QUEENSLAND COURTS AND TRIBUNALS

TRANSCRIPT OF PROCEEDINGS

MAGISTRATES COURT

NOUD, Magistrate

MAG-00014524/20(7)

OFFICE OF THE WORK HEALTH AND SAFETY PROSECUTOR	**Complainant**
and	
BM ALLIANCE COAL OPERATIONS PTY LTD	**Defendant**

BRISBANE

12.11 PM, FRIDAY, 9 AUGUST 2024

DAY 1

DECISION

Any rulings in this transcript may be extracted and revised by the presiding Judge.

WARNING: The publication of information or details likely to lead to the identification of persons in some proceedings is a criminal offence. This is so particularly in relation to the identification of children who are involved in criminal proceedings or proceedings for their protection under the *Child Protection Act 1999*, and complainants in criminal sexual offences, but is not limited to those categories. You may wish to seek legal advice before giving others access to the details of any person named in these proceedings.

HIS HONOUR: The corporate defendant, BM Alliance Pty Ltd pleaded guilty before me to a complaint and summons with amended particulars on the 27th of May 2024. I have taken those pleas of guilty into account. I have reduced the sentence that I would otherwise have imposed because the defendant pleaded guilty. The matter has had something of a lengthy history but had ultimately resolved saving a three-week trial. On the 15th of December 2023, the original charge was listed for summary hearing. Estimated, as I say, to take three weeks commencing on the 27th of May. Submissions to resolve the matter on a simplicter basis had previously been rejected, however, the submission was revisited by the prosecution during final trial preparations. The matter resolved and on the 7th of May in advance of the summary hearing the trial was delisted.

Whilst the matter has had a lengthy history from when it was first mentioned in 2020. I do consider that there is real value and utility to the defendant's plea of guilty. It has saved the state time, money, resources and energy in prosecuting this matter. It has also saved witnesses having to give evidence about a traumatic event. This is important and I have taken this all into account in the defendant's favour.

Ms Farnden of King's Counsel appears with Ms Sargeant for the prosecuting authority, the Work Health Safety Prosecutor. Mr Rowney of King's Counsel appears for the defendant. Each of the parties relies upon a number of documents which have been marked as exhibits in the course of the sentence proceeding that occurred before me this morning. I have also been referred to a number of cases which I will turn to in due course.

For completeness, there was an agreed statement of facts that reflects an agreed basis upon which the court is to sentence the defendant. Ms Farnden also relies upon a written outline which has been received and marked as an exhibit. Ms Farnden had some other documents as well, and they were also received and marked as exhibits. Mr Rowney also relies upon a written outline of argument which formed a bundle of documents. He also relied upon the affidavits of Mr Dane Andrew Neilson. Mr Neilson was not cross-examined on the contents of his affidavit, and it all goes in uncontested. I accept the evidence of Mr Neilson.

I should not that it was of great benefit to the court receiving all of this material in advance of the sentence proceeding, and I thank each of the legal representatives for facilitating the administration of justice by providing their material in a timely fashion. It has assisted the court greatly. I have had regard to all of the material that the parties have put on before me, and I have carefully considered their submissions on the appropriate and just sentence in this case. Before coming to the facts of what it is the defendant did, it's important that I say something briefly about the statutory regime creating the offence for which the defendant has pleaded guilty to, and other relevant provisions that guide me in arriving at a just and appropriate sentence.

The objects of the Coal Mining and Safety Health – the objectives of the Coal Mining Safety and Health Act 1999 are to:

a) protect the safety and health of persons at coal mines, and persons who may be affected by coal mining operations; and
b) require the risk of injury or illness to any person resulting from coal mining operations be at an acceptable level; and
c) provide a way of monitoring the effectiveness of administration of provisions relating to safety and health under this Act and other mining legislation.

Those objects are achieved by imposing obligations on persons who operate coal mines and providing for safety and health management systems at coal mines to manage risk effectively. The Act requires a coal mine operator to ensure the risk to coal mine workers while at the mine is at an acceptable level. For a risk to be an acceptable level of risk per the Act, operations must be carried out so the level of risk from the operations is within acceptable limits and as low as reasonably achievable. To determine whether risk is within acceptable limits, regard must be had to the likelihood of injury or illness arising out of the risk, the severity of the injury or illness. An acceptable level of risk is achieved through management and the operating systems in place for each of the coal mines.

Section 34 of the Act prescribes five levels of offending that are based on the outcome of the offence or aggravating circumstances. Namely, whether the offence caused bodily harm, grievous bodily harm, death or multiple deaths, or whether there was no such causative effect. In this case, the defendant is charged with and has entered a guilty plea to an offence under section 34(e) of the Act. This is the lowest level of offending and is a simplicter offence, having no circumstance of aggravation. That is to say no causative effect. The maximum penalty prescribed for an offence under Section 34(e) of the Act is much less than that of an offence which caused the death or grievous bodily harm of somebody. I accept that this is an important distinction when considering the objective gravity of the offence.

