Neutral Citation Number: [2018] EWCA (Crim) 1944

Case No: 201701793/7 B5

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT AT PRESTON
HHJ Altham
T2016 0266

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23.8.2018

Before:

LORD JUSTICE SIMON
MR JUSTICE SWEENEY
and
MR JUSTICE GOSS

- -

Between:

Regina	**Respondent**
and	
Electricity North West Ltd	**Appellant**

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- -

Mr John Cooper QC and **Mr Malcolm Galloway (**instructed by **DWF LLP)** for the Appellant
Mr Nigel Lawrence QC (instructed by **Fieldings Porter Solicitors)** for the Respondent

Hearing date: 19 July 2018
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Approved Judgment

Lord Justice Simon:

Introduction

1. On 23 March 2017 in the Crown Court at Preston (before HHJ Altham and a jury), the appellant ('the company') was convicted of contravening regulation 4(1) of the Work at Height Regulations 2005 ('WAHR 2005'). This was count 2 on a three-count indictment.

2. The jury acquitted the company on count 1, breaching regulation 3(1) of the Management of Health & Safety at Work Regulations 1999, and on count 3, breaching s.2(1) of the Health & Safety at Work Act 1974.

3. On 31 March 2017 the company was sentenced to pay a fine of £900,000 within 28 days and the statutory victim surcharge.

4. The appellant appeals against conviction and sentence with the leave of the single judge.

5. There are two grounds of appeal in relation to the conviction. First, that in the light of the acquittals on counts 1 and 3, the only factual basis for the conviction on count 2 could be one that did not give rise to any material risk, and such a shortcoming could not constitute a breach of regulation 4(1) of WAHR 2005. Second, and linked to the first ground, the conviction on count 2 was logically inconsistent with the acquittals on counts 1 and 3.

6. So far as the sentence is concerned, the company argued that the size of the fine bore no relation to the seriousness of the count 2 offence, in terms of culpability and harm, and in the light of the acquittals on counts 1 and 3, and that it was manifestly excessive.

The facts in outline

7. The company owns, operates and maintains the electricity distribution network in the north-west of England. The three counts on the indictment resulted from an investigation into a fatality that occurred on 22 November 2013, when John Flowers, a linesman employed by the company, fell from height while clearing ivy from a vertical wooden pole, identified as pole 582651 ('the pole').

8. There was no issue that Mr Flowers was a skilled craftsman, competent and authorised to carry out work on electrical equipment, such as wooden poles supporting overhead electrical lines. His work was distinct from vegetation management work, which involved clearing vegetation close to but not on electrical equipment. Vegetation management work was carried out by tree cutters (or arborists) whose task was to clear away vegetation other than on poles.

9. As Mr Flowers carried out the work on the pole on 22 November, he was held in place by a work positioning belt, which was designed to allow him to lean back and work at height, but was not designed to arrest a fall. The equipment that was designed to arrest a fall was a fall-arrest lanyard: a rope line with an integral shock absorber, designed to reduce the distance and consequences of a fall. He was not wearing a fall-arrest lanyard. During the course of clearing the vegetation with a handsaw, Mr

Flowers cut through his work positioning belt and fell, sustaining fatal injuries. It was not in dispute that this work ought to have been carried out from a Mobile Elevated Work Platform ('MEWP') or alternatively from a ladder. The uses of a positioning belt and a full-arrest lanyard was a third and least appropriate choice, but was nevertheless a choice open to linesmen.

The statutory and regulatory provisions relied on and charges in the indictment

Count 3

10. It is convenient to start with the general duty under s.2 of the Health and Safety at Work Act 1974 ('the Act'), which formed the basis of the charge under count 3 and on which the company was acquitted:

> (1) It shall be the duty of every employer to ensure, so far as is reasonably practicable, the health, safety and welfare at work of all his employees;
>
> (2) Without prejudice to the generality of an employer's duty under the preceding subsection, the matters to which that duty extends include in particular –
>
> > (a) the provision and maintenance of plant and systems of work that are, so far as reasonably practicable, safe and without risks to health;
> >
> > …
> >
> > (c) the provision of such information, instruction, training and supervision as is necessary to ensure, so far as is reasonably practicable, the health and safety at work of his employees.

