Yuong Cheong Construction Pte Ltd v Shimizu Corporation
[2003] SGHC 48

Case Number : MA 86/2002

Decision Date : 05 March 2003

Tribunal/Court : High Court

Coram : Yong Pung How CJ

Counsel Name(s) : Syed Ahmad Bin Alwee Alsree and Chan Lai Foong (Billy & Alsree) for the appellant; Tan Soo Kiang and Simon Jones (Wee Swee Teow & Co) for the respondent

Parties : Yuong Cheong Construction Pte Ltd — Shimizu Corporation

Building and Construction Law – Statutes and regulations – Factories – Failure to ensure the systematic demolition of wall and for continuing inspections by a designated person during progress of demolition – Whether the occupier or the third party whom he charges as actual offender or both liable for the offences – Factories Act (Cap 104) ss 88(1), 92 & 93.

Building and Construction Law – Statutes and regulations – Factories – Failure to ensure the systematic demolition of wall and for continuing inspections by a designated person during progress of demolition – If third party proven to be actual offender, whether third party can rely on lack of due diligence on the part of the occupier as a ground of appeal against conviction – Factories Act (Cap 104) s 92.

1 Shimizu Corporation ("Shimizu") was the main contractor, engaged to carry out additions and alterations to the existing first storey warehouse units, at the IMM Wholesale Centre at Jurong East ("IMM building"). It was not disputed that Shimizu, as the main contractor, was the occupier of the premises in question. The appellant, Yuong Cheong Construction Pte Ltd ("YCC") was the sub-contractor appointed by Shimizu to, *inter alia,* demolish 44 internal partition walls, erect new walls and carry out tiling and plastering works.

2 Shimizu was charged by the Ministry of Manpower ("MOM") with two offences under s 88(1) of the Factories Act, Cap 104 ("the Act"). The first charge related to the contravention of regulation 115(1) of the Factories (Building Operations and Works of Engineering Construction) Regulations ("BOWEC") for failure to ensure that the demolition of an L-shaped wall at the first storey of the IMM building was carried out in a systematic manner, i.e from the "top-down" instead of "bottom-up". The second charge was in relation to the contravention of regulation 116(1) of the BOWEC for failure to ensure that continuing inspections were made by a designated person during the progress of the demolition of the L-shaped wall.

3 The facts which led to the two charges being brought against Shimizu were undisputed. The demolition works on the walls begun on 8 July 2000. By 10 August 2000, YCC had demolished 42 of the 44 walls it contracted to demolish. The remaining walls were the L-shaped wall and the AHU room wall. On 11 August 2000, during the daytime, Abu Taher Jalal Ahmad ("Abu"), an employee of YCC was tasked to demolish the L-shaped wall while two others were to demolish the AHU room wall. Abu hacked at the L-shaped wall using a hand-held pneumatic breaker and created a huge hole at a height of 1.5 m from the bottom. When he left his work unattended to fetch his supervisor, Chai Chin Chian, the wall which he was demolishing collapsed onto an adjacent public area, killing one member of the public and injuring four others.

4 As a defence to the charges, Shimizu sought to rely on ss 92 and 93 of the Act and brought a private summons against YCC, claiming that YCC was the actual offender.

The statutory scheme

5 In order for the decision of the magistrate and the appeal to be understood properly, I found it useful, at the outset, to lay down the statutory scheme which has been put in place by Parliament on this matter relating to the liability of occupiers or owners of factory premises. The relevant provisions are as follows :

> **Offences**
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> **88**. (1) In the event of any contravention in, or in connection with, or in relation to, a factory of the provisions of this Act or of any regulations, rules or orders made thereunder, the occupier or (if the contravention is one in respect of which the owner is by or under this Act made responsible) the owner of the factory shall, subject as hereafter in this Act provided, *be guilty of an offence*.
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> …
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> **Penalty on persons actually committing offence**
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> **92.** Where an act or default for which any person is liable under this Act or any subsidiary legislation made thereunder is in fact the act or default of some other person then that other person *shall be guilty of an offence* and shall be liable on conviction to the like penalty as if he were the first-mentioned person.
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> **Power of person primarily liable to exempt himself from liability**
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> **93.** (1) Where a person is charged with an offence under this Act, he shall be entitled, upon a charge duly made by him and on giving to the prosecution not less than 3 days' notice in writing of his intention, to have any other person *whom he charges as the actual offender* (whether or not that person is his agent or employee) brought before the court at the time appointed for hearing the charge.
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> (1A) If, after the commission of the offence has been proved, the first-mentioned person proves to the satisfaction of the court –
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> > (a) that he has used all due diligence to enforce the execution of this Act and any relevant regulations, rules or orders made thereunder; and
> >
> > (b) that the said other person had committed the offence in question without his consent, connivance or wilful default,
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> that other person shall be convicted of the offence and the first-mentioned person shall not be guilty of the offence, and the person so convicted shall, in the discretion of the court, be also liable to pay any costs incidental to the proceedings.
>
> (2) The prosecution shall have the right in any such case to *cross-examine the first-mentioned person* if he gives evidence and any witnesses called by him, *in support of his charge*, and to call rebutting evidence.
>
> (3) When it is made to appear to the satisfaction of an inspector at the time of discovering an offence –