Turning now to the facts of this case. There is an agreed statement of facts which has been received and marked as exhibit 1. It is important that I emphasize some aspects of the defendant's conduct. A saraji mine, s-a-r-a-j-i is an open-cut coal mine located 20 kilometres north of the town of Dysart in central Queensland. The mine is operated by the defendant, BM Alliance Coal Operations Pty Ltd who was one of the country's largest coal producers and operates five coal mines in the Bowen Basin in Queensland. The mine produces [indistinct] coal which is then processed on site before being transported to the Haypoint coal terminal via train. As part of the mining process, explosives are loaded into holes in the bench and then detonated to expose the coal seen. Material is then removed by machinery called a drag line which is very heavy machinery that drops buckets into the pit to remove material to uncover the coal. Following the explosions before the drag line can be used, the area must be stabilised. The mine undertakes a process known as drag line bench preparation. Drag line bench preparation includes a process that involves dozer operators pushing slots or dozer blades of dirt and rock around the bench area to level the ground so that a drag line can sit on the bench. This process is referred to as dozer bench preparation. Once the drag line bench is prepared, the drag line can be brought in to remove the material to uncover the coal. I've had the benefit of

instructions from Mr Rowney throughout the course of submissions by reference to some photographs that was

Turning to the incident, the drag line bench preparation was being conducted on ramp two in December 2018. Dozers were assisting in bench preparation from approximately the 28th of December 2018. The dozer bench preparation shifts were divided into day and night shifts and involved up to three dozers working on the bench at a time, removing rock and levelling the area. On the 31st of December 2018, an incident occurred at the mine involving the death of a dozer operator, Mr Allen Houston who had been conducting dozer bench preparation work on ramp 2, along with two other dozer operators, a Mr Gallow and a Mr Fowler. All three operators were experienced and competent dozer operators.

The incident occurred after Houston's dozer began tramming out parallel to the bench edge towards crib at approximately 10.25 pm. Houston's dozer changed direction and trammed over the abundant low wall edge rolling approximately 18 metres down an embankment. The regulator conducted an investigation into the incident. During that investigation, the defendant produced various documents in response to a number of information requests which form part of the defendant's safety and health management system, herein after referred to as SHMS, that were in place at the mine. This included a standard work instruction herein after referred to as SWI, for bulk push dozer operations which provided instructions for dozer operators performing bulk push dozer operations, and was the procedure that some dozer operators working on ramp two believe they were working under. The SWI did not include specific instructions for bulk push dozer operations associated with drag line bench preparation. The Regulator's investigation into the incident concluded that the SHMS for the mine did not provide for an acceptable level of risk for bulk push dozer operations associated with drag line bench preparation.

After the incident, the defendant developed and implemented a SWI that included instructions specifically for the activity of dozer bench preparation work at the mine and that provided for a number of measures which are referred to in the statement of facts. It is not alleged in any way that the defendant's failure caused Mr Houston's death or Houston's dozer to be driver over the low edge wall or roll down the embankment. The defendant's failure meant that the risk to the coal mine workers performing the dozer bench preparation work at the mine was not at an acceptable level because it was not within the acceptable limits and as well as reasonably achievable because there were reasonable measures to reduce the risk that were not taken, in contravention of section 34(e)(i) of the Coal Mining Safety and Health Act 1999.

Before turning to a discussion of section 9 of the Penalties and Sentences Act, those features in mitigation and the submissions on penalty on each of the parties, it is necessary to make some assessment of the objective gravity of the offence that the defendant has pleaded guilty to. As alluded to by Mr Rowney in his outline, following the incident, the defendant reviewed its SHMS documents applicable to undertaking dozer bench preparation and identified a gap in the system, namely that

while there was an SWI for bulk dozer push operations which provided instructions for dozer operators generally performing bulk push dozer operations, it did not include specific instructions for bulk dozer push operations associated with dozer bench preparations. As Mr Rowney says at paragraph 6 of his outline, it is accepted that this gap existed, although all three dozer operators were very experienced dozer operators, had done this work before and had received training in the mine.

The defendant's liability is that the failure to include specific instructions for the activity of dozer bench preparation work incorporating a number of measures meant that the risk to the coal mine workers performing dozer bench preparation work was not at an acceptable level. However, importantly, it is not alleged that the failure to do so caused Mr Houston's death or caused his dozer to be driven over the low edge wall, or roll down the embankment. This feature, I consider to be a material consideration. And whilst there has been this failure by the corporate defendant, I consider its culpability significantly because of this lack of causative feature falls towards the lower end of seriousness.

