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Case No. 2011/01603/B5

IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
The Strand
London
WC2A2LL

Date: Wednesday 11 May 2011

B e f o r e:
THE LORD CHIEF JUSTICE OF ENGLAND AND WALES (Lord Judge)
MR JUSTICE BEATSON
and
MR JUSTICE BEAN

- -

R E G I N A

- v –

COTSWOLD GEOTECHNICAL HOLDINGS LIMITED

- -

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Wordwave International Ltd
(a Merrill Communications Company)
165 Fleet Street, London EC4
Telephone No: 020 7404 1400; Fax No: 020 7404 1424
(Official Shorthand Writers to the Court)

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Mr R Lissack QC and Mr K Morton QC
appeared on behalf of the Applicant
Mr M Ellison QC and Mr A Darbishire appeared on behalf of the Crown

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JUDGMENT (As Approved by the Court)

THE LORD CHIEF JUSTICE:

1. . This is an application, which has been referred to the full court by the Registrar, for leave to appeal against conviction and sentence by Cotswold Geotechnical Holdings Limited ("CGH") following its conviction of corporate manslaughter contrary to section 1(1) of the Corporate Manslaughter and Corporate Homicide Act 2007 ("the 2007 Act") on 15 February 2011 in the Crown Court sitting at Winchester, before Field J and a jury.

2. . The prosecution arises from the sad death of Alexander Wright on 5 September 2008 during the course of soil investigation work by CGH on land near Stroud in Gloucestershire. Investigations of this kind represented a significant proportion of the company's business. It was a small company which employed eight people in total.

3. The sole director of the company was Peter Eaton. He was in total control of the way in which its affairs were managed and in which the work was organised. By September 2008 he and the deceased were the only two people in the company who carried out actual soil investigations.

4. . Given the issues which arise in the applications, a lengthy description of the broader issues involved in the trial is unnecessary. On 5 September 2008 the deceased entered a trial pit, known on site as "trial pit No 5". It had been dug to a depth of at least 3.5 metres (about 10 feet). The purpose was to obtain soil samples from the pit and to conduct shear vane tests within it. This 3.5 metre pit was entirely unsupported. Unsurprisingly, it collapsed. Despite the efforts of the landowner, who was nearby, to save the deceased, the weight of earth which fell upon him caused traumatic asphyxia.

5. It was not in dispute between the prosecution and the defence that at the time when the deceased entered the pit it was dangerous for him to have done so. However, there was a difference of view about how that had arisen. The Crown's case was that an unsupported pit of this depth needed some kind of shoring or support and that the death was the result of a gross breach of duty of care owed by the company to the deceased as one of its employees. The company should have enforced a strict prohibition on any employee entering a trial pit that was deeper than 1.2 metres, unless it was made safe by shoring or by any other alternative means available for the purpose.

6. The defence case was that it was reasonable to approach the issue of the safety of trial pits by leaving it to Mr Eaton, who had many years experience in the field, and to the deceased, who had much less experience but was qualified for the purposes, to form their own judgments about the safety of entering any particular trial pit. If there was a breach of duty, the breach was not gross; but even if the breach of duty was gross, on examination, the cause of death was the fact that the deceased had entered the pit contrary to the company's practice that trial pits should not be entered unless there was someone nearby keeping the pit under close observation and in a position to respond to any collapse. The defence case was that when the deceased entered trial pit 5 the operator of the mechanical digger, who would have performed the safety function, had already left the site. It was therefore the deceased who had acted in breach of the company's system of work which required that he should not work entirely on his own in a trial pit.

7. The Crown asserted that there was a gross breach of duty by the company in any event because when Mr Eaton left the site, as he did, even if he assumed that the deceased would not enter trial pit 5, he himself had already entered three trial pits at the site which were not significantly different from trial pit 5 in depth and lack of support. It was therefore not in the least surprising that the deceased went into trial pit 5 on the same basis and for the same reason. In reality, the allegation was that there was a system of work in play which meant no more and no less than that it was company practice for the deceased (and for that matter Mr Eaton himself) to enter into dangerous, unsupported pits.