(a) that the person who would be proceeded against apart from this subsection has used all due diligence to enforce the execution of this Act and any relevant regulations, rules or orders made thereunder;

(b) by what person the offence has been committed; and

(c) that it has been committed without the consent, connivance or wilful default of the first-mentioned person and in contravention of his orders,

the inspector shall proceed against the person whom he believes to be the actual offender without first proceeding against the first-mentioned person. (Emphasis mine)

6 It will be seen that the occupier's responsibility under the Act does not depend upon proof of personal blame. The occupier does not even need to have knowledge of the contravention. Section 88(1) of the Act provides clearly and simply that the occupier is to be liable for *any* contravention of the provisions of the Act or of any regulations, rules or orders made thereunder. The policy of the Act is, no doubt, to fasten liability onto the occupier in the first instance, such that for every contravention, there will always be someone who will be accountable for it. This stringency is, however, in accordance with the overall purpose of the Act, which is to improve and maintain high standards of safety for workers at factories and other workplaces falling within the definition of "factory" under the Act. At the second reading of the Factories Bill No. 27/72 on 3 November 1972, the then Minister for Labour, Mr Ong Pang Boon had this to say in relation to the Act :

> … the Bill seeks to repeal and re-enact with amendments the Factories Act…with a view to improving the health and safety measures and the welfare facilities of persons employed in factories; and ensuring a more stringent observance of the safety provisions so as to reduce the rate of industrial accidents.

7 Nevertheless, to mitigate this harshness, especially when occupiers employ sub-contractors or outsource to other contractors, the Act gives occupiers the right to have a third party charged as the actual offender. Section 93 makes available to the occupiers a defence mechanism to escape from the liability imposed on them by the Act. The section is clear to the effect that if it is proven that a third party was the actual offender, the occupier would be exempted from liability if he could show the court first, that he had exercised all due diligence to enforce the execution of the Act and any relevant regulations, rules or orders made thereunder and secondly, that the offence was committed by the third party without his consent, connivance or wilful default.

8 In my view, this section, undoubtedly, deals with the liability or non-liability of the occupier *solely*. This is clear from the heading of the section which reads 'Power of person primarily liable to exempt himself from liability'. Section 93 does not concern itself with the liability of the third party who is the actual offender, which is governed by s 92 instead.

9 Essentially, s 92 provides that a third party shall be guilty of an offence if the act or default for which the occupier was liable under the Act or any subsidiary legislation made thereunder is, in fact, his (the third party's) act or default. It further provides that the third party will be liable on conviction to the like penalty as if he was the occupier.

10 By virtue of s 92, once the commission of the offence by the third party has been proven, whether by the occupier under s 93(1) or by the inspector under s 93(3), the third party would be guilty of the offence. The criminal liability of the third party does not depend upon whether the occupier could prove the two additional elements of due diligence and lack of consent, connivance or

wilful default under s 93(1A) of the Act. Such further proof by the occupier goes towards the exemption of liability on the part of the occupier, but not towards the liability of the actual offender. Ultimately, whether or not the occupier could avail himself of the defence successfully should not detract from the proper conviction of the third party, if indeed, the third party has been proven to be the actual offender.

11 A reasonable interpretation gleaned from an examination of both the provisions as a whole is that Parliament had not intended that the liabilities of the occupier and the third party be mutually exclusive. Therefore, in a situation where the occupier can prove that a third party was the actual offender but cannot rely on the defence under s 93 (by reason of not being able to prove the two elements under sub-section (1A)), criminal responsibility will fall on both the occupier and the third party. In this way, both the occupier and the third party would be justly punished; the third party for committing the offence and the occupier, for not being totally free from blame, by either not exercising all due diligence or allowing the offence to be committed with his consent, connivance or wilful default.

