DISTRICT COURT OF QUEENSLAND

CITATION:	*Nicholson v GCMR Project Services Pty Ltd* [2024] QDC 58
PARTIES:	**NICHOLSON, Simon** (appellant) **v** **GCMR Project Services Pty Ltd** (respondent)
FILE NO/S:	D13/23
DIVISION:	Civil
PROCEEDING:	Appeal
ORIGINATING COURT:	District Court at Beenleigh
DELIVERED ON:	26 April 2024
DELIVERED AT:	District Court at Beenleigh
HEARING DATE:	8 March 2024
JUDGES:	Chowdhury DCJ
ORDER:	**Appeal dismissed.**
CATCHWORDS:	APPEAL FROM MAGISTRATE – WORKPLACE HEALTH AND SAFETY PROSECUTION – SENTENCE – whether Magistrate erred in reasons – whether fine inadequate.
LEGISLATION:	*Justices Act 1886* (Qld), ss 222(1), 222(2)(c) *Penalties and Sentences Act 1992* (Qld), s 9 *Work Health and Safety Act 2011* (Qld), ss 3(1)(a), 18, 19, 32
CASES:	*Bennett Developments v Steward* [2020] QDC 235 *Guilfoyle v Ultra Floor (Aust) Pty Ltd & RGD Constructions Pty Ltd* (Decision of Magistrate Courtney, 15 June 2020) *Nash v Silver City Drilling (NSW) Pty Ltd; Attorney-General for New South Wales v Silver City Drilling (NSW) Pty Ltd* [2017] NSWCCA 96 *Reynolds v Orora Packaging Australia Pty Ltd* [2019] QDC 31 *Rongo v Commissioner of Police* [2017] QDC 258 *R v Robertson* [2008] 185 A Crim R 441 *Short v Lockshire Pty Ltd* 165 QGIG 521 (20 November 2000)

Steward v Mac Plant Pty Ltd and Mac Farms Pty Ltd [2018] QDC 20

COUNSEL:	J.J. Underwood for the appellant. R. Frigo for the respondent.
SOLICITORS:	Office of the Work Health and Safety Prosecutor for the appellant. Frigo James Legal for the respondent.

Introduction

[1] By way of notice filed on 19 April 2023, the appellant appeals against the sentence imposed by the Magistrates Court on the respondent for failing to comply with its health and safety duty – Category 2 contrary to s 32 of the *Work Health and Safety Act 2011* ("WHSA"). The grounds of the appeal are that the learned Magistrate erred in imposing a sentence that was manifestly inadequate.

[2] The hearing of the sentence proceedings in the Magistrates Court was on 24 February 2023. The Magistrate reserved her decision, and imposed sentence on 20 March 2023. She imposed a fine on the respondent of $30,000, and also ordered the respondent to pay court costs in the sum of $1,601.40. The costs were to be paid within three months, and the fine was to be paid within 12 months.

Relevant facts

[3] An agreed statement of facts was tendered and marked Exhibit 1.

[4] The respondent company operated a residential and commercial roofing business. The sole director is Simon Vincent.

[5] Teys Australia Beenleigh Pty Ltd operated an abattoir. It engaged an entity called Donnan as the principal contractor to replace an existing roof at a building on the abattoir site. The construction project was undertaken in a number of stages, and work was being conducted on a number of buildings.

[6] In turn, Donnan engaged the respondent company to undertake works which included removal of the COLORBOND roofing material, including insulation, and resheet the existing roof. The works also included removal and replacement of roof purlins.

[7] On 16 March 2021, workers employed by the respondent company and other workers were at the site. Workers included Damon Matthews, the injured worker ("IW"). Mr Matthews had been working for the respondent company for about eight months. He held a Work Safety at Heights Accreditation from Advanced Industry Training. He had been working on site for about two to three weeks before 16 March 2021, and had signed a site induction form on 4 March 2021.

