COURT OF APPEAL FOR ONTARIO

CITATION: R. v. 1222149 Ontario Ltd.
(Dairy Queen and/or Embrun DQ Grill & Chill), 2024 ONCA 543
DATE: 20240708
DOCKET: COA-24-CR-0075

Miller, Paciocco and Copeland JJ.A.

BETWEEN

His Majesty the King in Right of Ontario
(Ministry of Labour, Immigration, Training and Skills Development)

Appellant

and

1222149 Ontario Ltd. o/a
Dairy Queen and/or Embrun DQ Grill & Chill

Respondent

Evan Schiller and Madeleine Chin-Yee, for the appellant

Stephen Bird, for the respondent

Heard: June 20, 2024

On appeal from the judgment of Justice Marc D'Amours of the Ontario Court of Justice dated May 9, 2023, dismissing an appeal from the sentence imposed on January 7, 2021 by Justice of the Peace Francois J. Pilon of the Ontario Court of Justice.

REASONS FOR DECISION

[1] The Crown appeals the sentence imposed on the respondent in prosecution under the *Occupational Health and Safety Act*, R.S.O. 1990, c. O.1 ("*OHSA*"), arising out of a workplace injury.

[2] On December 29, 2023, Coroza J.A. granted leave to appeal, pursuant to s. 131 of the *Provincial Offences Act*, R.S.O. 1990, c. P.33 ("*POA*"), on the following questions:

1. Whether the appeal court erred in law by holding that in assessing the size of a corporation and the scope of economic activity, the sentencing court may restrict its consideration to the local operation; and
2. Whether the appeal court erred in law by failing to address the trial court's error by treating individual and corporate defendants as "similar offenders" when applying the sentencing principle of parity.

[3] For the reasons that follow, we allow the appeal and vary the sentence to a fine of $40,000, plus the victim fine surcharge.

Factual Background

[4] In September 2017, a 16-year-old high school student suffered a spinal injury while working at a summer job at a Dairy Queen restaurant owned by the respondent. The injury occurred when the employee's hair became entangled in the rotating spindle of the restaurant's Blizzard machine. The employee was in the process of blending using the machine and had a question about upcoming orders on the board. She took her foot off the machine's pedal and turned to ask someone. As she did so, her hair got caught in the spindle, which had not yet fully stopped rotating. She stepped back towards the machine and her foot accidentally tapped

the pedal, pulling her further in. She and another employee heard a loud cracking sound in her neck. The other employee rushed to get the shift leader, who managed to untangle the employee's hair from the spindle. The employee was stuck in the machine for seven minutes.

[5] The machine was a blender with a rotating spindle to mix ice cream. It came with a plastic safety guard. Without the plastic safety guard, the moving spindle was exposed. At the time of the offence, the safety guard had been removed by the shift leader in contravention of the *OHSA*. It was an agreed fact that it was common practice for some employees and shift leaders to remove the guard in order to save time, particularly if it was a "rush" period at the store. On one of the employee's early shifts, she had asked why some employees used the plastic guard and some did not. She was told by one of her shift leaders that she was not required to use the guard. The employee received no training about machine guarding or about occupational health and safety awareness in general. Dairy Queen had an employee handbook that addressed machine guarding and other health and safety issues, but the employee had not received a copy, nor had she ever seen the handbook in the workplace. The employee had not seen the operator's manual for the machine, which contained information about guarding.

[6] The employee suffered a C1-C2 subluxation injury, for which she was hospitalized for two weeks. She had to wear a neck brace and was on bedrest for "quite a while". She was unable to attend school for one semester, during which

she completed courses online. Two years after the incident, and after receiving physiotherapy for 18 months, she still suffered long-term effects, including numbness, pain, headaches, and limitations on activities.

[7] The respondent was charged with two counts under the *OHSA*: (1) failing to ensure that the employee's long hair was suitably confined to prevent entanglement with the rotating spindle, as prescribed by s. 83(1) of R.R.O. 1990, Reg. 851, and contrary to s. 25(1)(c) of the *OHSA*; and (2) failing to ensure that the machine was guarded to prevent access to the exposed spindle, as prescribed by s. 24 of R.R.O. 1990, Reg. 851, and contrary to s. 25(1)(c) of the *OHSA*.

[8] The trial proceeded before a justice of the peace over two days. A significant portion of the evidence was tendered by an agreed statement of facts. On August 15, 2019, the justice of the peace found the respondent guilty of failing to ensure the machine was guarded to prevent access to the spindle (count 2). The justice of the peace acquitted the respondent on the count of failing to ensure the employee's long hair was suitably confined to prevent entanglement (count 1).

[9] The Crown sought a fine of $75,000. The respondent sought a fine in the range of $5,000 to $10,000. The justice of the peace sentenced the respondent to a $7,500 fine.

