

# MAGISTRATES COURTS OF QUEENSLAND

CITATION: *Guilfoyle v Wicks* [2020] QMC 11

PARTIES: **Aaron John GUILFOYLE (Work Health Safety Prosecutor)**  
(Complainant)

v

**Angus Ruthven WICKS**  
(Defendant)

FILE NO/S: MAG-00216053/19(2)

DIVISION: Magistrates Courts

PROCEEDING: Sentencing Hearing

ORIGINATING COURT: Dalby Magistrates Court

DELIVERED ON: 4 September 2020

DELIVERED AT: Dalby Magistrates Court

HEARING DATE: 4 September 2020

MAGISTRATE: T. E. Mossop

ORDER:

CATCHWORDS:

SOLICITORS: R. Watson, In-House Legal for Work Health Safety Prosecutor, Qld Government  
Counsel Andrew Hoare i/b Carvosso and Winship for Defendant

## **A jolt from Farming Focus**

- [1] On a Tara farm one spring day in 2017, no doubt in many ways like many other days in the course of preceding decades, a farming machine was being moved. That mobile machine was an auger, used to load grain from trucks into silos. This particular day soon turned tragic because as the auger was being repositioned, it came into with contact with an overhead, high-voltage electrical power line. This caused serious and permanent injuries from electrocution to both the Defendant farmer and his employee, a 17 year old farm-hand.

- [2] In the realms of work, health and safety, what was being done that day was not electrically safe. The injured farmer had failed to comply with his duties under the Electrical Safety Act 2002 and by his failure exposed individuals, including himself, to risk of death or serious injury. That exposure was actualised when serious injuries to two persons resulted.
- [3] A complaint and summons followed, within time limitations, some 2 years later.
- [4] At the very first mention of this matter in court on 17 December 2019, the Defendant pleaded guilty, thus making it a very early plea.
- [5] The matter was listed for a sentence hearing in early 2020 at the lawyers' behest.

### **The Facts Surrounding the Incident, Contained within the Complaint and Summons Particulars and Agree Schedule of Facts**

- [6] The 12k Volt uninsulated single wire earth return high voltage overhead electrical line traversed the farm property in the vicinity of two grain silos at a height of about 7.2 metres. It is a powerline as part of the provision of electricity supplied by Ergon Energy.
- [7] The auger was only used for about one month a year. It was being repositioned from one silo to the other.
- [8] The Defendant was operating the hydraulic controls of the auger as his employee was steering it at the rear jockey wheel. The auger had to be spun 180 degrees to move it from one silo to the other.
- [9] The auger was in a raised position when it contacted with the overhead power line.
- [10] Both the Defendant and his employee assisting in moving the auger received serious injuries, including electrical burns, which required transportation and treatment at the Royal Brisbane Hospital.
- [11] The injured employee suffered burns to his hands, feet, right arm, chest, back, buttocks, genitals and both legs. He had four toes amputated and has suffered psychologically it seems, according to his own victim impact statement as opposed to any formal, professional diagnosis or report. He was hospitalised for two months and was still receiving physiotherapy and treatment as at the date of his victim impact statement.
- [12] I have obviously had regard to this victim impact statement that sets out the daily struggles faced by the injured employee and the dramatic change this incident has imposed on both his routine and quality of life.
- [13] From the defence submissions, I am told the Defendant also suffered injury. He required hospitalisation and is medicated for arrhythmia.

### **Some Safety Measures in Place**

- [14] There were signs and stickers on the auger that clearly provided written and visual warnings about keeping clear of power lines and looking out for overhead power lines.