[8] The work required the workers to stand on the existing coldroom roof. The roof where the incident occurred was operating as a warehouse or storeroom area, referred to as the "palletising area". It was a flat roof. The full coldroom panels on the roof could withstand the weight ratio of 140 kilograms, including one man and hand carried toolbox, per panel of 1200 millimetre width. There was one warning sign in the entry to the building which warned of the weight limit of one full panel.

[9] The roof had four existing skylights, or penetrations, which had previously been "patched" by Teys for food hygiene reasons, about 15 years beforehand. The bottom of the panel was a portion of coldroom panel that had been cut to 850 x 890 millimetres. The panel had a 10 millimetre gap so it would fit neatly into the plywood casing which ran down through the roof to the ceiling of coldroom. The panel was secured and placed using screws and/or pop rivets, with a metal trim around the edge which in turn was secured to the existing cold room panels. The timbers around the skylight sat above the height of the purlins.

[10] A toolbox meeting took place in the morning of 16 March 2021, conducted by an employee of the respondent. Mr Matthews signed that he had attended that meeting. The form of that meeting does not record any discussion of the risk posed by the skylights.

[11] On 16 March 2021, the respondent's leading hand, James Brownie, was not present on the roof. He was with the other supervisor employed by the respondent at another job. There is no other supervisor on site.

[12] On 16 March 2021, workers from a business called Fire Boar were also present on the roof, installing a new fire sprinkler system. Workers from the respondent had discussions with workers from Fire Boar about how they were going to install the

sprinkler pipes around the skylights. One of the sprinkler lines was to run through the path of a skylight.

[13] Workers from the respondent also identified a need to remove the timbers around the skylights to ensure that the new roof was flush with the existing purlins and skylight housing. Therefore workers from the respondent proceeded to remove the timbers from around the skylights.

[14] The skylights did not have any signs or markers around them. Workers were not warned about the dangers of standing on or working inside the skylights. The workers were not wearing harnesses. There was no catch barrier underneath the skylights. The respondent had installed edge protection around the perimeter of the roof. There is no edge protection around each skylight.

[15] The method of work adopted was that workers would stand in the skylight penetration, on top of the square fridge panel. Mr Burnie stood in the first skylight and removed the timbers by loosening the screws with his hammer. Mr Burnie thought standing in the skylight was safe.

[16] The IW, Mr Matthews, stood in the second skylight and removed the timbers. Mr Burnie was standing outside the skylight and helped remove the timbers by tapping them a couple of times with his hammer, then lifting them up and passing them to another worker. Mr Matthews said he thought the "patched" skylight was all part of one continuous panel.

[17] Mr Matthews stood inside the third skylight using the process of lifting the timbers up from around the skylight housing. He removed one of the timbers. He passed his drill to Mr Burnie. Mr Burnie turned around to get Mr Matthews pinch bar. At about 11.56am, Mr Matthews fell through the skylight and landed on the concrete below, a fall of about approximately 6.060 metres. He suffered multiple fractures to his femur, hip, pelvis and elbow and spinal injuries.

[18] Emergency Services were notified. A Workplace Health and Safety investigation was commenced.

Decision of the Magistrate

[19] The Magistrate delivered her decision on 20 March 2023. A written copy of her decision was given to the parties, but she also read it out.

[20] In the decision the Magistrate observed that the toolbox meeting on 16 March 2021 did not raise any risk of the skylights. It had certainly been identified that the timber around the skylights was a problem, as the timber framing around them would not sit flush with the new roof. The Magistrate said the following:

