SUPREME COURT OF QUEENSLAND

CITATION:	*R v Lavin* [2019] QCA 109
PARTIES:	**R** **v** **LAVIN, Gary William** (appellant)
FILE NO/S:	CA No 18 of 2019 DC No 464 of 2017
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction & Sentence
ORIGINATING COURT:	District Court at Maroochydore – Date of Conviction: 6 February 2019; Date of Sentence: 7 February 2019 (Cash QC DCJ)
DELIVERED ON:	Date of Orders: 3 May 2019 Date of Publication of Reasons: 31 May 2019
DELIVERED AT:	Brisbane
HEARING DATE:	3 May 2019
JUDGES:	McMurdo JA and Mullins and Davis JJ
ORDERS:	**Date of Orders: 3 May 2019** **1. Appeal against conviction allowed.** **2. Conviction set aside and a retrial ordered.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST CONVICTION RECORDED ON GUILTY PLEA – GENERAL PRINCIPLES – where the appellant was convicted by a jury of one count against s 31 of the *Work Health and Safety Act* 2011 – where the conviction arose from a fatal incident which occurred at a work site – where the appellant was the sole director of the company that employed the victim of the fatal incident – whether the learned trial judge did not properly identify the elements of the offence and gave a misdirection – whether the misdirection constituted a miscarriage of justice *Work Health and Safety Act* 2011 (Qld), s 3, s 4, s 5, s 10, s 14, s 17, s 18, s 19, s 22, s 27, s 31, s 32, s 33
COUNSEL:	A J Kimmins for the appellant M J Copley QC for the respondent
SOLICITORS:	Legal Aid Queensland for the appellant Office of the Work Health Safety Prosecutor for the respondent

[1] **McMURDO JA:** I agree with Davis J.

[2] **MULLINS J:** I agree with Davis J.

[3] **DAVIS J:** The appellant was convicted by a jury on 6 February 2019 of one count against s 31 of the *Work Health and Safety Act* 2011 (the WHS Act).

[4] The count of which he was convicted was in these terms:

> "That on the twenty-ninth day of July 2014 at Lake Macdonald in the State of Queensland GARY WILLIAM LAVIN had a health and safety duty pursuant to section 27 of the *Work Health and Safety Act 2011* and the said GARY WILLIAM LAVIN without reasonable excuse, engaged in conduct, namely, failed to exercise due diligence to ensure Multi-Run Roofing Pty Ltd complied with its duty under section 19 of the aforesaid Act, that exposed an individual to whom that duty was owed to a risk of death or serious injury or illness and the said GARY WILLIAM LAVIN was reckless as to the risk to an individual of death or serious injury or illness."

[5] Upon conviction the appellant was sentenced to a period of imprisonment of twelve months to be suspended after serving four months, namely 7 June 2019.

[6] On the appellant's appeal against conviction and his application for leave to appeal against sentence the court made the following orders on 3 May 2019:

(i) appeal against conviction allowed.

(ii) conviction set aside and a retrial ordered.[1]

[7] My reasons for joining in those orders follow.

[8] The prosecution arose from a fatal accident which occurred at a work site at Lake Macdonald on the Sunshine Coast on 29 July 2014.

[9] Peter Lavin, who is the appellant's brother is the sole director of Lavin Constructions Pty Ltd (Lavin Constructions). That company contracted to perform building work on a factory at Lake Macdonald which was being refurbished.[2] Lavin Constructions then subcontracted roofing work to Multi-Run Roofing Pty Ltd (Multi-Run), the sole director of which is the appellant.

[10] In Multi-Run's quote for the subcontracted work, the work was described as including "supplying and installing of safety rail".[3]

[11] One way of ensuring the safety of persons working on the roof of the building was to install a safety rail along the edge of the roof to prevent falls.

[12] Notwithstanding the terms of the quotation, no safety rail was installed. Instead an alternative plan was adopted namely the use by workers of harnesses which were attached to ropes secured to the ground and then secured to fixing points on the roof, and the positioning of scissor lifts as a barrier at the edge of the roof.