11. The particulars of the offence under count 3 were:

> That you, being an employer, did on and before 22 November 2013 fail to discharge the duty imposed on you by section 2(1) of the Act in failing to ensure, so far as is reasonably practicable, the health, safety and welfare of your employees, including John Flowers and other linesmen, whilst working at height during the course of their employment with you whereby you are guilty of an offence …

Count 1

12. Regulation 3 of the Management of Health and Safety at Work Regulations 1999 ('the 1999 Regulations') provides:

> (1) Every employer shall make a suitable and sufficient assessment of -

> (a) the risks to the health and safety of his employees to which they are exposed whilst there are at work; and
>
> (b) the risks to the health and safety of persons not in his employment arising out of or in connection with the conduct by him of his undertaking,
>
> for the purpose of identifying the measures he needs to take to comply with the requirements and prohibitions imposed upon him by or under the relevant statutory provisions.

13. The particulars of the offence charged under count 1 were as follows:

> That you, being an employer, did on and before 22 November 2013 fail to discharge the duty imposed on you by Regulation 3(1) … in failing to carry out a suitable and sufficient risk assessment in relation to risks to the health and safety of your employees, including John Flowers and other linesmen, to which they were exposed whilst carrying out work at height during the course of their employment with you whereby you were guilty of an offence …

Count 2

14. Regulation 4 of the WAHR 2005, provides:

> Every employer shall ensure that work at height is –
>
> (a) properly planned
>
> (b) appropriately supervised; and
>
> (c) carried out in a manner which is so far as is reasonably practicable safe,
>
> and that its planning includes the selection of work equipment in accordance with regulation 7.

15. Regulation 7 is headed: 'Selection of work equipment for work at height':

> (1) Every employer, in selecting work equipment for use of in work at height, shall -
>
> (a) give collective protection measures priority over personal protection measures; and
>
> (b) take account of -
>
> …
>
> (vii) the other provisions of these Regulations

> (2) An employer shall select work equipment for work at height which -
>
> …
>
> (b) is in other respects the most suitable work equipment, having regard in particular to the purposes specified in regulation 6.

16. The particulars of count 2, on which the company was convicted, were:

> That you being an employee, did on and before 22 November 2013 fail to discharge the duty imposed on you by regulation 4(1) [of WAHR] in failing to ensure that work at height carried out by linesmen on the Vegetation Management Section, including John Flowers, was properly planned, appropriately supervised and was carried out in a manner which was so far as reasonably practicable safe, and that its planning included the selection of work equipment in accordance with regulation 7, whereby you are guilty of an offence by virtue of the provisions of section 33(1)(c) of the Health and Safety at Work etc Act 1974 and are liable to penalty as provided by the said Act as amended.

The prosecution case as opened to the jury

17. The prosecution case on count 2 was that the work on the pole was not properly planned. Mr Flowers and Mr Bates turned up to work on 22 November and were told that they would have to clear vegetation from the pole. As Mr Lawrence QC told the jury:

> The reality is that nothing was planned … for the work the linesmen had to perform in clearing vegetation or ivy from dead wood poles. There was no documented or other safe system of work for this task … the bottom line, though, is that it wasn't properly planned, it wasn't appropriately supervised and it certainly wasn't then carried out safely. Not only this but, as regulation 4 requires, there was no proper selection of work equipment in accordance with regulation 7 either.

An outline of the evidence

18. The defence evidence was to the effect that risk assessments had been carried out that were suitable and sufficient. A generic risk assessment system was set out in a Code of Practice 430 ('CP 430') establishing procedures that linesmen were to follow and control measures that they must apply. CP 430 prescribed three methods of access to a wooden pole, albeit not a pole congested with vegetation: in order of preference, a MEWP, a ladder and climbing with climbing irons (metal spikes attached to the linesman's boots), with work positioning belt and fall-arrest lanyard. The CP 430 identified that a MEWP should be used if possible. If that or a ladder could not be used, the risk assessment made it clear that a linesman should not climb a pole

without a fall arrest lanyard, and because such a lanyard could not be used on a congested pole, the linesmen would know that they should not climb a pole without clearing it from the bottom so that a fall arrest lanyard could be used. The jury was shown the CP 430 generic risk assessment.