> *"[16] These skylights, as an unknown and unaddressed hazard by the defendant, remained a hazard. For that reason, they did not have any signs or markers around them; there was no warning about dangers of standing on or working inside them; the workers did not wear harnesses whilst working around or in the skylights; there was no edge protection around them nor for prevention implementation.*
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> *[17] The 2 employees of the Defendant took it upon themselves to stand within the skylight voids to remove the timber framing around and above the skylight voids. The other uninjured employees stood in the first one and removed timbers loosening screws of the timber framing with a hammer. The injured worker stood in the second skylight and worked. Unsurprisingly, where good fortune as opposed to good management was in play, they continued working in this manner until the third skylight gave way.*
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> *[18] Apparently neither worker thought standing in the skylight void would be unsafe, which is somewhat troubling given that on the balance of probabilities this defied commonsense. The injured worker in is VIS stated that he 'thought' the patched skylight was all part of one continuous panel. The basis for this misconstrued belief is unexplained.*
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> *[19] It is very apparent that the fall risk associated with the skylights was not properly identified nor than addressed in any way. The third skylight was clearly not a charm but a calamity."*

[21] The Magistrate referred to the relevant statutory provisions, and a number of comparable cases that she provided in a table at [28] of her decision.

[22] The Magistrate in her judgment then considered the nature of the offending and the Safe Work Method Statement ("SWMS") prepared by the respondent. She said as follows:

> *"[33] The defendant did not act in a manner totally devoid of addressing workplace safety. There had been the execution of*

a safe work method statement with job safety analysis, totalling some 17 pages. It included a photograph and diagram. The roofing tasks addressed within those documents does not include any reference to skylights. Sadly, the 'one size fits all' method failed with the third roof and the unidentified skylight factor. This demonstrates the defendant was mindful of his WHS duties and was not reckless in behaviour but lacked vigilance.

[34] *I do not accept the prosecution's submission that there was no negligence on the part of the employees when they clearly did not abide by item 37 of the SWMS which imposed a duty on them to which they signed as having read.*

[35] *Item 37 of the SWMS controls procedures for task. It referenced ineffective controls, control procedures inadequate in providing a safe workplace. Both workers and supervisors were listed as responsible to act by stopping work immediately and reviewing task procedures; implementing consultation procedures with Managers, Supervisors, Workers; formulating control procedures for the task that were to be effective in eliminating or reducing the risk and identify hazards and risks associated.*

[36] *Whilst employers owe their workers a high duty of care to protect them from injury, and this defendant has appropriately accepted guilt for the offence, I have observed that in this case there seem to be a complete lack of the exercise of commonsense by the two employee tradesmen who took it upon themselves to stand in a void in the roof, on a skylight whilst they removed timber framing around that void, without their own consideration as to their own safe.*

[37] *They did not notify their employer or supervisor of this unidentified factor that these voids were not covered in their SWMS or mentioned in the slight toolbox meeting, as item 37 of the SWMS suggests.*

[38] *Despite the absence of mention of skylights in both the SWMS (as signed off as read by the injured employee) and the toolbox meeting held for the purpose of identifying hazards and risks, the employees continued on their own volition and made very poor judgment calls, putting themselves in what most lay people might recognise as a clear danger by standing within a void of a roof, on a skylight, whilst using hammer and drills.*

[39] *This leaves me to address the SWMS. It was a verbose and complex document of some 17 pages in small font. I cannot understand how any practically effective safety system for labourers and tradesman is satisfied by such a document. On the balance of probabilities it is highly likely that such a document is not read entirely, if at all or properly absorbed or clearly understood.*

[40] When WHS measures require complicated measures, by way of lengthy and wordy SWMS, the task becomes one of bureaucratic compliance in an effort to avoid potential WHS prosecutions, whilst at the same time lacking in any practical utility of actually creating a safe system from workers and thereby finding its true purpose.

[41] This observation does not excuse the employer's strict liabilities and addressing safety requirements to protect workers but demonstrates the failings of a safety practice that has become to complicated to the detriment of practical effect.

[42] This employer had tried to comply with WHS duties with a 17 page, detailed SWMS with significance [sic] relevance to the roof work being conducted but still failed to provide for the risks of the skylight voids of the third roof because the defendant unfortunately relied on both the main contractor to provide all the relevant information as well as the workers abiding by their duties under the SWMS. The defendant was acting on the assumption, relying on the SWMS for the first two roofs on the same premise and a lack of any information from the main contractor that the third roof was any different.

