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IN THE COURT OF APPEAL, FIJI ISLANDS
ON APPEAL FROM THE HIGH COURT OF FIJI

CIVIL APPEAL NO. AAU0020 OF 2001S
(High Court Criminal Action No.HAC003 of 2001s)

BETWEEN:

S. KARAN CONSTRUCTION COMPANY LIMITED

Appellant

AND:

THE STATE

Respondent

Coram: Hon. Jai Ram Reddy, President
Hon. Sir Mari Kapi, Justice of Appeal
Rt. Hon. John Henry, Justice of Appeal

Hearing: Tuesday 13th August 2002, Suva

Counsel: Mr. G.P. Lala for the Appellant
Mr. J. Naigulevu for the Respondent

Date of Judgment: Friday, 16th August, 2002

JUDGMENT OF THE COURT

On 13 August 2001 the appellant pleaded guilty in the High Court to two counts of breaching the Health and Safety at Work Act of 1996. On 14 August 2001 the High Court imposed fines on those counts of $10,000 and $5,000 respectively. Although applications for stay of execution made to the High Court and also to this Court were dismissed, the fines have not yet been paid.

The first count charged a breach of s.9(1) of the Act, in failing to provide adequate protection from the noise and dust abatement that the appellant's workers were exposed to during their employment. The brief facts are that on the 28th of April 1999 at about 3:30 p.m. The appellant was carrying out construction and demolition work at

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Thompson Street, Suva. A gazetted Health and Safety Inspector, appointed under the Health and Safety at Work Act 1996, Suresh Singh, arrived to inspect the site. He found an employee of the Company, one Tevita Siga, using a Makita elecric hammer, without using an ear defender or eye protector or respirator. The noise emanating from the machine was 108 decibels at Mr Siga's ear level. Mr Siga told the inspectors that he had received no training for the use of the machine, and that he had not been issued with any protective gear.

Mr Singh then further inspected the premises and found that the Company had no health and safety policy as required by section 9(2) (f) (i) of the Health and Safety at Work Act of 1996. This formed the basis of the second count in the information. Both breaches occurred on 28 April 1999.

The Act provides for a maximum fine of $100,000 for a breach of s.9.

In passing sentence, the Judge noted that this was the first case of its kind in Fiji, and counsel's advice that the Act was based on similar legislation passed in Queensland, Australia under which the maximum penalty was A$300,000. He referred to a decision of the Queensland Industrial Court where a fine of A$35,000 was imposed on a charge of failing to provide a safe system of work. There a worker has fallen through the roof of a hangar, and had suffered fatal injuries. The Judge also referred to the purpose of the Act being to protect employees from their own actions or omissions as well as against those of employees. There was, she observed, a strict duty on employers to keep their premises safe from risk.

The Judge also took into account as mitigating factors the crisis of May 2000 which had created a business downfall, the appellant's quick compliance with its obligations following institution of the prosecution, its previous good record, and the fact that no injuries had resulted from the breaches.

In support of the appeal Mr Lala stressed the newness of the legislation and the prompt steps taken by the appellant to meet its obligations under the Act. He also submitted that payment of the total amount of $15,000 would put the appellant at financial risk. We do not think there is merit in the last point. No information of any value in this respect was put before the Judge in sentencing, and moreover the information now disclosed in the later applications for stay of execution does not support the submission.

The importance of the legislation which is aimed at preventing harm or injury to workers must not be underestimated, and employers must be aware that breaches will be considered seriously by the Courts. That nothwithstanding, the level of fines to be under this legislation must still be in keeping with those imposed by the Courts in other cases, as well as recognizing the facts of the particular case, its relative seriousness, and any relevant mitigating factors.

The legislation was new, and these breaches did not call for any thing in the nature of a deterrent penalty. They were at the lower end of the scale of offending. The appellant accepted liability, and promptly and properly remedied the faults which had been identified. Importantly in our view, the level of the fines imposed can only be described as very high in the Fijian context. There must be a relativity which recognizes the general state of the country's economy, and that of its citizens, who are subject to the Act.

Taking all matters into consideration, we are persuaded that the fines imposed in the present case are excessive. We do not see it as appropriate to attempt to lay down any formula for assessing fines under the Act. As in all cases, each must be determined on its own facts. We have reached the conclusion that in the present case justice will be done if the fines are reduced substantially. The appeal is therefore allowed, the fines in question are quashed and replaced by fines of $3,500 on count 1 and $1,500 on count two. There is no cause for any deferment of payment.

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Hon. Jai Ram Reddy, President

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Hon. Sir Mari Kapi, Justice of Appeal

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Rt. Hon. John Henry, Justice of Appeal

Solicitors:

Messrs. G.P. Lala and Company, Suva for the Appellant
Office of the Director of Public Prosecutions, Suva for the Respondent

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