8. . The original indictment contained four counts. Counts 2 and 3 alleged that the company was guilty of corporate manslaughter, contrary to the 2007 Act, and had failed to discharge the duty of an employer to ensure the health, safety and welfare of an employee, contrary to section 2(1) of the Health and Safety at Work Act 1974. Counts 1 and 4, directed at Peter Eaton personally, alleged manslaughter by gross negligence and consent or connivance by him to the company's failure to discharge its statutory duty under the 1974 Act, or causing the breach of that duty by his own neglect.

9. . The issues in this application arise from the decision of the trial judge, which was entirely justified on the evidence available to him, that it would be unjust and oppressive for the prosecution against Mr Eaton personally to continue. This was not a case which had anything to do with any potential, possible, or theoretical abuse of process by the Crown. The medical evidence made it clear that Mr Eaton was terminally ill and that the immediate treatment required for his condition would leave him exhausted and would impair both his memory and his concentration. Accordingly, the proceedings against him were stayed.

10. Thereafter, an application was made on behalf of CGH that the counts which it faced (counts 2 and 3) should also be stayed on the ground that for the trial to continue against the company would amount to an unfair trial. It may have been suggested that this was an abuse of process, but whether or not the term "abuse of process" was used in argument, it came to this: if Mr Eaton could not give evidence in his own defence, it was unfair for the case to proceed against CGH when Mr Eaton was the main and significant witness who would have given evidence in support of the defence of the company. Mr Eaton was a vital defence witness. If he could not be called to give evidence, the company would be placed at a distinct disadvantage and any consequent trial would be unfair.

11. That was a broad submission. Mr Richard Lissack QC on behalf of the company was able to reinforce it by an argument developed in relation to section 8 of the 2007 Act, which requires that a jury must consider whether the evidence showed that a defendant organisation failed to comply with any relevant health and safety legislation and if so, how serious any such failure was and how much of a risk of death was posed by it. From that he highlighted that section 40 of the 1974 Act imposed a burden on the defendant to show, where it arose, that it was not reasonably practicable to conform to any of the relevant regulations or safety measures.

12. On this argument the reverse burden in relation to some elements of count 3, which alleged breach of duty under the 1974 Act, would also apply in relation to count 2, the manslaughter offence under the 2007 Act. Given that there was a reverse burden of proof, the inability of the company to call the person who was in effect in sole control of it would be especially unfair and create even greater difficulties than would be occasioned if the burden of proof throughout was on the prosecution.

13. In his oral submissions before us today, Mr Lissack highlighted some of the specific features of the evidence relating to Mr Eaton's position in the company. In the course of this judgment we do not propose to repeat them. In essence, it was that Mr Eaton was the entire guiding hand in the company and that he was the person who was involved in the operation. He knew the experience of his employee and he himself had also had many years' experience, there having been no less than 7,000 occasions when he had entered into pits which had been dug for the purposes of soil investigation. Indeed, he had been into trial pit 5 himself.

14. In his ruling on these issues the judge noted that Mr Eaton had been interviewed for nine hours about the health and safety practices within the company, the training of its employees, the measures (such as they were) adopted by the company when deciding whether to allow an employee to enter into a test pit, and, quite apart from the generality, also about the narrative of events on 5 September 2008. The judge took the view (and the contrary has not been argued) that this material would be admissible in any event as hearsay evidence if it was not called by the Crown. However, it was called by the Crown. The material was summarised in writing and part of the interview was shown to the jury on video equipment. The judge also took the view that any proof of evidence taken from Mr Eaton before he became too ill to give further instructions would also be available to be admitted before the jury as hearsay evidence. In due course, his 36 page proof of evidence was read to the jury by counsel in support of the defendant company's case. With that material the judge concluded that the fairness of the company's trial could be secured, provided also that a careful direction was given to the jury about the potential disadvantages faced by the company through the inability for medical reasons of Mr Eaton to give his evidence live.

15. In due course all appropriate warnings were given. No criticism is made either or the terms of the directions, nor has it been suggested that anything was omitted from the directions which should have been explained.

16. We pause there. There was a potential corresponding advantage that there could be no cross-examination of Mr Eaton either on his proof of evidence, if that were deployed before the jury, or on the interview record to the extent that that was before them. Mr Lissack suggested that there are cases -- and indeed there are -- where the witness for the defence may strengthen the defence case; just as there are cases when a defendant may cause huge damage to his own defence. We recognise all of that, but, having regard to the facts of this case, which we have not set out in narrative form, there were, as it seems to us, a number of extremely difficult questions which Mr Eaton would have had to address if he had been crossexamined. The reality is that there was no proper safe system of work in relation to either himself or his employee (the deceased) entering into unsupported pits. As the evidence suggested, it is a matter of pure good fortune that this accident happened on 5 September 2008 when it might well have happened weeks (if not months) before.