[43] Sadly, all of this highlights that even reasonable assumptions of employers can be dangerous and are not enough to escape WHS liability when new risks, even remotely foreseeable then clearly and visibly present.

[44] I stress these observations not to lay blame on the workers but to demonstrate the ineffectual impact of a complicated SWMS on their safety. These workers clearly do not correlate the absence of reference to any voids or skylights on this roof as opposed to the previous two groups with no such voids. They clearly modify their work tasks to address the voids and yet they do not abide by their duty as per item 37 of the job analysis safety form. This is a form they supposedly read and definitely did sign to that affect."

[23] In respect of the foreseeability of the risk, the Magistrate said this:

"[47] The offending is serious, as are most WHS breaches of duty.

[48] The potential consequences were more serious then the actual consequence.

[49] The risk was not an evident foreseeable or probable risk, differing from the large of number of four cases considered, but there was still a degree of probability. I note that the defendant has taken steps to avoid any such future unforeseen risks by conducting site inspections of all roofs to be worked on, that adds additional duties and costs upon the defendant, no doubt some of which are passed on to consumers. These are not so burdensome when considering the consequences of the risk

> *attached. The defendant now acts proactively and vigilantly to identify unexpected voids and properly assess risks or falls from a roof height."*

[24] The Magistrate observed there was a need for general deterrence. The injuries sustained by the injured worker were also significant, and not minor, and not at the worst end of the injury scale.

[25] The Magistrate took into account the following matters and mitigation:

- The defendant fully cooperated with the WHS investigation;
- Provided an interview with the director, who made full and frank admissions, against the interest of the company;
- Provided support for the injured worker;
- Expressed remorse in written form to the Court;
- Has no prior WHS violations;
- Has operated in the same industry for over 20 years without committing an offence;
- Has identified the failings in this case, whilst working as a subcontractor, the defendant has already reduced the risk of recidivism by implementing additional safety measures by requiring mandatory inspections of all roofing prior to works on each roof, and updated the SWMS, and ensured the presence of supervisors at job sites to inspect and identify hazards;
- Pleaded guilty at an early point in proceedings;
- The defendant accepts by the plea that the company failed to identify a fall hazard and therefore implement measures to control the risk;
- The defendant was and still is a small roofing business with 10 staff and several subcontractors;
- Provided some information as to its financial position, by way of an accounting letter, stating the company is family owned and operated, and is currently solvent, yet it is not necessarily financially stable given supply chain disruptions and increased cost of materials.

[26] The Magistrate concluded that the appropriate penalty was a fine of $30,000.

Submissions of the appellant

[27] In essence, the appellant submits that the sentence was inadequate based on two errors made in the assessment of the objective seriousness of the offence namely:

(a) Taking into account Mr Matthews conduct as a mitigating feature, and

(b) Finding that the relevant risk was not "evidently foreseeable".

[28] The appellant submits that the appeal should be allowed, and the respondent should be resentenced to a fine between $50,000 to $75,000.

[29] The effect of ss 222(1) and 222(2)(c) *Justices Act 1886* ("JA") is such that an appellant is limited to agitating a sole ground of appeal, namely the sentencing imposed was inadequate.

[30] It was submitted that this does not mean the appellant cannot contend that specific errors led the sentencing discretion to miscarry. Reference was made to Rongo v Commissioner of Police [2017] QDC 258, where Devereaux SC DCJ, as he then was, observed that the real question on an appeal to the District Court was whether the sentence was excessive. Although the appellant may argue that the Magistrate made a certain error, the success of the appeal does not depend on persuading the appeal court on that point. It was further observed by his Honour that a successful demonstration of an error does not guarantee success of the appeal, because the ultimate question is whether the sentence was excessive in all the circumstances. The primary object of the WHSA is to secure the health and safety of workers and workplaces by protecting workers and other persons against harm to their health, safety and welfare through the elimination or minimisation of risks arising from work or from particular types of substances or plan.[1]

[31] Section 19 imposes a primary duty of care on persons conducting a business or undertaking to ensure, so far as is reasonably practicable, the health and safety of workers engaged, or caused to be engaged by the person, and workers whose activities in carrying out work are influenced or directed by the person, while the workers are at work and the business are undertaking.