19. A specific or dynamic risk assessment was done by the linesmen on site, and was not necessarily recorded in writing. Such a risk assessment was, the company submitted, suitable and sufficient.

20. On 10 June 2013 a surveyor, Paul Mathie, had inspected the pole, suspected that there was rot at the bottom of the pole and noted that important markings which should have been visible were not (due to the fact that the pole had become congested with ivy) and that there was ivy within the conductors. The anti-climbing device was missing, and the stays were rusted. He advised that the company should cut the vegetation as soon as possible. It was accepted that none of the information and data gathered by Mr Mathie was passed on to the men who were to do the work.

21. The work was then issued to a surveyor, Craig Robson, who inspected the pole and on 1 October 2013 completed a document setting out the work that needed to be done to make it compliant, including clearing the ivy. On the document was the word, 'MEWP'. The prosecution argued that this was a planning document which showed that the company had knowledge that a MEWP was required. The defence submitted that the purpose of this document was to scope out the work to be done, not to prescribe the means by which it was to be done. Mr Robson agreed with this.

22. On 6 November 2013, John Flowers and Barry Bates visited the site. Mr Bates gave evidence that the purpose of the visit was to locate the link box and find the open point. They were not there to look at ivy or vegetation on the pole. They had some documents in a job pack, but these did not include Mr Robson's survey.

23. Mr Bates told the jury that on the day of the accident, they had not been told that they would have to clear ivy from the pole. They were there with the vegetation management team, one of whom, Mr Birkby, had a MEWP. Mr Birkby told them that they needed to clear the ivy from the pole. The two men disconnected the electricity via the link box using the MEWP, before they left for a 20-minute break. When they returned the MEWP was being used by the vegetation management team. They put a ladder up against the pole and Mr Bates footed until Mr Flowers was in position. He then put on his harness and work positioning belt and climbed the ladder. Neither man had their fall arrest lanyards with them. Mr Flowers secured himself to the pole with his harness and began stripping the ivy with a hand saw, while Mr Bates cleared the ivy from the lower part of the pole. He did not see Mr Flowers fall.

The summing-up

24. The Judge identified the issues for the jury in relation to each count. So far as count 1 was concerned: Had the prosecution proved that the company failed to make a suitable and sufficient assessment of the reasonably foreseeable risks to which the deceased and other linesmen were exposed while working at height clearing ivy and other vegetation from deadwood poles on or before 22 November 2013? As to count 2: had the prosecution proved that the work at height was not properly planned? If so, the verdict was guilty. If not, had the prosecution proved that the work was not

appropriately supervised? If so, the verdict was guilty. If not, had the defence proved on the balance of probabilities that the company had ensured that the work was carried out in a manner which was, so far as was reasonably practicable, safe? So far as count 3 was concerned: had the prosecution proved that the company exposed its employees who were engaged in removing vegetation from deadwood poles on or before 22 November 2013 to material risk to their health and safety? If not, the verdict was not guilty. If so, had the company proved on the balance of probabilities that it was not reasonably practicable to do more than was actually done to ensure the health and safety of its employees engaged in removing ivy from deadwood poles on or before 22 November 2013? If so, the verdict was not guilty. If not, the verdict was guilty.

25. No criticism of the summing-up was pursued on the appeal.

The Judge's assessment of the basis on which the jury convicted on count 2, having acquitted on counts 1 and 3

26. The Judge heard extensive argument as to the effect of the verdicts on the sentencing exercise. He set out in summary the basis on which he considered the jury had reached its verdict and, on which he would sentence, as follows:

> There was no site-specific assessment done in relation to the clearing of the poles. However, there was no need for that because there was a combination of generic risk assessment in [CP 430] and the dynamic risk assessment which was done on the day the work was to be done by the linesman themselves and clearly that regime was, as the jury found and I accept of course, a suitable and sufficient risk assessment procedure. However, there was no planning to ensure that the tools required to do the work at height were readily available. Indeed, the linesmen went to the site on the day the work was to be done without even knowing whether there was work at height to be done. That meant that when the linesmen had completed their suitable and sufficient risk assessment at the site and determined that they needed in this case a MEWP there was no MEWP readily available. That, of course, did not expose them to a risk of foreseeable harm because there were MEWPs available at the yard which in this case happened to be close by, but often could be hours away or, of course, they could use the MEWP which the vegetation management had … Because there was no proper planning of the tools required to do the work the linesmen were left … to either return to the yard to pick up a MEWP or to disrupt the work of the vegetation management team by borrowing their MEWP for potentially a number of hours. That cannot be proper planning. (*emphasis added*).