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1 The Court reserved its reasons.
2 Exhibit 31.
3 Exhibit 30.

[13] Scissor lifts are mobile platforms which can be raised to various heights. When the platforms are at height, there is a danger to any worker as they may fall from the platform to the ground below. To guard against this, the platforms have rails which run above waist height on an average height worker.[4]

[14] It was not contemplated that all the workers on the factory roof would use harnesses all the time. Those doing work away from the edge would not wear a harness as they were not in danger of falling off the roof.

[15] The plan was to position the scissor lifts adjacent to where the workers were working on the roof so that the rails on the lifts operated as a barrier preventing a fall.[5] As the workers progressed along the roof, the scissor lifts would be moved along the edge providing a barrier where the work was being undertaken. The lifts, together with the workers using harnesses, would, it was planned, prevent falls from the roof.

[16] Mr Fuddy Te Amo was employed by Multi-Run. On 29 July 2014 Mr Te Amo was working on the roof of the factory. He had been working away from the edge and therefore was not wearing a harness. At some stage he approached the edge, tripped in a gutter and fell off the roof. No scissor lift was positioned at the edge of the roof adjacent to where he fell. The ground below the roof edge was covered in places by a concrete slab and in other places by hard rubble. Mr Te Amo dropped almost six meters. Tragically, he suffered fatal injuries and died shortly after the accident.

[17] The evidence revealed that a scissor lift was not positioned where Mr Te Amo fell as the ground was uneven and this made positioning the lift difficult.[6]

[18] An indictment was presented charging each of Lavin Constructions, Peter Lavin, Multi-Run and the appellant with offences against s 31 of the WHS Act. This apparently is the first prosecution under that provision.

[19] After a trial in the District Court sitting in Maroochydore, Multi-Run and the appellant were convicted by majority verdict and the jury were unable to reach a verdict on the counts laid against each of Lavin Constructions and Peter Lavin. The jury were discharged from their obligation to return verdicts on the counts against those two accused.

[20] As already observed, the appellant challenges both his conviction and sentence, however no appeal or application for leave to appeal against sentence was filed by Multi-Run. As the court allowed the appellant's appeal against conviction, it is not necessary to deal with his application for leave to appeal against sentence.

[21] Only one ground of appeal was argued and that was; "the verdict arose from a miscarriage of justice, arising from the misdirection of the learned trial judge".

The statutory context

[22] The objects of the WHS Act are stated in some detail in s 3, but in summary they are to establish a scheme "to secure the health and safety of workers in workplaces".[7] It achieves this by imposing duties upon various persons who might

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4 Exhibits 6 and 7.
5 Exhibit 23.
6 Exhibits 4, 13 and 20.
7 *Work Health and Safety Act* 2011 s 3.

be in a position to influence conduct at the workplace. These provisions are contained in Part 2 of the Act.

[23] Section 17 provides, relevantly:

> "**17 Management of risks**
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> A duty imposed on a person to ensure health and safety requires the person—
>
> (a) to eliminate risks to health and safety, so far as is reasonably practicable; and
>
> (b) if it is not reasonably practicable to eliminate risks to health and safety, to minimise those risks so far as is reasonably practicable."

[24] Section 18 then provides:

> "**18 What is *reasonably practicable* in ensuring health and safety**
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> 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—
>
> (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
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> (c) what the person concerned knows, or ought reasonably to know, about—
>
> (i) the hazard or the risk; and
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> (ii) ways of eliminating or minimising the risk; and
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> (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."

[25] Section 19 is the first of various sections which impose duties. It provides relevantly:

> "**19 Primary duty of care**
>
> (1) A person conducting a business or undertaking must ensure, so far as is reasonably practicable, the health and safety of—

(a) workers engaged, or caused to be engaged by the person; and

(b) workers whose activities in carrying out work are influenced or directed by the person;

while the workers are at work in the business or undertaking.