[10] The Crown appealed the sentence to a judge of the Ontario Court of Justice (the "appeal court"), pursuant to s. 116 of the *POA*. The appeal was dismissed.

Analysis

[11] The Crown advances its appeal on the basis that the appeal court erred in law and that the errors had an impact on the sentence imposed. Pursuant to s. 131 of the *POA*, the appeal to this court is from the judgment of the appeal court. Thus, in considering whether there are errors of law warranting appellate intervention, this court looks to the judgment of the appeal court. However, the reasons of the sentencing judge are relevant to considering whether the errors of law had an impact on the sentence imposed.[1]

(1) The appeal court erred in law in restricting its consideration of the size of the corporation to the location operation

[12] The Crown argues that the appeal court erred in holding that, in assessing the size of a corporate defendant and the scope of its economic activity, a sentencing court may restrict its consideration to the local operation. The Crown further argues that the error had an impact on the sentence imposed because the sentencing justice incorrectly limited his assessment of the size and economic scope of the respondent corporation to the store where the offence occurred.

[1] As the Crown advances its appeal on the basis that the appeal court made errors of law that had an impact on the sentence imposed, and we agree with that submission, it is not necessary to broach the issue of whether the standard of review in *POA* sentence appeals allows broader scope for appellate intervention than in criminal sentence appeals, discussed by this court in *Ontario (Labour) v. New Mex Canada Inc.*, 2019 ONCA 30, 144 O.R. (3d) 673, at paras. 41-46.

[13] The respondent concedes that the appeal court erred in holding that the size and economic scope of a corporate defendant must be considered at the local level when the offence is a local offence. However, it argues that the error had no impact on the sentence imposed because the sentencing justice stated and applied the law correctly on this issue. It also argues that the precedents involving corporations that the Crown relied on at the sentencing hearing do not support a fine as high as that sought by the Crown.

[14] We agree with the Crown that the appeal court erred on this issue and that it had an impact on the fine imposed.

[15] In his reasons dismissing the Crown's sentence appeal, the appeal court judge referred to the passages from this court's decision in *Ontario (Labour) v. New Mex Canada Inc.*, 2019 ONCA 30, 144 O.R. (3d) 673, about the relevance of the size of a corporation and the scope of its economic activity in assessing a fit deterrent sentence. However, he then stated:

> I am also of the view, that the regional, provincial, national or international corporate activity cannot always be considered as the bases for the proper penalty. Once again, the proper penalty shall be assessed to the severity of the contravention. If evidence establishes that the contravention is local, then the proper penalty shall be considered on the basis of its local commercial activity. If it is provincial then the provincial economic activity shall be considered, and so on.
>
> In this matter, the Justice focused on the local economic activity of the corporation as he determined that it was a local corporate neglect, and therefore the

> blameworthiness was limited to that place of business. I am satisfied that he applied the proper principle as established by *Cotton Felts* and *New Mex Canada*. [Emphasis added].

[16] The underlined portions of the passages above reflect error because they fail to recognize and apply the principle that in determining what quantum of fine is appropriate for a corporate defendant for an *OHSA* offence, a sentencing judge must consider the size of the company and the scope of its economic activity with a view to assessing what level of fine will achieve specific and general deterrence, given the financial means of the company. This court has recognized that in order to achieve specific and general deterrence, the amount of a fine imposed on a corporate defendant must be sufficient that the fine will be "felt" by the corporation and not merely a "slap on the wrist": *R. v. Cotton Felts Ltd.* (1982), 2 C.C.C. (3d) 287, at pp. 294-95. In other words, a fine imposed on a corporation must take into consideration the economic means of the corporation in order to achieve both specific and general deterrence: *New Mex*, at paras. 97, 98 and 111.

[17] To make this assessment, a sentencing judge must consider the size of the corporation and the scope of its economic activity. Where a corporate defendant's operations involve more than one location, in most cases, consideration of the size and economic means of the corporation will require consideration of the corporation as a whole, not just the location where the offence occurred.

[18] A focus only on the size of the location where the offence occurred, rather than the corporation as a whole, fails to recognize the responsibility of the corporation for the conduct of its local operations.

[19] The ultimate question that a sentencing court must contend with in deciding the quantum of a fine to impose on a corporation is what quantum is necessary to achieve the relevant sentencing objects, in particular specific and general deterrence: *New Mex* at para. 102. In sentencing a corporate defendant, a sentencing court can only make this assessment if it properly considers the size and scope of the corporation's economic activity.

[20] This error by the appeal court had an impact on the sentence imposed. The appeal court found no error by the sentencing justice. However, the sentencing justice's reasons show that he either sentenced the respondent corporation on the basis of only looking at the size and economic scope of the local store where the offence occurred or failed to make a finding on its economic size and scope and to engage with what quantum of fine was required to achieve specific and general deterrence in light of its size.