The procedure

12 The magistrate was unable to find any established case law which dealt with the procedure to be applied in such cases whereby ss 92 and 93 are invoked to bring in a third party. The only other case involving the application of ss 92 and 93, which was cited to the court was *Tiong Seng Contractors Pte Ltd v PP* (MA No. 288 of 2000, unreported). It was heard by the same magistrate himself. In both cases, the magistrate chose to apply the following procedures : the prosecution would first present their case against the primary accused and, at the close of the prosecution's case, he would decide whether a *prima facie* case had been made out. If there was such a *prima facie* case made out, the primary accused would be called upon to present his defence and commence with his private prosecution of the third party. At the close of the primary accused's case, there would, in turn, be a finding as to whether a *prima facie* case against the third party had been made out and, in the event that there was such a *prima facie* case, the third party would be called upon to enter his defence.

13 This uncommon procedure in criminal proceedings was, no doubt, thought by the magistrate to be necessitated by the provisions relied upon by Shimizu, which are unusual in themselves. In essence, they allow the occupier to bring in a third party by charging him as the actual offender through the process of private prosecution. It would seem that counsel for both Shimizu and YCC had concurred in this procedure since neither of them made any objection to such a procedure being applied by the magistrate. In fact, by agreement of all the parties involved, counsel for YCC was even allowed to cross-examine the prosecution's witnesses.

14 Initially, I had some concerns that both the State and the private prosecution were heard together in the same trial. Since the procedure was not, in fact, a subject of the appeal at hand, I did not have the benefit of submissions from counsel and will, therefore, only deal with this matter briefly.

15 After some thought, I concluded that such a procedure could be defended by virtue of the special provisions found in the Factories Act. Section 93(1) entitles the occupier to have a third party, whom he charges as the actual offender, brought before the court at the time appointed for the hearing of his own charge. It is a necessary part of the occupier's defence to prove that the offence was, in fact, committed by another party. Therefore, even though the private prosecution is initiated by a separate charge against the third party, it is wrong to view it as forming separate proceedings from the original prosecution.

16 This is further supported by s 93(2) of the Act, which gives the prosecution a right to cross-examine the occupier when he gives evidence or calls witnesses in support of his charge against the third party. It seemed to me that this particular provision implies that the private prosecution against the third party should be heard together with the original prosecution. Otherwise, it would be meaningless to speak of a right of cross-examination on the part of the prosecution *in the course of* the occupier's private prosecution against the third party, not to mention the practical difficulties that would arise by having two separate proceedings.

17 Moreover, the factual matrix which gives rise to the offence would have been the same in respect of the charges against the occupier and the third party respectively. In such circumstances, having the prosecutions in one proceeding has the added advantage of avoiding the need to hear exactly the same evidence twice over, and hence reaping the benefits of saving time and costs. The unsatisfactory result of possibly conflicting findings of fact could also be avoided. In addition, any possible prejudice to the parties could be avoided by giving counsel for the third party the opportunity to cross-examine the prosecution's witnesses, as was done in this case. Therefore, the rights of either the occupier or the third party to a fair and just trial are not sacrificed by reason of having both prosecutions in the same proceedings.

The arguments of the parties at trial

18 At the trial, Shimizu contended that YCC had carried out the demolition on 11 August 2000 without its knowledge or consent, and therefore, had flouted the procedures which had been put in place by Shimizu. On the day that YCC commenced demolition work i.e 8 July 2000, the tenants at the IMM had made a complaint about noise pollution. The established practice was that the demolition of internal partition walls should be carried out only at night. Procedures were set up to ensure that the nightly demolition works were closely supervised by both Shimizu and YCC personnel. It was argued that, had YCC complied with these procedures, the tragedy which occurred on 11 August 2000 would have been averted.

19 In response, YCC made the following arguments :-

(i) YCC was actually allowed to continue carrying out demolition work during the day with hand-held breakers as the complaint of noise pollution by the tenants at IMM only related to demolition using the mini excavator and not any demolition work involving hand-held breakers.

(ii) There was a complaint by the Ministry of Environment relating to noise pollution on 27 July 2000 and YCC was, in fact, ordered to carry out any further internal wall demolition during the day instead of the night.

(iii) YCC was behind schedule in the demolition of the walls and had been informed by Shimizu personnel that they had to demolish the L-shaped wall by 11 August 2000.

(iv) The reason why the wall was hacked at a height of 1.5 m was so as to insert scaffolding through the hole for the purposes of creating a platform which workers could climb onto and demolish the wall with tools from the "top-down".

(v) At a meeting on 6 July 2000, Joseph Chee ("Chee"), the project co-ordinator for YCC, had proposed three methods of wall demolition to Chow Sai Keat ("Chow"), the project co-ordinator for Shimizu and the above-mentioned method was approved by Chow.