(2) A person conducting a business or undertaking must ensure, so far as is reasonably practicable, that the health and safety of other persons is not put at risk from work carried out as part of the conduct of the business or undertaking.

(3) Without limiting subsections (1) and (2), a person conducting a business or undertaking must ensure, so far as is reasonably practicable—

(a) the provision and maintenance of a work environment without risks to health and safety; and

(b) the provision and maintenance of safe plant and structures; and

(c) the provision and maintenance of safe systems of work; and

(d) the safe use, handling and storage of plant, structures and substances; and

(e) the provision of adequate facilities for the welfare at work of workers in carrying out work for the business or undertaking, including ensuring access to those facilities; and

(f) the provision of any information, training, instruction or supervision that is necessary to protect all persons from risks to their health and safety arising from work carried out as part of the conduct of the business or undertaking; and

(g) that the health of workers and the conditions at the workplace are monitored for the purpose of preventing illness or injury of workers arising from the conduct of the business or undertaking."

[26] Section 19 includes terms "person conducting a business or undertaking" and "worker". Both Lavin Constructions and Multi-Run are persons "conducting a business or undertaking" relevantly to the building work performed on the factory.[8] Lavin Construction's duty remained upon it notwithstanding that the work was subcontracted to Multi-Run. Lavin's duty was not transferable.[9] Mr Te Amo was clearly a "worker".[10]

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8 *Work Health and Safety Act* 2011 s 5.

9 *Work Health and Safety Act* 2011 s 14.

[27] Sections 21 to 26 of the WHS Act impose specific duties on various persons and s 27 imposes duties upon "officers" or persons "conducting a business or undertaking". The term "officer" includes persons defined as "officers" of a corporation by s 9 of the *Corporations Act* 2001 (Cth).[11] There is no doubt here that the appellant, being a director, was an "officer" of Multi-Run.

[28] Section 27 of the Act provides:

> "**27 Duty of officers**
>
> (1) If a person conducting a business or undertaking has a duty or obligation under this Act, an officer of the person conducting the business or undertaking must exercise due diligence to ensure that the person conducting the business or undertaking complies with that duty or obligation.
>
> (2) Subject to subsection (3), the maximum penalty applicable under division 5 for an offence relating to the duty of an officer under this section is the maximum penalty fixed for an officer of a person conducting a business or undertaking for that offence.
>
> (3) Despite anything to the contrary in section 33, if the duty or obligation of a person conducting a business or undertaking was imposed under a provision other than a provision of division 2 or 3 or this division, the maximum penalty under section 33 for an offence by an officer under section 33 in relation to the duty or obligation is the maximum penalty fixed under the provision creating the duty or obligation for an individual who fails to comply with the duty or obligation.
>
> (4) An officer of a person conducting a business or undertaking may be convicted or found guilty of an offence under this Act relating to a duty under this section whether or not the person conducting the business or undertaking has been convicted or found guilty of an offence under this Act relating to the duty or obligation.
>
> (5) In this section, ***due diligence*** includes taking reasonable steps—
>
> (a) to acquire and keep up-to-date knowledge of work health and safety matters; and
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> (b) to gain an understanding of the nature of the operations of the business or undertaking of the person conducting the business or undertaking and generally of the hazards and risks associated with those operations; and

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10 *Work Health and Safety Act* 2011 s 10.

11 *Work Health and Safety Act* 2011 Schedule 5.

(c) to ensure that the person conducting the business or undertaking has available for use, and uses, appropriate resources and processes to eliminate or minimise risks to health and safety from work carried out as part of the conduct of the business or undertaking; and

(d) to ensure that the person conducting the business or undertaking has appropriate processes for receiving and considering information regarding incidents, hazards and risks and responding in a timely way to that information; and

(e) to ensure that the person conducting the business or undertaking has, and implements, processes for complying with any duty or obligation of the person conducting the business or undertaking under this Act; and

Example—

For paragraph (e), the duties or obligations under this Act of a person conducting a business or undertaking may include—

- reporting notifiable incidents
- consulting with workers
- ensuring compliance with notices issued under this Act
- ensuring the provision of training and instruction to workers about work health and safety
- ensuring that health and safety representatives receive their entitlements to training

(f) to verify the provision and use of the resources and processes mentioned in paragraphs (c) to (e)."