### **Safety Measures that were Lacking**

- [15] The Defendant should have ensured an exclusion zone to comply with section 68 and Schedule 2 Part 2 of the Electrical Safety Regulation 2013 and Chapter 3 of the Electrical Safety Code of Practice of 2010, to prevent any person or machinery coming within an unsafe distance of the high voltage power line.
- [16] It is conceded by the Defendant that there was no code of practice in place at the time that would have satisfied the Safety Regulations or Code.
- [17] The presence and location of the power line and silos, with a machine such as an auger that extended to some height whilst being manoeuvred in that region, was a dangerous hazard that required safety measures.
- [18] I was originally concerned when counsel for the defence have suggested the offence was committed as a result of the Defendant providing instruction to the injured party which resulted in both parties losing “situational awareness” and unintentionally deviating from the normal path of the auger. According to the Defence, the normal path would have the auger not come within the exclusion zone. What that really means is that if the safety measure of an exclusion zone had been clearly identified, marked and properly controlled by visual barriers, such “situational awareness” would have been unavoidable. This is really the crux of the offending and an admission by the Defendant as to how the offending occurred, namely the absence of any appropriate safety measures being taken. Evidence received from Defence during the sentence hearing has demonstrated the Defendant has since placed short but highly visible, orange bollards under the power line in the vicinity of the silos, thus now clearly marking the exclusion zone to avoid future and similar catastrophes.
- [19] The prosecution referred to other steps the Defendant could have taken, including requesting Ergon Energy to move the line, de-energise the line or isolating and earthing the line for the duration of work being performed, or asking for the line to be replaced with an underground cable. It is my finding none of these seem reasonably feasible given the extra-ordinary costs and practical logistics that on a balance of probabilities would naturally follow.
- [20] One safety measure not identified by either prosecution or defence in their written submissions but alluded to by the injured worker in his victim impact statement was in relation to always having a third person present when the auger was being moved. Indeed, it is apparent from the victim impact statement that there was a third person present that day who was able to administer some resuscitation and call emergency assistance. I would agree that even with an exclusion zone in place, if two (2) persons were required to manoeuvre the auger, the presence of a third person at a safe distance to act as a safety spotter seems to be another reasonable proposition to ensure situational awareness is not compromised. This proposition was accepted by the Work Health Safety Prosecutor during the sentence hearing as being another appropriate safety measure that might be employed in the future. I have referred to this in the course of my sentence as a helpful observation of another appropriate safety measure. It is not my intention that this observation have any impact upon my considerations in sentencing of this Defendant.

### **Legislation and Penalties that Apply**

- [21] The present case falls within a category 2 offence pursuant to section 40C of the Electrical Safety Act 2002, where the Defendant has breached his electrical safety duty and exposed an individual to risk of death or serious injury or illness.
- [22] For a breach of a section 30 duty, the penalty for a category 2 offence is 3000 penalty units for an individual.
- [23] I have been advised by the Work Health Safety Prosecutor that the applicable penalty unit which applies in this case is \$100, being a penalty unit that has been set nationally for these prosecutions. This makes the maximum applicable penalty \$300,000.
- [24] I have not been assisted much by way of comparative sentences as there have been very few cases of similar offending since the 2014. I have been referred to Sharon Steward v Mac Plant Pty Ltd; Mac Farms Pty Ltd [2018] QDC 20 and some successful prosecutions provided the Defence in relation to Electrical Safety breaches which have been recorded by prosecutors identified by numbers E194223 as worker one and worker two. I have had regard to them as well as to Steven John Reynolds v Orora Packaging Australia Pty Ltd [2019] QDC 13.

### **Sentencing**

- [25] In accordance with the High Court in Wong v R [2001] 207 CLR 584, I am to use an “*instinctive synthesis*” approach to deciding the appropriate penalty by having regard to:-
- a) The obvious existence of the hazard to the Defendant;
  - b) The legislative requirement to implement measures in that regard;
  - c) The real risk of death and injury from a failure to implement such a measure as an exclusion zone;
  - d) Punishment;
  - e) Deterrence, both personal and general;
  - f) The injury and harm caused by this breach;
  - g) Community denouncement;
  - h) The maximum penalty;
  - i) All appropriate mitigating factors
- [26] Principles set out in the Penalties and Sentences Act 1992 (Qld) naturally also apply, most of which have already just been stated.
- [27] I also have regard to the factors referred to in Nash v Silver City Drilling (NSW) PTY Ltd; Attorney General for New South Wales v Silver City Drilling (NSW) Pty Ltd [2017] NSWCCA 96, that is when determining the objective gravity of this offence, consideration has been given to:-
- a) The potential consequences of the risk;
  - b) The probability of the risk;
  - c) The availability of steps to lessen, minimise or remove the risk – including whether those steps are complex and burdensome or mildly inconvenient; and
  - d) The particular offence in the context of the penalties imposed by legislation.