27. Later, he added this:

> The test in relation to count 3 was exposure of linesmen to foreseeable harm. As already stated, regulation 4 of the

> [WAHR] does not require any risk of foreseeable harm to be proved, but that does not mean that there is no likelihood of harm at all. The jury would have been quite entitled to conclude that by having a MEWP available at the yard and on site, though being used principally by the vegetation management team, there was no foreseeable risk of a person attempting to do this work from a ladder. However, that does not mean that a failure to plan the work properly so that a MEWP is available carries absolutely zero risk. The [WAHR] create a strict liability to plan when work at height is carried out, presumably for good reason that liability is strict, presumably because of the potentially catastrophic consequences of work at height. The regulations require the work at height to be properly planned irrespective of whether there was a foreseeable risk of harm, so that planning should be done even when the risk is not foreseeable.

The argument on the appeal

28. So far as ground 1 was concerned, Mr Cooper QC accepted that an offence under regulation 4(1) of WAHR 2005 was in effect an offence of strict liability; but he submitted that, as had been accepted by both parties at trial, the offences charged under all the counts 'bled into each other'. He pointed to a passage in the prosecution opening, at §§62-70, in which the overlap was made clear; and to a passage in the summing-up in which the Judge told the jury that the case did not 'carve up' by reference to the particular counts. The counts covered the same period of time, the same work and risk and the same employees. The verdicts were consistent with a proper risk assessment and the conclusion that there was no foreseeable risk from the work that was carried out. This was crucial to the conviction on count 2, since proper planning did not exist in a vacuum but must be based on foreseeable risk of harm. The mischief in count 2, he submitted, was covered by counts 1 and 3. CP 430 provided the generic risk assessment and was complemented by the dynamic risk assessments made by qualified and trained linesmen on the day.

29. The difficulties created by the charge under count 2, when there were also charges under counts 1 and 3, had been raised before the summing-up when discussing directions to the jury. Mr Cooper submitted that count 2 added nothing to count 3, which was, in effect, the same allegation. The Prosecution argued that there were elements in count 2 that were not in count 3, although it did not elaborate at that stage.

30. Mr Cooper submitted that the Judge's view, set out at [27] above, that work must be planned even if there is no foreseeable risk of harm [that must be planned against] and where a risk of harm is not foreseeable, was wrong. Although there was no likelihood of harm from the failure properly to plan, in the light of the verdict on count 3, the Judge was wrong to conclude that the inherent dangers in working at height meant that there was 'always a likelihood of harm at some stage' even if the jury's verdict meant that the there was no material risk in relation to the facts of the case before them.

31. As to ground 2, Mr Cooper submitted that proper planning for foreseeable risks was covered by the verdicts on the other counts, and particularly count 1. Regulation 3 of

the 1999 Regulations imposed a very wide duty: 'a suitable and sufficient assessment … for the purpose of identifying the measures [needed to be taken] to comply with the requirements and prohibitions imposed upon … by or under the relevant statutory provisions.' In the light of the acquittals on counts 1 and 3, there was nothing left on count 2, and on this basis the verdicts were inconsistent. The Judge identified the need for a MEWP, but there was a MEWP available. The Judge thought that the crucial question was whether it was 'readily' available.

32. Mr Lawrence QC submitted in answer that the material duty under regulation 4(1) of the WAHR, properly to plan was a strict duty, for the reasons given by the Judge (the implicit dangers of working at height). The Judge had identified the material planning failure. The company acknowledged that a MEWP should have been available throughout; and, in fact, a MEWP had been available earlier to make the line dead. However, it was not available when Mr Flowers and Mr Bates returned to carry out the removal of the ivy. Mr Bates gave evidence that he did not know that a MEWP was available when they began to remove the ivy from the pole. It followed that there was a proper evidential basis for the conviction on count 2: the MEWP should have been planned to be available for the two linesmen when they began to remove the ivy.