[29] Division 5 of Part 2 of the WHS Act creates offences. While the count laid here alleged an offence against s 31, the proper construction of that section is informed by ss 32 and 33. These three sections are as follows:

"**31 Reckless conduct – category 1**

(1) A person commits a ***category 1 offence*** if—

(a) the person has a health and safety duty; and

(b) the person, without reasonable excuse, engages in conduct that exposes an individual to whom that duty is owed to a risk of death or serious injury or illness; and

(c) the person is reckless as to the risk to an individual of death or serious injury or illness.

Maximum penalty—

(a) for an offence committed by an individual, other than as a person conducting a business or undertaking or as an officer of a person conducting a business or undertaking—3,000 penalty units or 5 years imprisonment; or

(b) for an offence committed by an individual as a person conducting a business or undertaking or as an officer of a person conducting a business or undertaking—6,000 penalty units or 5 years imprisonment; or

(c) for an offence committed by a body corporate—30,000 penalty units.

Note—

In this division, the penalty applicable to a body corporate is separately expressed. Otherwise the *Penalties and Sentences Act 1992*, section 181B applies for this Act.

(2) The prosecution bears the burden of proving that the conduct was engaged in without reasonable excuse.

(3) A category 1 offence is a crime.

32 Failure to comply with health and safety duty – category 2

A person commits a ***category 2 offence*** if—

(a) the person has a health and safety duty; and

(b) the person fails to comply with that duty; and

(c) the failure exposes an individual to a risk of death or serious injury or illness.

Maximum penalty—

(a) for an offence committed by an individual, other than as a person conducting a business or undertaking or as an officer of a person conducting a business or undertaking—1,500 penalty units; or

(b) for an offence committed by an individual as a person conducting a business or undertaking or as an officer of a person conducting a business or undertaking—3,000 penalty units; or

(c) for an offence committed by a body corporate—15,000 penalty units.

Note—

See also the note to section 31(1).

33 Failure to comply with health and safety duty – category 3

A person commits a ***category 3 offence*** if—

(a) the person has a health and safety duty; and

(b) the person fails to comply with that duty.

Maximum penalty—

(a) for an offence committed by an individual, other than as a person conducting a business or undertaking or as an officer of a person conducting a business or undertaking—500 penalty units; or

(b) for an offence committed by an individual as a person conducting a business or undertaking or as an officer of a person conducting a business or undertaking—1,000 penalty units; or

(c) for an offence committed by a body corporate—5,000 penalty units."[12]

[30] The term "engages in conduct" is defined as:

"***Engages in conduct*** means doing an act or omitting to do an act."[13]

[31] The term "health and safety duty" is defined as including each of the duties created in Part 2.[14]

[32] The offences created by ss 32 and 33 carry fines but not imprisonment.

[33] The exculpations contained in Chapter 5 of the *Criminal Code* "apply to all persons charged with any criminal offence against the statute law of Queensland"[15] unless there is a statutory provision excluding the application of the exculpations. Section 23 excuses a person from criminal responsibility for an act or omission that occurs independently of the exercise of the persons will, or an event which was neither foreseen nor reasonably foreseeable. Section 24 provides that a person who is honestly and reasonably mistaken is not criminally responsible for an act or omission to any greater extent than if the circumstances were as the person believed them to be. Section 33A of the WHS Act modifies the operation of ss 23 and 24 of the Code but only in relation to offences against ss 32 or 33 of the Act, not s 31.

[34] Section 31 creates what can be described as the most serious of the offences created by Part 2 of the WHS Act.[16]

The direction complained of

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12 Statutory Notes (irrelevant here) omitted.
13 *Work Health and Safety Act* 2011 Schedule 5.
14 The duties are created in Divisions 2, 3 and 4 of Part 2: see s 30.
15 *Criminal Code* s 36.
16 It carries imprisonment and the operation of Chapter 5 of the Code is not excluded.