The decision below

20 The magistrate did not believe that YCC was allowed to continue demolition works during the day using hand-held breakers. Mr Alvin Seng from Exeltec, the property managers of IMM, had given evidence that he received the complaint from the tenants on the morning of 8 July 2000. By YCC's own evidence, the mini-excavator was also not brought onto the site until the afternoon of 8 July 2000. The magistrate therefore found that the source of noise that led to the complaints by the tenants must have been caused by the use of hand-held breakers. In order to ensure that there were no further complaints by the tenants about noise pollution, all internal demolition, whether by hand-held breakers or mini-excavator would, thereafter, be carried out at night. He noted that there were no further complaints about noise pollution by the tenants and found that no further internal demolition had, in fact, been done during the day up till 11 August 2000.

21 The magistrate also disbelieved that there was a change of orders for demolition works to be carried out in the day. He found that YCC had attempted to take advantage of Exhibit 2D26 and fabricated evidence of having been informed to cease demolition work during the night. Exhibit 2D26 was a letter from the Ministry of Environment, requiring Shimizu to set up noise monitoring equipment 50 meters from the IMM building. It did not, however, state that there was a complaint or, for that matter, that the complaint was with regard to demolition done during the day or night. The magistrate found that, even if there had indeed been complaints by the residents around the IMM building, such complaints was more likely to have been with regard to external demolition that was carried out using excavators. The fact that there were no further complaints by the tenants at IMM led him to believe that there was, in fact, no daytime internal demolition. Additionally, he noted that Mr Alvin Seng had stated that he did not, at any time, after 8 July 2000, give new instructions about when demolition was supposed to be carried out. The magistrate thus found that no such instructions were ever given as far as YCC was concerned.

22 As for whether YCC was behind schedule in the demolition of the works, the magistrate found that this was indeed so. According to the project timetable, demolition work on the internal partition walls was to have been completed by 20 July 2000 but as of 10 August 2000, there was still the L-shaped and AHU room walls left to be demolished. Nevertheless, although Shimizu personnel might have informed Chai Chin Chian of YCC that the walls were supposed to be demolished by 11 August 2000, the magistrate found that this was not an instruction, however, that YCC should commence demolition, against established practice, during the day on 11 August 2000.

23 The magistrate found that Chee had not told the truth with regard to the meeting on 6 July 2000. He believed Chow when he said that there was no discussion of the methods of demolition on that day and that he was merely showing the YCC representatives around the site, indicating to them the walls that were to be demolished. He found that Chow could not have agreed to the method of breaking a hole in the wall so as to insert scaffolding as this was unsafe. Madam Sia Ai Ling from the Accident Investigation Unit, MOM, gave evidence that regulation 115(1) required the demolition of walls and partitions to be done in a systematic manner i.e in the reverse manner to its construction, from the "top-down". She was of the opinion that if a wall was demolished by first breaking a hole in the wall and then hacking it at the bottom, this would create a void and weaken the support for the remaining load of the wall above the hole.

24 In any event, the magistrate had not believed that YCC was using its so-called method of inserting scaffolding to demolish from "top-down" at the time of the incident. The L-shaped wall was almost 5 m in height. Estimating the average height of a man at about 1.75 m, such a man would still find it impossible to reach the top of the L-shaped wall, even if he was standing on a 1.5-m high staging and extending his arms over his head, with the hand-held breaker in his hands. As such, the magistrate was of the opinion that YCC had fabricated this method in an attempt to show that it had, somehow, complied with the "top-down" procedure. He found that Abu had never been given any

instructions to hack a hole and insert scaffolding. In fact, Abu was simply told by Chai Chin Chian to demolish the wall by hacking it. The operative cause of the collapse of the L-shaped wall on 11 August 2000 was held to be YCC's method of demolishing the wall from a height of 1.5 m downwards.

25 The magistrate further found that, in order for Shimizu to take the benefit of s 93 of the Act, it had the onus of showing that it had exercised due diligence in the enforcement of the Act and BOWEC and that YCC had, in fact, committed the offences without its consent, connivance or wilful default.