Discussion

Ground 1

33. In our view, the fact that a risk is not reasonably foreseeable is not an answer to a charge of breaching regulation 4 of WAHR by a failure of proper planning. Proper planning for working at heights is a strict requirement due to the inherent danger of the work. In the present case a MEWP was required for the work of clearing ivy from the post and, at the crucial time, one was not readily available: in other words, no plan had been made for it to be there. The fact that, on the jury's verdict, this did not create a foreseeable risk was not an answer to the charge count 2, although it was material to sentence. The parties had agreed that, despite the overlap of matters covered by the three counts, the Judge should direct the jury in conventional terms that they should give separate consideration to each count and that their verdicts need not be the same. We note that the defence agreed the form of the basic route to verdict on count 2: namely, if they were sure that the company, as an employer, failed to properly plan the work at height, then it was guilty of an offence. This was how the case was opened and how it was summed up, without comment or objection from the defence.

34. Accordingly, we reject the first ground.

Ground 2

35. There is, at least to some degree, an overlap between the arguments on the first and second ground.

36. We have approached the second ground on the basis set out below in the light of the guidance provided by the decision of this court in *R v. Fanning and others* [2016] EWCA Crim 550, [2016] 1 WLR 4175 at [2]. However, we should make it clear that what we say is not to be understood as providing a synthesis of that case beyond what we consider necessary for the purposes of the present appeal.

37. The first question is whether the conviction is supported by the evidence, see *Fanning* at [2]. Notwithstanding Mr Cooper's submissions, we are satisfied that there was a proper evidential basis for the conviction on count 2: namely, that the planning was deficient in that there was no MEWP readily available for the entirety of the work.

38. If the conviction is supported by the evidence, an appellant who seeks to persuade this court that the jury has returned inconsistent verdicts must satisfy it that the two (or in this case three) verdicts cannot stand together, in the sense that no reasonable jury which had applied its mind properly to the facts in the case could have arrived at the conclusion that they did, and that the verdicts are so inconsistent as to demand the interference by an appellate court, see *R v. Stone* (unrep), *R v. Durante* [1972] 1 WLR 1612 at 1617 and *Fanning* at [8] and [21]. The burden of showing that a verdict cannot stand is on the appellant, see *Fanning* at [24].

39. Although further elaboration of these points is discouraged in *Fanning* at [22], we would add two further points by reference to cases referred to in *Fanning*, which go to explain an appellate court's reluctance to engage in over-analysis of, or second guessing, a jury's verdicts.

40. First, where a jury has been directed (as were the jury in the present case) that the facts are for them and that they should consider the charges separately without any obligation to decide all counts in the same way, and that they should not convict unless they are sure, it would be anomalous to hold that they have returned irrational or inconsistent verdicts because they take a judge's direction at face value and gave effect to it, see Lord Bingham CJ in the judgment of this court in *R v. W (Martyn)* (unreported), cited in *Fanning* at [29]. As Lord Bingham explained:

> … the jury is not a precise instrument. It delivers its decision ordinarily in one or two words; it gives no reasons; it provides no explanation. While jurors ordinarily listen with obvious attentiveness to judicial directions, no one can be sure what they make of those directions in the course of their deliberations. It may be that, if their processes were subjected to logical analysis, flaws would be found. If, however, a flawless process of reasoning were required, a jury would be a strange body from which to require it.

41. Second, while we do not suggest that this is what happened in the present case, in *MacKenzie v. The Queen* (1996) 190 CLR 348, 366-368, the High Court of Australia referred to the 'ameliorative' approach of juries and cited with approval the observations of the Supreme Court of South Australia in *R v. Kirkman* (1987) 44 SASR 591 at 593:

> Sometimes it appears to a jury that, although a number of counts have been alleged against an accused person, and have been technically proved, justice is sufficiently met by convicting him of less than the full number.

See also *Fanning* at [11] and [16].

42. In conclusion on this point, although we accept that the conviction on count 2 must have been based on the narrow evidential foundation set out by the Judge, we do not accept that there was no, or insufficient, factual basis, nor that the conviction on count 2 was inconsistent with the verdicts on counts 1 and 3 such as to call for interference by this court.