[35] His Honour summed up the case against each of Lavin Constructions, Peter Lavin and Multi-Run Roofing before turning to the count against the appellant.

[36] As to the appellant his Honour instructed the jury:

> "So as you have heard, Gary Lavin was the sole director of Multi-Run Roofing at the time of the events with which we are concerned. He is charged with the same offence as Multi-Run Roofing, so the five elements in a broad sense are the same. But the way in which the Prosecution puts its case, the way in which the Prosecution says Gary Lavin is guilty, is different to Multi-Run Roofing, so I will go through the relevant considerations when you consider the case against Gary Lavin. So again, starting at the beginning: (1) did Gary Lavin have a health and safety duty? So we come back to: if a person is conducting a business, then an officer of the person – in this case the company – must exercise due diligence to ensure the company complies with any health and safety duty that it has.
>
> So let me go through that again. If a person, which you remember includes a company, is conducting a business, then an officer of that company must exercise due diligence to ensure the company complies with any health and safety duty that the company has. So you might have little trouble concluding that, as the sole director of Multi-Run Roofing, Gary Lavin was an officer of that company. So if you have concluded that Multi-Run Roofing had a health and safety duty, then that obligated Gary Lavin to exercise due diligence to make sure that Multi-Run Roofing complied with its health and safety duty. So if you find that to be the case, then it means that Gary Lavin himself had a type of health and safety duty, though a one which is somewhat different from the duty that it is alleged Multi-Run Roofing had.
>
> Due diligence includes taking reasonable steps to acquire and to keep up-to-date knowledge of work health and safety matters; to gain an understanding of the nature of the operations of the business Multi-Run Roofing was running and generally the hazards and risks associated with those operations; and to ensure that Multi-Run Roofing had available for use, and uses, appropriate resources and processes to eliminate or minimise the risks to health and safety from work carried out as part of the conduct of the business; and to ensure that Multi-Run Roofing has appropriate processes for receiving and considering information about incidents, hazards and risks, and responding in a timely way.
>
> So first you then, as I have said, have to consider in a practical sense: Did Multi-Run Roofing have a duty? If they did, was Gary Lavin an officer of Multi-Run Roofing? If he did, then he had a separate duty which was one to ensure due diligence that Multi-Run Roofing complied with its duty. And that involved, as I have just said, keeping up-to-date in work health and safety laws; gaining an understanding of what Multi-Run Roofing was doing and the hazards and risks involved; and to ensuring that Multi-Run Roofing had available for use, and uses, appropriate resources and process to

eliminate or minimise the risks to health and safety. So that deals with whether the Prosecution have established that Gary Lavin had a health and safety duty.

So the second questions is: Did he engage in conduct? And the conduct alleged against Gary Lavin is that he omitted to make sure that Multi-Run Roofing installed edge protection. So again, while it is a matter for you to decide, you might have little trouble accepting that he engaged in that conduct. Of course, again, we know that rails were not erected until some point after Mr Te Amo's fall.

So we can move then to the third question of whether the Prosecution has proved that this conduct – omitting to make sure that Multi-Run Roofing installed edge protection – did that expose an individual to whom the duty was owed, to a risk of death or serious injury? So the cause – if you have concluded Gary Lavin had a duty, that duty was to exercise due diligence to make sure Multi-Run Roofing complied with its duty – you might think that the persons to whom Gary Lavin owed the duty were the same as Multi-Run Roofing, that is the roof workers.

If that is the case, then your question becomes whether the conduct engaged in by Gary Lavin – omitting to ensure that Multi-Run Roofing installed edge protection – was such as to expose one or more of those persons – that is the roofers – to a risk of death or serious injury? So consider that question, having regard only to the evidence admissible against Gary Lavin. And again, I remind you not to read backward – reason backward from the fact that Mr Te Amo did fall and die, to conclude that there was such a risk arising from the conduct of Gary Lavin.

