? None of these questions can be answered except by reference to other evidence because he was not present as a witness.
>
> . . .
>
> 31 No-one told me whether the driller works for the Defendant in its international operations. From the written material he still clearly worked for the Defendant on June 20, 2012 (Exhibit 8, Tab 3) and presumably on October 31, 2013 (Exhibit 8, Tab 16) since the Defendant was still tracking his certifications.

[4] In these circumstances, where the cause of the accident may be peculiarly within the knowledge of the employer, the important role played by the correct application of the onus of proof is obvious.

III. Statutory Provisions

[5] Section 2 of the *OHSA* provides the general duty of employers:

> **Obligations of employers, workers, etc.**
>
> **2(1)** Every employer shall ensure, as far as it is reasonably practicable for the employer to do so,
>
> (a) the health and safety of
>
> (i) workers engaged in the work of that employer, and
>
> (ii) those workers not engaged in the work of that employer but present at the work site at which that work is being carried out, and
>
> (b) that the workers engaged in the work of that employer are aware of their responsibilities and duties under this Act, the regulations and the adopted code.
>
> . . .

IV. Test for Leave to Appeal

[6] Section 19(1) provides that leave to appeal will be granted when a judge of the Court of Appeal certifies that the summary conviction appeal decision involves a sufficiently important question of law to justify further appeal. Under section 19(1) of the *Provincial Offences Procedure Act* this Court may grant leave to appeal on a question of law alone; questions of fact, or of mixed fact and law, will not suffice: ***R v General Scrap Iron & Metals Ltd***, 2003 ABCA 107 at para 2, 327 AR 84.

[7] In ***R v Stevenson***, 2016 ABCA 338 at para 4, 134 WCB (2d) 285, this Court considered a number of factors helpful in determining whether a proposed question of law justifies a further appeal. They include whether there is an unsettled question of law, whether guidance on the question is of sufficient importance to justify a further appeal, whether the appellant's position on the question has arguable merit, and whether an injustice might flow from the ruling if not reviewed.

V. Analysis

The First Question

[8] The first question posed by the Crown goes to the elements of the *actus reus* for an offence under section 2 of the *OHSA*. The Crown argues that the Appeal Judge required it to prove negligence or a "wrongful act" by Precision, or to negate due diligence.

[9] Precision argues that the Appeal Judge did not require the Crown to prove a wrongful act before the burden shifted to Precision to prove due diligence. Precision argues that the Appeal Judge's use of the term "wrongful act" merely meant that the fact of the incident itself was not enough to prove a breach of the general duty under section 2 of the *OHSA* in this particular case. Precision submits the Crown's question is one of mixed fact and law and not amenable to leave under section 19(1) of the *Provincial Offences Procedure Act*.

[10] In ***R v Sault Ste Marie (City)***, [1978] 2 SCR 1299, 85 DLR (3d) 161 [*Sault Ste Marie*], the Supreme Court of Canada set out the definitive approach to regulatory offences, at 1325-1326:

> While the prosecution must prove beyond a reasonable doubt that the defendant committed the prohibited act, the defendant must only establish on the balance of probabilities that he has a defence of reasonable care.
>
> . . .
>
> Offences in which there is no necessity for the prosecution to prove the existence of mens rea; *the doing of the prohibited act prima facie imports the offence, leaving it open to the accused to avoid liability by proving that he took all reasonable care. This involves consideration of what a reasonable man would have done in the circumstances.* The defence will be available if the accused … took all reasonable steps to avoid the particular event. These offences may properly be called offences of strict liability. . . . [emphasis added]

[11] The question of the standard of proof to be used in the interpretation and application of section 2 (1) of the *OHSA* has been considered by the Provincial Court and Court of Queen's Bench of Alberta. In ***R v Rose's Well Services Ltd (Dial Oilfield Services)***, 2009 ABQB 1, 467 AR 1, Graesser J endorsed the "accident as *prima facie* breach" theory, at paras 69 and 266. In ***R v Lonkar Well Testing Ltd***, 2009 ABQB 345 at para 27, 473 AR 1, Hillier J agreed, stating that it makes no

sense ". . . that the Crown should be required to go beyond proof of the act, and to somehow anticipate the employer's evidence as to efforts to ensure as far as reasonably practicable the health and safety of the employee." In ***R v Value Drug Mart Associates Ltd***, 2014 ABPC 164 at paras 123-131, 594 AR 315, Allen PCJ thoroughly considered the subject, finding the *actus reus* required proof the company was the employer, the person injured was engaged in its work at the time of the accident, and the company failed to ensure her safety as far as reasonably practicable.