43. Accordingly, we dismiss the appeal against conviction.

The appeal against sentence

44. The Judge heard submissions as to the applicability of the Sentencing Council Definitive Guidelines on Health and Safety Offences and concluded that they applied.

45. So far as culpability was concerned, he found that there was 'high culpability' since there was a persistent failure properly to plan over a lengthy period of time. The need to plan for work at height was obvious and a systemic failure put the case in the category of high culpability. As to harm, he concluded that, in light of the verdicts on counts 1 and 3, the likelihood of harm was low and the offending fell within harm category 3. He recognised that he had to put aside the fact of the actual accident. The high culpability and category 3 factors indicated a starting point of a fine of £540,000.

46. The Judge then went on to assess the company's turnover. As it was a very large organisation, it was necessary to make an upward adjustment to the starting point and move outside the range to achieve a proportionate sentence. He did not treat the company's previous health and safety record as an aggravating factor. Having arrived at a figure, he needed to consider whether it reflected the extent to which the company fell below the required standard and to ensure that it had a proportionate impact on the management and shareholders. In the circumstances, the least fine that could be imposed was £900,000.

47. The grounds of appeal against sentence are that the fine was manifestly excessive in the circumstances. The Judge had (exceptionally) to sentence for a Health and Safety offence on the basis that the company had carried out a sufficient risk assessment which did not expose anyone to a risk of harm. It followed that he ought not to have attempted to apply the Sentencing Guidelines. His assessment of culpability was inconsistent with the evidence and with the acquittals on counts 1 and 3; and he misdirected himself when considering the risk of harm created by the offence. The result was that the starting point was too high. The Judge was also in error in approaching the issue of sentence on the basis that, because the company was a 'very large' organisation, he was required to make an upward adjustment to the sentence. In fact, it was not necessary to increase the fine in order to achieve a proportionate sentence. In short, the sentence was out of proportion to the shortcomings the Judge had identified.

48. We have considered these points.

49. In our view the Judge was right to sentence by reference to the Guidelines on Health and Safety Offences since this was a conviction under s.33(1)(c) of the Health and Safety at Work Act 1974 and a breach of Health and Safety Regulations, to which the Guidelines apply.

50. The Judge concluded that there was high culpability because the company allowed the breaches of the WAHR to subsist over a long period of time. He may have had in mind the reports of 10 June and 1 October 2013; but in our judgment these did not provide a sufficient basis for finding that the failure to plan that a MEWP was readily available on 22 November made the offence one of high culpability. The failure was not comparable to the other factors indicating conduct or omission which falls 'far short of the appropriate standards' such as to justify a finding of 'high culpability': for example, failing to put in place measures which are standard in the industry or ignoring concerns raised by employees or others. In our view, in the light of the jury's verdicts, the company had been convicted of an offence which was properly characterised as an offence of between low and medium culpability.

51. So far as harm was concerned, the Guidelines make clear that, 'Health and Safety offences are concerned with failure to manage risks to health and safety and do not require proof that the offence caused any actual harm.' There is then in bold the following: 'The offence is in creating a risk of harm.' It was in this respect that the verdicts created difficulties for the Judge when he came to sentence, as he recognised. Any finding of a risk of harm was circumscribed by the acquittals on counts 1 and 3.

52. In our judgment the correct application of the Guidelines was on the basis that the seriousness of harm risked was at level A, because of the inherent nature of working at heights if no proper plan was in place; but there was, on the facts of the case, a low likelihood of harm. It followed that the offence charged under count 2 was harm category 3.

53. On the basis of offending on the cusp of low and medium culpability, and harm category 3, the Guidelines that apply to a large organisation indicate a starting point of between £35,000 (low culpability) and £300,000 (medium culpability), and ranges of between £10,000 to £140,000, and between £130,000 to £750,000 respectively.

54. We have concluded that the right sentence in this case was a fine of £135,000. We do not consider that any further upward adjustment to reflect turnover should be made on the facts of this case.

Conclusion

55. Accordingly, we dismiss the appeal against conviction; but allow the appeal against sentence by reducing the fine from £900,000 to £135,000.