The relevant question for you is whether the Prosecution have proved that Gary Lavin engaged in the conduct alleged by the Prosecution, and if he did – did the conduct expose one or more of the roofers to a risk of death or serious injury? So that is the question with which you are concerned.

We move, then, to the fourth element as it concerns Gary Lavin: Has the Prosecution proved that he engaged in conduct without reasonable excuse? So, as I have mentioned, it is sometimes impossible to remove all risk. If Gary Lavin had an obligation of due diligence, it was an obligation to take reasonable steps. So I emphasise that word "reasonable", because it is an important one, really, in your consideration of all of the counts.

What was a reasonable step is to be assessed having regard to what I have already said about what was reasonably practicable, and there I would refer you back to the definition which you will see in the handout document that you have got. So it could be put this way: In the case of Gary Lavin, the question is: Have the Prosecution proved that he omitted to do something – in this case said to be ensuring Multi-Run Roofing installed edge protection – that was a reasonable step for Gary Lavin to take to ensure that Multi-Run Roofing complied with its duty?

> So let me put that again: Have the Prosecution proved that Gary Lavin omitted to do something that was a reasonable step for Gary Lavin to take to ensure that Multi-Run Roofing complied with its duty? So in considering that, have regard to all of the things that you find Gary Lavin did or did not do, and keep in mind – as I have mentioned – that the bare demonstration that a step could have been taken that, if taken, might have had some effect on the risk, does not, without more, prove Gary Lavin acted without reasonable excuse. The question is whether that step has been proven by the Prosecution to have been a reasonable one, measured against the definition of reasonable practicability, which is the key."

[37] His Honour then went on to direct the jury on the concept of "recklessness". It is unnecessary to set out that part of the summing up.

[38] The summing up follows the particulars which were delivered by the Crown. Those particulars were:

> "1. Gary William Lavin had a health and safety duty (s 31(1)(a)) because Multi-Run Roofing Pty Ltd conducted a roofing business and had a duty to ensure, so far as reasonably practicable, the health and safety of workers it engaged (such as Pairama) (s 19(1)(a)) and that of workers whose activities in carrying out the roofing work it could influence (such as Te Amo, Leavitt, Paenga, Puhi) (s 19(1)(b)) while these workers were at work in the business of roofing and he was an officer of Multi-Run Roofing Pty Ltd and he had to exercise due diligence to ensure that Multi-Run Roofing Pty Ltd complied with that duty (s 27(1)).
>
> 2. To exercise due diligence Gary William Lavin had to take reasonable steps to ensure that Multi-Run Roofing Pty Ltd implemented the installation of edge protection either by ensuring Multi-Run Roofing Pty Ltd installed it or caused it to be installed (s 27(5)).
>
> 3. Without reasonable excuse, Gary William Lavin engaged in conduct (s 31(1)(b) (he omitted to ensure the Multi-Run Roofing Pty Ltd installed edge protection or cause it to be installed and/or tolerated the absence of edge protection) and that conduct exposed Te Amo (and Pairama, Leavitt, Paenga and Puhi), all persons to whom Gary William Lavin owed a health and safety duty, to the risk of death or serious injury. That risk was due to risk of a fall frim height.
>
> 4. Gary William Lavin was reckless as to the risk to those persons of death or serious injury (s 31(1)(c)) because he failed to ensure that Multi-Run Roofing Pty Ltd installed edge protection or caused it to be installed and/or tolerated the absence of edge protection when he foresaw or was aware of the risk of death or serious injury arising from a fall from height absent edge protection but nevertheless permitted that situation to go on."

[39] The particulars assert that the appellant offended against s 31 as he breached his duty under s 27 by failing to ensure Multi-Run's compliance with its duty under s 19.

Consideration

[40] Section 19 of the WHS Act imposed duties upon Multi-Run. Section 27 imposed a separate duty upon the appellant. That duty was to take "due diligence" to ensure compliance by Multi-Run with its duty under s 19. The scope of the appellant's duty (taking due diligence) is defined by s 27(5) and here the case was based on s 22(5)(c) and or s 27(5)(e) and the process not instigated was the erection of the safety rail.