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1 Section 3(1)(a).

[32] Section 18 defines "reasonably practicable" as follows:

> *"In this Act, reasonably practicable, in relation to a duty to ensure health and safety, means that which is, or was at a particular time, reasonably able to be done in relation to ensuring health and safety, taking into account and weighing up all relevant matters including—*
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> *(a) the likelihood of the hazard or the risk concerned occurring; and*
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> *(b) the degree of harm that might result from the hazard or the risk; and*
>
> *(c) what the person concerned knows, or ought reasonably to know, about—*
>
> *(i) the hazard or the risk; and*
>
> *(ii) ways of eliminating or minimising the risk; and*
>
> *(d) the availability and suitability of ways to eliminate or minimise the risk; and*
>
> *(e) after assessing the extent of the risk and the available ways of eliminating or minimising the risk, the cost associated with available ways of eliminating or minimising the risk, including whether the cost is grossly disproportionate to the risk."*

[33] It was submitted that the conduct of the injured worker in contributing to his own injury is irrelevant when assessing the objective seriousness of an offence against the WHSA. Reference was made to the decision of President Hall in Short v Lockshire Pty Ltd 165 QGIG 521 (20 November 2000). In that case it was held that it was wrong for the sentencing Magistrate to take into account the contribution made by the injured worker to his own misfortune.

[34] That case was considered by the District Court of Queensland in Steward v Mac Plant Pty Ltd and Mac Farms Pty Ltd [2018] QDC 20. In that case, Fantin DCJ considered that the sentencing Magistrate placed significant weight on the actual, rather than the potential consequence of the risk, the operators' error and the injuries actually suffered. She said the following:

> *"[70] The approach taken by the learned Magistrate on this issue is contrary to the principles enunciated in* Nash,[2] *that the risk to be assessed is not the risk of the consequence, to the extent that a worker is* ***in fact*** *injured, but the* ***potential*** *risk arising from the failure to take reasonably practicable steps to avoid the injury occurring. To that extent, the worker's conduct and the injuries sustained by him were irrelevant considerations.*
>
> *[71] By asking herself the wrong question, and by allowing these erroneous or irrelevant matters to guide her, the learned Magistrate erred in law. This ground of appeal is made out."*

[35] The appellant made the following further submissions:

> *"[34] Second, the learned Magistrate erred in finding that the relevant risk was 'not an evidently foreseeable or a probable risk'.[3] The relevant risk was that a worker might be injured as a result of falling through a skylight while repairing the roof. That risk was foreseeable in circumstances where: a. each skylight was located 6m above a concrete floor; b. the scope of work included removing timber around each skylight; and c. there had been no site inspection, nor any assessment of the risks the skylights posed.*
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> *[35] The only basis for the learned Magistrate's finding that the relevant risk was not foreseeable was her Honour's comment that 'one would think that for an abattoir building, namely, a storehouse, that skylights would not be immediately evident as a risk'.[4] This comment was based on speculation. Once GCMR's work came to include the removal of timber around each skylight, the risk that a worker might be injured as a result of falling through a skylight was reasonably foreseeable.*
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> *[36] Overall, there was no basis for her Honour's finding that a risk to GCM's workers was not foreseeable."*

[36] It was submitted that the following factors are relevant to the sentence:

(a) The maximum penalty for the offence, a fine of $1.5m;

(b) The catastrophic potential consequences of the relevant risk eventuating (although Mr Matthews did not die he could well have);

(c) The ready availability of steps to lessen, minimise or remove the relevant risk (GCMR could have undertaken a site inspection, conducted a risk assessment of the skylights, and implemented measures to mitigate or eradicate such risks);

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2 Nash v Silver City Drilling (NSW) Pty Ltd; Attorney-General for New South Wales v Silver City Drilling (NSW) Pty Ltd [2017] NSWCCA 96.