[12] At trial, there was competing evidence about what caused the drill string to spin. The Trial Judge found these facts concerning the event that caused Mr. Peterson's death, at para 6:

> Much of the argument focuses on what the Crown must prove pertaining to the actual *actus reus* of the event. Some of this controversy may be quieted by my factual findings as follows. I am satisfied beyond a reasonable doubt that the accident was caused by:
>
> 1. The Driller using the Rotary Table to spin off a connection, followed by;
>
> 2. The Driller setting the Rotary Table brake "on" and forgetting to feather out the torque he induced into the drill stem during # 1;
>
> 3. The Driller then attempted to lift the drill stem, at the same time as the two floorhands stooped and reached to remove the slips;
>
> 4. The trapped torque was released by the Driller lifting the drill stem allowing the whole drill stem and attachments to uncontrollably spin;
>
> 5. The lifting hardware (elevator/bales) spun with drill the stem contacting Mr. Peterson's head, ultimately causing the fatal injury.

[13] He found that Precision was the employer, Mr. Peterson was Precision's employee and a "worker" within the meaning of the *OHSA*, he was engaged in the work of Precision when he suffered blunt force cranial trauma, he died as a result of his injuries, and Precision was responsible for the mechanical condition of the rig.

[14] The Trial Judge concluded, at para 8, that the Crown proved the *actus reus* beyond a reasonable doubt more broadly than required by the "*prima facie* breach" approach, so that the defence needed to satisfy him on a balance of probabilities that they had taken all reasonable steps to avoid this type of accident.

[15] First, it is arguable the Appeal Judge did not accept that the elemental facts proved a *prima facie* breach but required more, in part because she found there was no clear cause for the accident. Second, it is arguable the Appeal Judge referred to the obligation upon the Crown to prove that the accused committed a prohibited or "wrongful act" beyond the *prima facie* breach (Appeal Decision, paras 43, 46):

> 43 Even though this case involves an alleged action or failure of an employer, *because there is no clear cause for Mr. Peterson's fatal injuries -- except of course his contact with rig machinery -- there is an insufficient factual foundation to establish an apparent breach of duty by the employer.*
>
> . . .
>
> 46 Here the Crown has proved that Precision was Mr. Peterson's employer and that the drilling rig had the capacity to endanger the safety of any person. *What is missing from the Crown's case here is the indication that the employer, Precision, committed any wrongful act*. [emphasis added]

[16] The Appeal Judge held that the Trial Judge erred by finding that the Crown proved the offence merely by proving that the accident occurred.

[17] On existing law in Alberta, it is arguable the Crown need only prove the fact of employment, the worker's engagement in the employer's work, and his injury or death, to prove a *prima facie* breach under section 2(1) of the *OHSA*, that is, failure to ensure the health and safety of workers engaged in the work of that employer. The Crown's position on this question has arguable merit.

[18] The question of law squarely engaged is the proper test to determine whether the Crown has proved a breach of section 2(1) of the *OHSA*, a question not yet settled by this Court. As the Crown argues, this question is of sufficient importance to justify a further appeal, as workplace safety is of significant public importance in the context of the oil and gas industry, and generally, in Alberta. As well, the policy reason for strict liability offences – that the facts are peculiarly within the knowledge of the employer – is engaged here, including because the primary witness was unavailable to the Crown and not called by Precision.

[19] I also conclude that an injustice might flow from the lower court's ruling if not reviewed on appeal, since the Appeal Judge's decision rests upon a standard of proof that is arguably wrong, but will nonetheless guide the court at the new trial directed by the Appeal Judge.