[41] Each of the offences created by ss 32 and 33 contain, as an element, a failure to comply with a health and safety duty. To prove an offence against s 32 the Crown must prove three elements:

(i) The accused is subject to one of the health and safety duties defined in Part 2.

(ii) The accused breached the duty.

(iii) The breach of duty has a particular consequence namely that it exposes an individual to "a risk of death or serious injury or illness".

[42] Section 33 creates an offence with only two elements namely the first two elements of an offence under s 32. To succeed in proof of an offence against s 33 the Crown need not prove that the breach of duty exposed a person to risk of death or serious injury or illness.

[43] Sections 32 and 33 import considerations of "reasonableness". This is because s 19 of the WHS Act defines the duty as one to ensure health and safety in so far as is "reasonably practicable".

[44] Section 31 creates an offence with four elements namely:

(i) the accused is subject to a health and safety duty.

(ii) the accused engages in conduct that exposes a person to whom the duty is owed to a risk of death or serious injury or illness.

(iii) the accused engages in the conduct[17] without reasonable excuse.

(iv) the accused, in engaging in the conduct is reckless as to the risk of death or serious injury or illness.

[45] Section 31, like ss 32 and 33, imports a consideration of "reasonableness" for a jury's consideration but in a very different way to ss 32 and 33. By s 31, the conduct is not criminal if there is "reasonable excuse" for the act or omission.

[46] The learned trial judge directed the jury that the criminal liability of the appellant turned on a consideration of "reasonable practicability". His Honour directed the jury on what he identified as the fourth element of the offence as follows:

(i) The appellant had a duty of due diligence. This was a reference to s 27 of the WHS Act.

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17 Which includes an omission; s 30.

(ii) The Crown must prove that he "omitted … ensuring Multi-Rim Roofing installed edge protection".

(iii) If so, then did the appellant have "reasonable excuse" for that omission. This was a reference to s 31 of the WHS Act.

(iv) "The question is whether that step [installing the railing] has been proven by the prosecution to have been a reasonable excuse measured against the definition of reasonable practicably which is the key".

[47] That was a misdirection. The issue under s 31 was not whether the erection of the railing was "reasonably practicable". The issue was whether the failure to erect the railing "expose[d] [Mr Te Amo] to a risk of death or serious injury…", and if so whether there was "reasonable excuse" in making that omission. In determining whether there was "reasonable excuse" the jury was obliged to consider the alternative measures which the appellant directed to be put in place (the harnesses and the use of the scissor lifts), not just whether it was reasonably practicable to install the railing. Did the implementation of those measures provide a reasonable excuse for leaving Mr Te Amo otherwise exposed to whatever risk of falling from the roof remained? "Reasonable excuse" also raises consideration not only of what measures were put in place but also what measures the appellant believed had been put in place. His belief is relevant to the reasonableness of any excuse.

[48] Here the appellant may have been found by the jury to have failed to cause Multi-Run to erect the railing. The jury may have been satisfied that the erection of the railing was a "reasonably practicable" step to take. However, the appellant had directed that workers on the roof were to use harnesses if working near the edge. He also directed that the scissor lifts be positioned in such a way as to constitute a barrier. The real question was, having given those directions and, in the context of any other relevant evidence in the case, whether he had a "reasonable excuse" for not causing Multi-Run to erect the railing.

[49] The summing up was defective in that it did not properly identify the elements of the offence. Such a misdirection prevented the jury from performing its proper function and constitutes a miscarriage of justice.[18]

[50] For those reasons it was necessary that the conviction be set aside and a retrial ordered.

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[18] *Lane v The Queen* (2018) 92 ALJR 689 at [48], *Handlen v The Queen* (2011) 245 CLR 282 at 287, *R v Dobie* [2017] 2 Qd R 193 at [44] and [64].