3 Decision transcript, page 1-8 line 15.

4 Decision transcript , page 1-4 line 6.

(d) The simplicity and the inexpensiveness of such steps;

(e) GCMR's admissions and early pleas;

(f) The measures GCMR subsequently put in place to mitigate the risk realised in this case (although the significance of these should not be overstated); and

(g) GCMR's lack of prior convictions under the WHSA.

[37] It was submitted that a sentence in the order of a fine of $50,000 - $75,000 is appropriate in this case. Bennett Developments v Steward [2020] QDC 235, and Guilfoyle v Ultra Floor (Aust) Pty Ltd & RGD Constructions Pty Ltd, a decision of the Magistrates Court, 15 June 2020 were cited as appropriate comparable cases.

Submissions of the respondent

[38] The respondent submitted some important factual inaccuracies needed to be corrected. While it was accepted that the respondent was subcontracted by Donnan (Qld) Pty Ltd to remove and replace the rooves of a number of different buildings making up an abattoir at Beenleigh, the work itself did not *"require workers to stand on a roof with four skylights in it"*.

[39] The particular roof above the palletising room where the incident occurred, the third one in the project was not part of the original scope of works for which GCMR had been engaged by Donnan.[5] This building differed from the two previous buildings in so far as it had four skylights in the roof. Those skylights had been patched. But critical information had not been brought to GCMR's attention by the head contracted Donnan nor the building owner Teys. It was not included in any of the plans supplied to GCMR prior to the commencement of the works.

[40] The work on the palletising area roof took place on 16 March 2021. During the day it became necessary to remove some timber framed around each skylight due to the installation of sprinkler pipes by other tradesmen. Subsequently, a decision was made by the workers themselves without any consultation with GCMR's supervisors that they would remove this said timber by standing in each of the skylights.

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5 Hearing transcript, pages 1-13 to 1-14, line 21.

[41] The workers were not instructed or authorised to stand directly in the skylights. Importantly, the hazard posed by the skylights was unknown to GCMR, and the admitted failure of its duty was fundamental in failing to assess/identify this risk. Had GCMR identified this risk, GCMR would have implemented the necessary safety measures and controls to prevent/eliminate the risk by ensuring a catch barrier, edge protection and the workers wearing a safety harness.

[42] The respondent in its outline referred to a number of cases relating to the proper approach of the District Court to an appeal under s 222 JA. Reference was made to a statement by Fantin DCJ in Steward v Mac Plant Pty Ltd and Mac Farms, supra at [20] that the District Court should not interfere with a sentence:

> *"unless it is manifestly excessive or inadequate, it is vitiated by an error of principle, there has been a failure to appreciate a salient feature or there is otherwise a miscarriage of justice. A mere difference of opinion about the way in which the discretion should be exercised is not a sufficient justification for review, it must be shown that the discretion miscarried."*

[43] Reference was also made to the comments of McGill SC DCJ in this case Reynolds v Orora Packaging Australia Pty Ltd [2019] QDC 31, where his Honour said the following:

> *"[7] I considered the approach to an appeal against sentence by a complainant in Young v White [2016] QDC 159. I concluded that before a judge would increase a sentence on appeal, it was necessary for the appellant to show that the sentence the subject of the appeal was the result of some legal, factual or discretionary error, then to show that an appropriate sentence in the circumstances was one which was more severe than the sentence in fact imposed, and finally to show that the discretion to vary the sentence initially imposed ought to be exercised in favour of the appellant."*

[44] The respondent accepted that the conduct of the injured worker was not a relevant consideration in assessing the objective seriousness of the offence, and should not be treated as a mitigating factor for that purpose. However, it was submitted that the Court was still entitled to take it into account as a relevant consideration pursuant to the factors set out in s 9 *Penalties and Sentences Act 1992* ("PSA").