- [28] Further, Defence have referred me to *Comcare v Commonwealth of Australia* [2007] FCR 207 providing yet another, further guide as to sentencing considerations being:-
- a) The penalty must be such as to compel attention to occupational health and safety generally to ensure workers will not be exposed to risks;
  - b) It is a significant aggravating factor that the risk of injury was foreseeable even if the precise cause or circumstances of exposure were not;
  - c) Further aggravation if the risk of injury is actually foreseen and an adequate response is not taken by an employer
  - d) The gravity of the consequence of the accident does not itself dictate the seriousness or amount of penalty but may manifest the degree of seriousness of the detriment to safety
  - e) Systematic failures are more seriously viewed than an exposure by inadvertence and momentary lapse of supervision;
  - f) General and personal deterrence;
  - g) Precautions, vigilance, proactivity which set the level of diligence demonstrated by an employer is another relevant consideration;
  - h) Maximum penalties;
  - i) Neglect of simple, well-known precautions to deal with a risk of injury make matters worse;
  - j) The objective seriousness of the offence may alone call for the imposition of a very substantial penalty to vindicate the social and industrial policies of legislation and its regime of penalties.
- [29] There is no doubt that the risk of death by electrocution is real and a significant punishment as significant general deterrence must be imposed.
- [30] This is an offence where significant harm, by way of both permanent physical harm and mental anguish, has been caused to two (2) persons, one (1) being the offender.
- [31] The appropriate response to the risk not taken by the Defendant was to ensure an exclusion zone within the high voltage power line vicinity, whilst also providing adequate information, training, instruction and supervision to protect persons in that vicinity from risks which would have provided some control measures. These such steps were not onerous or expensive.
- [32] In mitigation, it is acknowledged by the prosecution that:-
- a) This is the first offence for the Defendant as against the electrical safety or work health safety legislation;
  - b) A plea of guilty has been entered by the Defendant at the earliest opportunity;
  - c) There has been co-operation with the investigators.
- [33] The defence have added to these mitigation factors:-
- a) The long history of the Defendant farming on this very same property without a previous prosecution, with the intention to keep on doing so with the next generation to continue the family farming enterprise;
  - b) Remorse, including actions demonstrating remorse by in engaging with the injured worker and his family after the event and subsequently;

- c) That steps have been taken to remove the risk after the incident by the installation of a tangible and clearly visible exclusion zone.
- d) The devastating effect of the drought and CoVid19 affecting the Defendant and others. [Although I note, this has not adequately been clearly explained as to how but I am willing to accept that on the balance of probabilities there would naturally be some adverse effect on the Defendant, particularly given it is accepted the region in which he farms is drought affected.]

- [34] With respect to the financial circumstances of the Defendant, also relevant to my consideration of a fine, I am informed he earns a gross income from his farming business of approximately \$250,000 with operating expenses of some \$153,000 per annum. Accordingly, his pre-tax income is \$97,000 with household expenses of \$1,250 per week amounting to \$65,000 per annum. There were other factors raised by the Defence in their submissions which suggest that the income for this year is going to be substantially less and the Defendant's income may be considered to be a modest farming income.
- [35] I have also considered favourable character references which set out that the Defendant is a valued and contributing member of his community who presents without any prior mar upon his good character.
- [36] The defence acknowledge the principle of general deterrence to ensure employers are vigilant to ensure their workplaces are safe is a key sentencing consideration.
- [37] The penalty range submitted for by the prosecution is one of \$20,000 to \$40,000.
- [38] The Defence submit for a fine between \$9,000 and \$19,000 but urge for a fine at the very lowest end of that range.

### **My Conclusion**

- [39] The Defendant is convicted. A conviction is not recorded.
- [40] In not recording conviction I have had regard to the prosecution case tendered of *Steward v Mac Farms*. Whilst the prosecutor in that case did not seek for a conviction to be recorded, unlike here, it is highly unusual for first offenders to have a conviction recorded where there is a previous good record absent of offending and maintained over a lengthy period of operation, as are the facts here.
- [41] Having regard to all of the factors of the offending, the sentencing considerations I have outlined, the factors in mitigation including the early plea and lack of prior history and the Defendants financial circumstances, I order the Defendant to pay a fine in the sum of \$16,000. I refer the fine to SPER (*State Penalties Enforcement Registry*) for registration and collection.
- [42] With respect to costs, there has been some additional delay between the early plea of guilty entered and the initial attempt at proceeding to a sentence hearing in March of this year.
- [43] Those delays can be explained by way of an issue of law arising as between the prosecution and defence concerning the alleged facts. The Prosecution were seeking to allude to and rely upon additional, contested facts which would have significantly

aggravated the penalty. Those facts were not contained within the Complaint itself nor in the agreed schedule of facts. After hearing legal submissions, at an earlier occasion, and having found in favour of the Defendant, it is my view that the additional costs faced by the Defendant to litigate that issue should result in the Defendant not facing any additional monetary outlay by way of any costs order today. In fairness therefore, I am not ordering the Defendant to pay any of the \$1599.55 costs sought by the Prosecution.