[21] On this issue, the sentencing justice said:

> The arguments raised by the Prosecution and the Defence center mainly on the amount of employees in order to justify their positions. The Prosecutor advanced that the Defendant is a large company or a corporation based on the number of employees under six different stores or locations. It can be very well argued that since

> each and every store locations are managed by individual managerial personnel that it would be considered a small operation. [Emphasis added].

[22] Apart from this passage, the sentencing justice did not address the issue of the size of the respondent corporation and the scope of its economic activities.

[23] The passage above shows that the sentencing justice recognized the argument made by the Crown based on *Cotton Felts* and *New Mex* that he was required to consider the economic activity of the respondent corporation as a whole. However, he then queried whether the corporation should be considered a small operation – the one store – in this case.

[24] This underlined portion of the passage can be read in two ways. Both readings reflect error. It could be read as a finding that it was appropriate to consider the size and scope of the corporation's economic activity based on the one store where the offence occurred. That conclusion is incorrect in the circumstances of this case. It was an agreed fact that the corporation ran seven stores and employed 84 full-time equivalents, but the local store only employed 12 full-time equivalents. Treating the respondent corporation as only the local operation understates the size and scope of its economic activity and artificially lowers the quantum of fine required to achieve specific and general deterrence.

[25] Alternately, the underlined passage could be read as questioning whether the economic size of the corporation should be assessed only on the local store

level. But if read this way, the sentencing justice never made a finding to resolve the question posed.

[26] On either reading, the sentencing justice erred on this issue and the error impacted the consideration of what quantum of fine was required to achieve specific and general deterrence. Thus, the appeal court's error on the same issue had an impact on the sentence imposed.

(2) The appeal court erred in law by failing to address the trial court's error of treating individual and corporate defendants as "similar offenders" when applying the parity principle

[27] The Crown argues that the appeal court erred in failing to consider the argument it made that the sentencing justice erred by relying on the case of *R. v. Scott* (2005), 80 W.C.B. (2d) 582 (Ont. C.J.), a case involving an individual defendant, as a reference for the appropriate range of sentence for the corporate respondent in this case.

[28] The respondent argues that there was no impact from the failure of the appeal court to address this issue because the sentencing judge appropriately considered *Scott* as comparable. The respondent also notes that the sentencing justice imposed a fine 2.5 times that imposed in *Scott*.

[29] We agree with the Crown that the appeal court erred on this issue and that the error was material.

[30] Although the appeal court listed among the issues raised by the Crown the issue of whether it was an error to treat individual and corporate offenders as "similar offenders" for parity purposes, the court failed to address the issue. The appeal court considered parity only from the perspective of similarity of injuries caused by an offence and the size of the corporation (the latter point was tainted by the first error, discussed above, that the appeal court only considered the store where the offence occurred in assessing the size of the corporation). The appeal court did not consider whether it was an error for the sentencing justice to treat sentences imposed on individual offenders as a reference for consideration of parity when sentencing a corporation. The failure to address this issue was an error in law as the issue was fully argued by the Crown before the appeal court.

[31] The error had a material impact on the sentence imposed because the justice of the peace also erred on this issue. He found that the *Scott* decision was "very comparable" to the present case. In *Scott*, a $3,000 fine was imposed on an individual defendant where an employee's fingers were injured in a dough sheeting machine without a guard at the time of the accident. At the time of the sentencing in *Scott*, the maximum fine under the *OHSA* for an individual was $25,000, compared to $500,000 for a corporation. Setting aside that the injuries in *Scott* appear to have been less serious and less long term than in this case, the sentencing justice failed to consider that the sentencing range for individual defendants is not the same as for corporate defendants.

[32] Sentencing ranges for individuals for provincial offences cannot be unthinkingly applied to sentencing of corporate defendants. This is so for at least two reasons. First, for most offences created by provincial statute, the legislature has set a higher maximum fine for a corporate defendant than for an individual defendant. For the legislation at issue in this case, the *OHSA*, at the time of the offence, the maximum fine for an individual was $25,000, while the maximum fine for a corporation was $500,000.[2] The fact that the maximum penalty is significantly higher for corporations than for individuals speaks to a different sentencing range. The different sentencing range for corporations as compared to individuals means that parity usually will not apply directly between sentences imposed on individuals and corporations: *Cotton Felts*, at p. 294; *New Mex*, at para. 100.

[33] This brings us to the second reason that parity often will not apply directly between corporations and individuals in sentencing for *OHSA* offences. The legislative choice to enact a higher maximum fine for corporations demonstrates a legislative intention that a broader spectrum of penalties be available in sentencing corporations than is available for individuals because it is often, but not always, the case that corporations have more economic means than individuals. As a result,

[2] Section 66 of the *OHSA* has been amended since the offence in this appeal. The maximum fine is now $500,000 for an individual and $2,000,000 for a corporation.

higher fines may be required to achieve specific and general deterrence in sentencing a corporation as compared to an individual.