17. The prosecution rejected the essential elements of the argument in relation to any possible interaction between the 2007 Act and the 1974 Act; but in any event it was decided that a pragmatic course should be adopted. For the purposes of the forthcoming trial, and without making any concessions about the matter in relation to any future trial, in view of Mr Eaton's illness the prosecution were prepared to accept the full burden of proof in respect of any health and safety legislation allegedly breached by the company.

18. The argument advanced by Mr Lissack, which he has repeated before us, was that the effect of section 40 of the 1974 Act meant that the prosecution could not make a voluntary assumption of the burden of proof. Accordingly, the concession offered by the prosecution, although as we see it (and we continue to see it) hugely advantageous to the defence, was, somewhat unusually, rejected. This surprising approach can only be understood in the context of the forensic issues which arose at the trial when Mr Eaton was no longer available to be called as a witness on behalf of the company. The suggestion, as we understand it, was that if Mr Eaton could not be called as a witness, and if there was any burden of proof on the defence, the submission that the forthcoming trial of the company in the absence of Mr Eaton would be reinforced by the fact that there were reverse burden of proof provisions.

19. The judge took a robust view. We agree with him. The course proposed by the prosecution was sensible. The judge permitted it to be taken and in due course it was. Shortly before the start of the trial the prosecution indicated that it would not proceed with count 3, so that the jury would be left with the single count of corporate manslaughter. On any view the reverse burden provisions would not apply in such a case.

20. In our view this, too, was a sensible course, designed to give effect to the prosecution acceptance for the purposes of the current proceedings that the burden of proof throughout rested on the Crown, and, to the extent that the Crown could, to allay any difficulties faced by the defendant company arising from the absence of Mr Eaton.

21. The trial proceeded. The 36 page statement of Mr Eaton was read to the jury. Thereafter, the judge refused an application by the defence to permit the jury to be provided with a written copy of that statement when they retired to consider their verdict. Some criticism was advanced about that decision in the written submissions we have considered, but there is no realistic possibility that the decision is open to criticism. Nor is any criticism made of the summing-up. In due course the jury convicted the company on the single count of manslaughter.

22. The point taken in the present application is in effect a repetition of the submission before the judge about the interaction of the 2007 Act and the 1974 Act in relation to the reverse burden of proof. The submission is that the judge's ruling was wrong. That represents a point of significance in a case like this, where the real battle ground in the forensic process was whether or not any breach of duty was so gross as to fall within the ambit of the provisions relating to corporate manslaughter. The company

had to defend itself both by deploying Mr Eaton's professional judgment about the system of work and the conditions on the date in question, and by reference to Mr Eaton's personal reputation.

23. We recognise the potential disadvantage created for a defendant who is unable to call a live witness for the defence, certainly in the context of a prosecution of a company of which the witness whose evidence is unavailable is both the guiding hand and the guiding mind. The judge had these matters firmly in mind. His decision, however, was that the jury would not be deprived of the evidence of Mr Eaton in whichever form the defence chose to advance it. The jury knew why he was not available. It was given a careful direction about the potential disadvantages to the defence of Mr Eaton's unavoidable absence. Accordingly, the company's defence to the corporate manslaughter charge was placed before the jury.

24. We shall not recite what Mr Eaton said in his interviews, nor read out his lengthy statement. Having summarised the interview record and his proof of evidence or statement, and taking what he said at face value, the jury's verdict is unsurprising.

25. We return to the argument based on the judge's failure correctly to analyse the interaction between the two legislature provisions. On our preliminary view -- and we do not need to decide the point for the purposes of the present application -Field J was entirely right in the self-direction he gave and the ruling which followed it. However, for the purposes of the present application, the question whether the judge was right or wrong is beyond the peripheral. Despite Mr Lissack's careful submission, we cannot see that it has any relevance. If the prosecution was prepared to accept, and the judge was prepared to agree, that, notwithstanding any statutory provision which might have imposed a burden on the defence, that the prosecution should carry the entire evidential burden to the standard which applies when the prosecution does carry the burden, and the judge directed the jury accordingly, it is impossible to see how the subsequent conviction can begin to be unsafe. By definition, the verdict means that the jury was satisfied beyond reasonable doubt of the correctness of all the prosecution contentions on these issues and that the defence contentions were to be rejected. In the context of the safety of the conviction, therefore, that is an end of the argument. It would have been an end of the argument even if the case based on the alleged contravention of the 1974 Act (the original count 3) had been before the jury.