26 He found that Shimizu was able to fulfil those two conditions. Shimizu had employed Mok Tee Hua ("Mok") as the site safety supervisor, pursuant to s 25 of the Act. The magistrate found that, in the exercise of his work, Mok had ensured that all his statutory duties were carried out in compliance with the law. He also found that Shimizu had in place a proper system for the demolition of walls. Shimizu's "Request for Night Work" forms were utilized in order for YCC to inform Shimizu that there would be demolition on a particular night. In response to YCC filing these forms, Shimizu would then ensure that their personnel, either Chow or Imran, was present to supervise the demolition at night. There was no evidence that, apart from the demolition during the day on 11 August 2000, Shimizu personnel were not present during all of the night-time demolition sessions conducted by YCC.

27 The magistrate found that YCC had not complied with the established procedure for the demolition of internal walls and had instead embarked on an independent course of demolishing the L-shaped wall during the day without supervision. Shimizu was caught completely unawares and was not guilty of any wilful default. Accordingly, he convicted YCC and acquitted Shimizu of the charges. YCC was fined $30,000 in respect of the first charge and $10,000 in respect of the second charge. Being dissatisfied with the magistrate's decision, YCC appealed against its conviction and sentence.

The appeal

28 First of all, it must be stated that most of the grounds of appeal were directed towards the magistrate's findings of fact, therefore the usual rule that an appellate court should be slow to overturn findings of fact would apply.

29 A careful examination of the magistrate's grounds of decision and the evidence revealed that the magistrate did not go against the weight of evidence in finding that YCC was the actual offender who was responsible for demolishing the L-shaped wall in an inherently dangerous manner. There was no evidence of any instructions given by Shimizu to YCC to demolish the L-shaped wall during the day on 11 August 2000. The established procedure was for the internal walls to be demolished at night under supervision by both Shimizu (either Chow or Imran) and YCC (Chee) personnel. It was the evidence of Mok, the site safety supervisor that he made it a point to stay late at the site occasionally to observe the method of wall demolition employed by YCC, which was by means of a mini-excavator, from the "top-down" starting at the free end. Shum Kwai Peng, the operator of the mini-excavator from YCC had also admitted under cross-examination that he had considerable experience in wall demolition and testified that he knew that the walls must be demolished from the "top-down". YCC clearly flouted the settled practice, by giving Abu the task of hacking down the L-shaped wall during the day without any supervision on 11 August 2000.

30 Since YCC was unable to show that the magistrate was wrong to hold that it was the actual offender in relation to the collapsed wall at the IMM building, YCC must fail in this appeal.

31 I noted that there were other submissions on the part of counsel for YCC that the magistrate

had erred in finding that Shimizu had exercised due diligence to enforce the execution of the Act and BOWEC. In particular, he argued that Shimizu had failed to issue proper work method statements to YCC. Neither had Shimizu sanctioned any specific method for demolishing the walls safely. This resulted in Abu not knowing that it was dangerous to hack the wall in the manner which he did.

32 It appeared to me that the arguments of counsel for YCC were misconceived. As mentioned above, once the third party has been proven to be the actual offender, his criminal liability does not depend on whether or not the occupier could prove the two additional elements of due diligence and lack of consent, connivance or wilful default. As such, the alleged lack of due diligence on the part of Shimizu was not a ground of appeal which YCC could rely upon.

33 In any event, it did not lie in YCC's mouth to contend that the lack of work method statements meant that Shimizu had failed to exercise all due diligence. In the case of *Riverstone Meat Co Pty v Lancashire Shipping Co Ltd* [1960] 1 All ER 193, the English Court of Appeal, in holding that the ship-owners had exercised due diligence to make a ship seaworthy, stated at p 201:

In each particular set of circumstances it will be a question of fact as to what steps and measures a carrier should take in order to exercise due care and diligence to make his ship seaworthy; it will be a further question of fact whether he has done all that he should.

34 I agreed fully that what constitutes due diligence must of necessity vary according to the facts of each case. In this present case, the magistrate had found that Shimizu was in full compliance with the BOWEC regulations by ensuring that YCC used the mini-excavator to demolish the wall from the "top-down" and by supervising its demolition work at night without fail. Moreover, YCC was a construction company with a vast experience of over 20 years in the removal and erection of walls. It was employed by Shimizu specifically for the task of removing and erecting walls. Paragraph 4.2.3 of the Singapore Standard Code of Practice No.11 (1992) "*The Code of Practice for Demolition*" spells out clearly that "buildings and other structures should generally be demolished in the reverse order to that of their construction". It was unbelievable that YCC, as contractors of demolition works and players in the construction industry, should be unaware of this particular code of practice. YCC could not, therefore, be allowed to blame its "lack of knowledge" on the non-issuance of work method statements on the part of Shimizu.

Conclusion

35 For all the reasons given above, I dismissed YCC's appeal and confirmed the fines imposed by the magistrate.

Appeal dismissed.