[34] We do not suggest that sentencing precedents for individuals in provincial offence prosecutions are entirely irrelevant to sentencing corporations. One could imagine circumstances involving a small, closely-held corporation where the quantum of fine necessary to achieve specific and general deterrence would be very similar to that appropriate for an individual defendant.

[35] The difficulty that arises when sentencing precedents for individuals are applied to corporate defendants without careful consideration is that the ranges of sentence are not the same. Typically, ranges of sentence for individual defendants for the type of offence at issue in this appeal are in the thousands of dollars, whereas ranges of sentence for corporate defendants are in the range of tens of thousands of dollars. Where a sentencing judge or justice of the peace relies on a precedent involving an individual in sentencing a corporate defendant, the reasons must show that the judge or justice of the peace turned their mind to the difference between individuals and corporations in terms of range of sentence and considered the quantum of fine necessary to achieve specific and general deterrence for the corporate defendant: *New Mex*, at para. 108.

[36] We acknowledge that the sentencing justice imposed a fine 2.5 times that imposed in *Scott*. But even $7,500 is well below the range commonly imposed on

corporate defendants of the respondent's size for similar offences (discussed further below). In the absence of any discussion by the sentencing justice in his reasons adverting to the different ranges for individual and corporate defendants, and given his reliance on *Scott* as "very comparable", we conclude that he erred on this issue. As a result, the failure of the appeal court judge to address this issue had an impact on the sentence imposed.

(3) The appropriate sentence

[37] In light of the material errors in the courts below, it falls to this court to consider and impose the appropriate sentence: *POA*, ss. 122(1)(b) and 134.

[38] The Crown asks the court to impose a fine of $75,000, plus the victim fine surcharge. The Crown placed before the court a chart listing cases that it argued support a range of sentence of $40,000 to $90,000 for a corporate defendant of the respondent's size for similar offences. We do not list all of the cases the Crown relied on, but particular emphasis was placed on the following cases: *R. v. Breadko National Baking Ltd.* (September 16, 2014), Mississauga, (O.C.J.); *R. v. Global Finishing Solutions Canada Inc.* (August 24, 2004), Barrie, (O.C.J); *R. v. Canada Brick Ltd.* (October 31, 2005), Oakville, 01-97200 (O.C.J).

[39] The respondent argues that *Scott*, involving an individual defendant, is helpful in setting the range of sentence. There, the individual defendant was sentenced to a $3,000 fine. The respondent argues that the fine of $7,500 imposed

by the justice of the peace – 2.5 times the fine in *Scott* – was appropriate for the corporate respondent. It further argues that the cases relied on by the Crown are not comparable as they involve a combination of larger corporations, more serious injuries, and/or a higher degree of culpability.

[40] In *New Mex*, at para. 102, this court summarized the question that must be posed in considering a fit fine for an *OHSA* offence as follows: “What amount of fine is required to achieve general and specific deterrence, and would otherwise be appropriate bearing in mind the principles of sentencing, including proportionality and parity?”

[41] The central facts bearing on sentence in this case are as follows.

[42] The 16-year-old employee was not provided training about using the guard on the machine. The guard was routinely removed by employees and shift leaders, putting multiple employees at risk. This was not an unforeseeable accident, but rather was a direct result of the practice at the store of removing the guard to speed up service to customers at the expense of employee safety. The injuries to the employee, while perhaps not permanent, were significant and had a significant impact on her quality of life for an extended period.

[43] The corporate respondent operates seven Dairy Queen stores employing a total of 84 full-time equivalents.

[44] The respondent had no prior *OHSA* charges and the Crown did not allege a history of non-compliance with occupational health and safety requirements at the respondent's other locations. During prior Ministry of Labor inspections of the location where the offence occurred, no observations were noted that the Blizzard machine was unguarded or operated without a guard.

[45] In our view, a fine of $40,000 is appropriate in the circumstances of this case to achieve the relevant sentencing objectives. This amount is sufficient for purposes of specific and general deterrence, given the size of the corporate respondent. It addresses the nature of the offence, the nature of the harm caused to the employee, and is proportionate and consistent with the principle of parity. In particular, without downplaying the injuries suffered by the employee in this case, the cases relied on by the Crown for a higher range of fines generally involve more serious or life-changing injuries than the injuries in this case.

Disposition

[46] The appeal is allowed. The sentence is varied to a fine of $40,000, plus the victim fine surcharge.

"B.W. Miller J.A."
"David M. Paciocco J.A."
"J. Copeland J.A."