26. Accordingly, the application for leave to appeal against conviction is refused.

27. We can deal briefly with the application for leave to appeal against sentence. The judge had regard to the Definitive Guideline issued by the Sentencing Guidelines Council in relation to corporate manslaughter and associated health and safety offences resulting in death. It is a brief guideline. It explains the factors likely to affect the seriousness of the offence, of which the first is whether serious injury was foreseeable.

28. . The judge found, and we agree, that it was plainly foreseeable that the way in which the company conducted its operations could produce not only serious injury but death. The standard by which it fell short of its duty of care was found by the jury to have been gross. In addition, there was an earlier incident when the company had failed to heed advice and guidance and to take note of what the Health and Safety Executive had indicated to Mr Eaton when following up the complaint of a young employee who had been required to go into deep, unsupported pits. In the course of this discussion Mr Eaton was reminded of the broad principle that trenches and pits deeper than 1.2 metres should be shored and supported. Mr Eaton had given assurances that in the future shoring would be provided. They were not honoured.

29. . Having reflected on the seriousness of the offence, the judge turned to the financial position of the company. He acknowledged that it was parlous. It had been kept going by Mr Eaton. It was just about breaking even. Given his illness, it did not have a very bright future. The judge also recognised that a substantial fine would inevitably put the company into liquidation and therefore its employees out of work. He recognised, too, that all this would have an impact on Mr Eaton's family at a time when they would have troubles enough. He accepted the genuineness of Mr Eaton's expressions of deep remorse and regret. Finally, he had in mind the moving victim impact statement provided by the mother of the deceased.

30. The judge then considered the general level of fines suggested in the guidelines. He came to the conclusion that, in the context of the relatively small scale of the company's operation as reflected in its turnover and its current financial state, a fine of £385,000 would be sufficient to mark the gravity of the offence and to send the necessary message about the need for employers generally to attend to their duties to provide safe places of work. He recognised that the consequence of his decision, even if this fine were to be paid over a period of ten years, would be that the company would go into liquidation. That would unfortunately be the end of the business, but he reached the conclusion that this was unavoidable.

31. In the submissions on behalf of the applicant our attention is focused on the scale of this fine, which represented 250% of turnover, to be paid over a period of ten years, which would mean that there was no prospect whatever of the company surviving, even if Mr Eaton were not in the poor health which he is. Our attention was drawn to paragraph 16 of the guideline which states that account must be taken of the financial circumstances of the defendant organisation. It underlines that a fine is intended to inflict punishment, but that it should be one which the defendant should be capable of paying, if appropriate over a period which may be a period of a number of years. Our attention was further drawn to section 164 of the Criminal Justice Act 2003, which also makes provision for fines to be reflective of the financial circumstances.

32. On the other hand, we also note that in the guideline one of the features expressly noted in assessing the financial consequences of a fine is that the court should have regard to the question "whether the fine will have the effect of putting the defendant out of business". In some bad cases this may be an acceptable consequence. The same point is repeated towards the end of paragraph 20 in the context of extended periods for the payment of fines and of instalments. An extended period "may be particularly appropriate for an organisation of limited means which has committed a serious offence, and where it is undesirable that the fine should cause it to be put out of business".

33. The reality of this case is that the judge took the view, rightly, that in the circumstances as they appeared before him, and indeed as they appear before us now, the fact that the company would be put into liquidation would be unfortunate, but in our

judgment, as in his, this was unavoidable and inevitable.

34. Having reflected on the submissions carefully advanced by Mr Lissack in relation to this part of the case, in the end we see no justifiable criticism of the sentence imposed. The judge was faced with manslaughter causing death as a result of a gross breach of duty following a system of work which was demonstrably, and for some time had been, unsafe, with the potential for causing death.

35. In these circumstances the application for leave to appeal against sentence must also be refused.