[45] It was submitted that the comments made by the Magistrate in her decision were taken in isolation and out of their context. It was submitted that the learned Magistrate was

aware of the correct legal approach, as shown by the exchange with the prosecutor at the sentence hearing, set out at [20] and [21] of the respondent's outline.

[46] It was submitted that having regard to the whole of the Magistrate's reasons, this Court should be satisfied that the Magistrate adopted the correct approach, and the injured worker's conduct did not unduly overwhelm or influence the Magistrate in her assessment of the objective seriousness of the offence, nor the ultimate penalty that was imposed.

[47] It was submitted that the Magistrate did not err in finding that the risk was not evidently foreseeable or probable. The earlier submission was emphasised, that the respondent's scope of works did not originally include the removal of the timber around each skylight, and it was not made aware either by Donnan nor Tayes that the panel below the skylights had been pierced.

[48] It was submitted that even if this Court was to accept the appellant's contentions that the learned Magistrate fell into error in exercising the sentence discretion, the appeal should not be allowed because the sentence actually imposed by the Magistrate was adequate in the circumstances and within the permissible sentencing range. A number of cases were cited by the respondent at [33] of its outline that an appellate court has a discretion to refuse or decline to intervene even if error is established.

[49] The respondent submits that the comparable cases relied on by the appellant are not truly comparable in the circumstances.

Consideration

[50] The relevant principles relating to an appeal to the District Court of Queensland from the Magistrates Court under the JA have been set out in the summary of the submissions of both parties.

[51] The learned Magistrate in her judgment spent some time being critical of the employees of the respondent, including the injured worker. In particular at [34], the learned Magistrate did not accept the prosecution's submission that there was no negligence on the part of the employees, stating that they clearly did not abide by Item 37 of the SWNS. In particular the Magistrate was critical of the work as a complete lack of common sense, and making very poor judgement calls.

[52] I consider that the learned Magistrate has erred by placing too much weight on the negligence of the workers, and their failure to have regard to their own personal safety. It was not simply the Magistrate having regard to the nature and circumstances of the offence, in accordance with s 9 PSA.

[53] There was a lack of logic in the learned Magistrate's conclusions at [49] of her judgment. The risk of falling through the skylights was clearly foreseeable, and probable, especially when the workers were required to remove the timber framing around the skylights.

[54] I accept the submissions of the appellant that the risk was substantial, as each skylight was located some six metres above a concrete floor, there had been no site inspection, nor any assessment of the risks the skylights posed.

[55] I turn then to the question of whether the actual fine of $30,000 imposed was inadequate in all the circumstances.

[56] Fraser JA in R v Robertson [2008] 185 A Crim R 441 said this at [6]:

> *"[6] To the extent that decisions establish ranges within which sentences are regularly imposed for similar offending, it is of course right to take them into account, but in the end the proportion which the period to be served in prison bears to the whole term is to be fixed by taking into account all of the circumstances rather than by some rule of thumb. The authorities do not condone, in any aspect of sentencing, some arithmetical approach under which a deduction is made from a pre-determined range of sentences: the sentencing judge is obliged 'to take into account of all of the relevant factors and to arrive at a single result which takes due account of them all.'"* (citations omitted)

[57] In my view the appropriate penalty for this offending, having regard to all the circumstances, was in the range of $30,000 to $50,000 by way of fine. There were significant mitigating factors which were taken into account by the learned Magistrate. The fine was modest, but I cannot hold that the penalty imposed was inadequate in all the circumstances, despite the errors made by the learned Magistrate.

[58] The appeal is dismissed.