Turning now to the comparative sentences. A number of comparative sentences of my brother and sister Magistrates have been put before me. Of course, while very helpful, they are not binding. I don't propose to go over all the cases in any great detail, but I've had the benefit of submissions on them, and have had regard to all of those submissions. Of course, no one case is on all fours with one another, and cases such as these turn on many factual differentials so it is difficult for the court to discern comparable decisions that are a true and like nature. However, comparable sentences can still be useful to delineate perhaps a sound sentencing range.

The three decisions that have been placed before me were the decisions of the office of the Work Health Safety Prosecutor v Middlemount Coal Pty Ltd, sentence of her Honour Magistrate Hardigan from the 8th of August 2023, the decision of Harrison v Angelo Coal a decision of his Honour Magistrate Dwyer out of the Mackay Industrial Magistrates Court on the 23rd of November 2016, and a decision of Harrison v [indistinct] Pty Ltd, a decision of her Honour Magistrate Bentley out of the Brisbane Industrial Magistrates Court from August 2017.

I consider that the decision of her Honour Magistrate Hardigan in the case of Middlemount Coal to be of the most assistance. I think, with respect, that as mines focussed in the course of oral submissions there was broad agreement that this case was factually the closest to the instant case. In Middlemount Coal, a blast had been conducted in the coal mine to continue coal mining. A worker was operating an excavator when an echelon wall of the strip he was working on failed, collapsed, and the material engulfed him and killed him. Approximately one year prior to that incident the regulatory body had identified the risk was not as low as reasonably achievable and issued a directive to the site senior executive to review the safety and health management system in relation to ground control management. In checking whether the directive had been complied with, the director was later revised. Due dates were subsequently extended and ultimately the plan was not developed or implemented. That posed the basis of the charge.

It is accepted by the prosecution that there is a distinction to be drawn in that Middlemount Coal had been specifically alerted to its gap in its safety and health management system and had been given advice on how to fix it but didn't do so. However, that differential must be balanced against another feature. That is, that the defendant here has a history of breaches under the Act, which Middlemount did not have. In Middlemount, the Magistrate considered that a fine ten percent of the maximum penalty was proportionate to the criminality of the defendant, namely she imposed a fine of $70,000 and a conviction was not recorded. Although I note that in submissions in Middlemount the parties were quite far apart which is not the case here.

I consider when analysis is made of the decision of Middlemount, that it's the most useful comparable sentence here in discerning a sound sentencing range. I consider that the decision supports a range of fines in the vicinity of $70,000 for cases similar to this where no serious injury or death is said to have been caused by the failure, the basis of the charge. I consider though, there should in the sound exercise of judicial discretion, be a permissible uplift in that range to reflect this defendant's history of breaches under the Act which was not a feature in Middlemount. I will say more about that later. That, I consider would take the range of fines here somewhere between $75,000 and $85,000.

Turning to the relevant purposes under the Penalties and Sentences Act. There is a fundamental principle of sentencing that the sentence imposed must ultimately reflect the objective seriousness of the offence committed, and there must be a reasonable proportionality between the sentence passed and the circumstances of the offence committed. A court should only impose punishment to an extent or in a way that is just in all of the circumstances. One of the main purposes of punishment so far as it is relevant, is to protect the public from the commission of such offences, by making it clear to the defendant and others who might commit similar offences, that they will be met with sentences of appropriate punishment.

A sentence should also communicate society's denunciation of what has happened here. The sentence should represent a symbolic and collective statement that the defendant's failures, or failure, should be punished. I do not lose sight, though, of rehabilitation as a purpose of sentencing which is aimed at the renunciation by the defendant of their wrongdoing. I consider that there are good prospects of rehabilitation in this case. The defendants have taken a number of steps since the offence to address their failures, and I have taken that into account when assessing their prospects of rehabilitation. Mr Rowney has carefully taken me through all of this and I have had regard to it. Mr Neilson has carefully explained much of the steps taken by the corporate defendant after the incident which demonstrates that they understand the seriousness of the offending and the need to ensure that it does not happen again. While every sentence requires individualised treatment, courts must in the exercise of their discretion take guidance from a number of sources. They include the maximum penalties prescribed, the decisions of other magistrates; some of which I have gone through, and of course, the purposes of sentencing which

here importantly include, I consider, the deterrence of others from committing similar offences.

I would think that there is a community interest in ensuring that corporations like the defendant comply with safety requirements. While I'm very mindful that there is no suggestion here their failure has caused Mr Houston's death, every day people in our community undertake hazardous work such as his, and employers like the defendant should know they must take their safety and health obligations seriously. While keeping everything in balance, I consider general deterrence to be of considerable importance here.