The Second Question

[20] The second question relates to the standard of proof required of Precision at the due diligence stage. The Crown argues that the Appeal Judge made a legal error by strictly comparing Precision's practices to generally accepted standard practices in the industry, rather than taking a broader view

of steps that Precision reasonably should have taken. The Crown argues that legislated and industry standards may set a minimum level of care, but are not determinative of due diligence.

[21] Precision responds that the Appeal Judge properly cited and applied the test for due diligence. It submits that the question of steps reasonably available in the circumstances is a question of fact or mixed fact and law, and not amenable to leave to appeal.

[22] In ***R v XI Technologies Inc***, 2013 ABCA 282 at para 35, 556 AR 233, this Court held that the due diligence test includes an aspect of foreseeability, and the generally accepted test for foreseeability is found in ***R v Rio Algom***, (1988), 66 OR (2d) 674 at para 25 [*Rio Algom*]:

> XI Technologies also argues that the summary conviction appeal judge misapplied the foreseeability test. The parties concede that the due diligence defence includes an aspect of foreseeability (***R. v. Lonkar Well Testing Ltd.***, 2009 ABQB 345, 473 AR 1), and that the generally accepted test for foreseeability in the occupational health and safety context is described by the Ontario Court of Appeal in ***R. v. Rio Algom***, (1988), 66 OR (2d) 674 at para 25, as follows:
>
> > The test which should have been applied was not whether a reasonable man in the circumstances would have foreseen the accident happening in the way it did happen but rather whether a *reasonable man in the circumstances would have foreseen* that an "overswing" of the gate could be dangerous in the circumstances and *if so whether the respondent in this case had proven it was not negligent in failing* to check the extent of overswing *in order to consider and determine whether it created in any way a potential source of danger to employees and in failing to take corrective action to remove the source of danger.* [emphasis added]

[23] In an earlier decision, ***R v Bruin's Plumbing and Heating Ltd***, 2003 ABCA 300, 339 AR 191 [*Bruin's Plumbing*], Fraser CJA described the due diligence test in this way, at para 7:

> We would express the due diligence test this way. *What should an employer in the position of this employer do to ensure as far as reasonably practicable the health and safety of a worker engaged* in a neutralization process involving an inherently dangerous chemical? [emphasis added]

[24] The Trial Judge in this case found there were "cheap, quick and easy" engineered solutions available that Precision could have implemented, along with simple technical solutions and administrative procedures (Trial Decision, paras 61-64), as it did in the wake of this death.

[25] The Appeal Judge found that Precision met all industry standards and regulations. She held the Trial Judge erred by failing to assess due diligence with reference to industry standards and the

absence of any specific safety standard, which would govern what a reasonable drilling company would have done in the circumstances. The Appeal Judge found that there was only one other small drilling company that had implemented the engineered device referred to by the Trial Judge, and there was no evidence that the device or any other technical solutions had made an impact on industry standards. Finally, the Appeal Judge held that the Trial Judge failed to consider evidence that an *OHS* officer effectively endorsed Precision's pre-accident administrative procedures.

[26] The second question of law engaged in this case is the test to be applied in the interpretation and application of the due diligence test, a question not yet broadly settled by this Court.

[27] I conclude the Crown's position on this second question has arguable merit, since the decision of the Appeal Judge arguably uses a test of due diligence that imposes an obligation on the Crown to disprove compliance with industry standards and specific government regulation. Arguably, the Appeal Judge did not apply the foreseeability test in ***Rio Algom***, or the broader due diligence test in ***Bruin's Plumbing***, as appropriate to the facts and circumstances of this case.

[28] As I have found with respect to the first question, the second question is of sufficient importance to justify a further appeal, since workplace safety is of significant public importance.

VI. Conclusion

[29] The application is granted and the Crown may advance its appeal on the two questions set out in paragraph 2 of these reasons, which are hereby certified as posed.

Application heard on December 15, 2016

Reasons filed at Edmonton, Alberta
this 8th day of February, 2017

Greckol J.A.

Appearances:

C.A. Schlecker
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