Neutral Citation Number: [2016] EWCA Crim 1171
No: 2015/5752/A3
IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
Strand
London, WC2A 2LL

Tuesday 12 July 2016

B e f o r e:
LORD JUSTICE HAMBLEN

MR JUSTICE OPENSHAW

HIS HONOUR JUDGE BEVAN QC
(Sitting as a Judge of the CACD)

R E G I N A

V

ERNEST DOE & SONS LTD

Computer-Aided Transcript of the Stenograph Notes of
WordWave International Limited trading as DTI
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Tel No: 020 7404 1400 Fax No: 020 7404 1424
(Official Shorthand Writers to the Court)

Mr S Antrobus appeared on behalf of the **Appellant**

The **Crown** did not appear and was not represented

J U D G M E N T
(Approved)

1. MR JUSTICE OPENSHAW: On 26th October 2015 the appellants, Ernest Doe and Sons Limited pleaded guilty before the Magistrates' Court to an offence of failing as an employer to discharge the duty imposed by section 2(1) to an employee contrary to section 33(1)(a) and (2) of the Health and Safety at Work Act in failing to ensure, so far as reasonably practicable, the health and safety at work of its employees. They were committed for sentence pursuant to section 3 of the Powers of Criminal Courts (Sentencing) Act 2000 and on 19th November at the Crown Court at Chelmsford before Mr Recorder Chandler they were fined £750,000, against which they now appeal by leave of the single judge.

2. The appellant company is a large retailer and distributor of agricultural construction machinery with provision for after sales servicing and repairs to the agricultural industry. It is a private limited company. It was incorporated in 1947 but had in fact traded since the 19th Century. Its head office is at Ulting in Essex. It had 19 branches throughout the country and has just over 500 employees. One of them was John Albone who was an experienced tyre fitter employed at their branch in Ulting. On 10th December 2014 he was working with another tyre fitter changing the tyres on a four-wheel-drive vehicle. They were seeking to re-inflate and re-fit the tyres back onto the vehicle following complaints that the tyres had not been seated correctly when originally fitted. In order to re-seat the tyres, both men inflated them far in excess of the maximum pressure. It had apparently been their longstanding practice to do so when re-seating large tyres. They successfully re-seated two of the tyres but when working on the third tyre it split and exploded, as a result of which Mr Albone was very seriously injured. He lost sight in his right eye and had various cuts and a fractured nose. In fact for the first 24 hours he was on a life support machine. He spent a two further days in intensive care. He was later able to return to work for the appellants, albeit in a different occupation.

3. The prosecution opening note, which rather unhelpfully was not served until the day before the sentence hearing, set out the prosecution case as to the various failings which they alleged on the part of the appellant. Those can be summarised as, first, a failure to ensure a sufficient risk assessment including a proper determination of the competency of the individual employees to carry out tyre fittings on this specialist type of tyre. Secondly, failing to provide suitable and adequate instruction and training to those employees. The appellant's had drawn up a written method statement identifying the proper safety measures that should be taken, but those measures were not in fact implemented, with the result that staff did not consistently use the cages in which the tyres should have been inflated, so that if they exploded the cage would take the force of the blast and they did not seem to know how to use the inflation bags which again could have contained the consequential explosion. The third failing, although not causative of the accident, was that there was not a fully functioning pressure gauge which if used would have recorded the fact that they were increasing the pressure to more than twice

the recommended level. The fourth failing - a significant failing - was that there was a lack of sufficient supervision and monitoring at this particular branch because the system that they were using of inflating tyres without using the cages or the inflation bags or indeed safety goggles was plainly a long standing practice. There was a tyre shop supervisor but he had not received sufficient training to give him either the knowledge or the confidence to realise that the system being used by these two subordinate employees was unsatisfactory and unsafe. Prior to the sentencing hearing, the appellant company had served a written basis of plea which substantially accepted those failings with a number of qualifications which perhaps it is unnecessary for us to detail.

4. The parties were broadly agreed on the relevant aggravating and mitigating features. The prosecution did provide the Sentencing Guidelines Council Definitive Guideline on Corporate Manslaughter for Health and Safety Offences Causing Death. Of course this was not an offence of corporate manslaughter, neither was death caused, but plainly there are a number of helpful observations in that Guideline.

5. Neither Counsel engaged for the prosecution, nor indeed for the defence, submitted before the Recorder a list of similar cases. Of course there is huge range of culpability and indeed means of various companies, but valuable guidance is to be found in other cases before this court. In terms of the aggravating features, the prosecution acknowledged that this was not a case of deliberate cost cutting at the expense of safety, nor did it involve deliberate non-compliance with a relevant licence or injury to someone who was particularly vulnerable. But there had been a failure to heed previous advice from the Health and Safety Executive because there had been a similar accident in 2011, following which the company had taken steps to improve their safety practices; over time those improvements had lapsed.

6. Before the sentencing hearing, the appellant had quite properly served its accounts for the preceding years. It had a substantial turnover ranging from somewhere between £100 million and £122 million. But the profit margin was relatively low. There was a significant variation, as is perhaps to be expected, over the years. The profit in the last five years ranged from somewhere between £600,000 to £1 million, but there was a detailed letter from the accountants showing that the likely profits for the current trading year were considerably less than that.

7. Although, as we have said, the guidelines on corporate manslaughter and health and safety offences causing death were provided, the court as it seems to us was not provided with the help that the Recorder was entitled to expect. We have been helpfully provided with a long list of other cases. We hesitate to say that any other case is similar because of the huge variation that there is in culpability and in means, but Mr Antrobus when asked to select the case that perhaps provides the greatest parallel has drawn our attention to the

case of Tuffnells Parcels Express [2012] EWCA Crim. 222 which involves similar culpability and a company of roughly similar size.

8. We are impressed with the point that Mr Antrobus makes about the company's means. Whilst the company undoubtedly had significant turnover and assets, the profit margin was relatively small and it seems to us that there is considerable substance in the submissions made that the Recorder did not give sufficient regard to the effect that the fine that would have upon the company. It would seem from exchanges that took place after sentence was passed that the Recorder had taken a starting point of a fine of £1.25 million, which she had reduced by £500,000 to reflect the mitigation and the credit for the early guilty plea. But as Mr Antrobus points out, the sentence arrived at is in fact far in excess of the range of decisions of this court which have been reported in terms of sentencing for non-fatal cases where the culpability is broadly comparable.

9. There is a further point bearing on the company's means which seems to us to have considerable substance. There is a very substantial deficit in the company's final salary pension scheme, they must therefore to set aside £600,000 per year to fund that deficit for the next 15 years. In our judgment a fine of £750,000 in these circumstances is entirely beyond the range which has been imposed in comparable cases. The Recorder perhaps can scarcely be blamed for that since, as we have said, comparable cases were not unfortunately drawn to his attention. Doing the best we can, we are entirely satisfied that the fine of £750,000 is manifestly excessive. We think that a proper starting point would be somewhere in the region of £150,000, which we will reduce to £100,000 on account of the plea of guilty and the prompt measures that the company took to mend and improve their practices when they were drawn to their attention by the Health and Safety Executive. To that extent therefore this appeal is allowed.