There is also some need for the sentence to strengthen, I consider, the specific deterrent component of the sentence. On two previous occasions, the defendant has been placed before the courts to be sentenced for failures, and I focus just on that. The defendant, as I have said, has appeared twice and pleaded guilty in the Industrial Magistrates Court for breaches under the Coal Mining Safety and Health Act 1999. On the 21st of December 2007, the defendant was sentenced to a fine of $35,000 and an order to pay $9,000 in investigative costs for failing to ensure the risk to coal mine workers at its Broadmeadow coal mine, located near Moranbah, were at an acceptable level.

On another occasion, that is to say on the 19th of December 2014, the defendant pleaded guilty to failing to discharge its health and safety obligations pursuant to section 34(b) of the Coal Mining Safety and Health Act. That offence occurred on the 13th of January 2013 at the defendant's Broadmeadow mine. On that occasion, the defendant was sentenced to a fine of $75,000 and costs were ordered in the sum of $4859.26 but convictions were not recorded. Details of those convictions have been elucidated in the prosecutor's outline which I have had regard to. I have listened very carefully to Mr Rowney's submissions about his client's past history and I don't lose sight of those submissions. There have been long periods of time without any failures resulting in a court having to impose punishment on the defendant. But even taking account of that, I consider that the history demonstrates that the defendant's continued failures demonstrate a need that whilst keeping the sentence proportionate for a greater personal deterrent effect on the corporate defendant.

I am careful though, generally, as to how I approach this issue of the defendant's past history. It has been said previously by courts of high authority that a defendant's criminal history is a factor which may be taken into account when determining the sentence to be imposed. But it must not be given such weight as to lead to the imposition of a penalty disproportionate to the gravity of the instant offence. To do so would be quite unfair and would be seen to impose a fresh penalty for past offences. I am mindful of this and I don't allow the defendant's previous history to overwhelm my sentence and result in a disproportionate penalty. However, I consider, even having regard to Mr Rowney's submissions on the point, that the defendant's history is relevant to my sentence to show another example of continued

failure by the corporate defendant and that this offence, for which I'm to sentence the defendant for here today is but not an uncharacteristic aberration.

It is for those reasons that I consider that the court must strengthen in its sentence here today its specific deterrent response. However, these considerations must be balanced carefully against a number of mitigating factors which will be given full weight. Mr Rowney has taken me through these in his outline and in oral submissions. Also Mr Neilson has deposed to the many steps taken by the defendant in their investigation of the matter and the positive steps that they have taken, which I all accept. Mr Neilson's affidavit, I accept, shows the defendant's sophisticated approach to the management of safety and the adoption of broader BHP values, standards including incident investigation standards and safety improvement initiatives including a significant commitment to a fatality elimination program. I accept that it doesn't appear at the – it doesn't appear that the defendant is someone who has a disregard for safety given those steps that have been taken.

Mr Neilson, and in submissions today, Mr Rowney has also taken me through the corporate defendant's otherwise good character. These are detailed in Mr Rowney's outline and include a variety of community work and contributions in donations which the corporate defendant has made. This includes partnering with the Queensland Indigenous Land Conservation Project to build relationships with local indigenous groups and communities to deliver environmental, conservation, cultural, and economic outcomes. This all demonstrates that the corporate defendant's good character and that it otherwise seems that the corporate defendant is a responsible corporate citizen. I am required under the Penalties and Sentences Act in section 48 to have regard when imposing a fine to the defendant's capacity to pay a fine and the nature of the burden of the fine will have on the defendant. It did not really loom large before me but I have done this. Turning now to sentence.

While keeping all of these matters in balance, in my view, a fine designed to have a deterrent impact on the defendant and others is required. However, there must be a real reflection in my sentence of those matters in the defendant's favour which I have done. Mr Farden submits that for the defendant's conduct, a fine in the range of 90 to $100, 000 would be appropriate to meet the purposes of sentence. For the reasons I have gone over, I don't, with respect, consider that a fine at the middle or top of that range would be just or appropriate in the circumstances of this case. Mr Rowney on the other hand says that a fine in the vicinity of $70,000 would be appropriate. So it seems that the parties fall somewhere in the range of 70 to $90,000. As I have indicated, when one takes regard to the decision of Middlemount, it's more in the range of the 70 to $85,000.

However, as the above analysis has revealed, and the relevant purposes of sentencing having been identified, I consider that an appropriate fine to be imposed on the corporate defendant, BM Alliance Coal Operations Pty Ltd is a fine of $78,000. Accordingly, I impose a fine of $78,000 on the defendant, BM Alliance Coal Operations Pty Ltd. No convictions are recorded. The prosecution did not seriously agitate for the recording of convictions, and given the defendant's gap in their

offending, and the other factors in their favour pertaining to their character, which is something that I can properly take into account under section 2, such an order seems appropriate. The prosecution in their outline did not seek any costs. Accordingly, there will be no order as to costs. The fine is referred to Spur for registration and enforcement. Ms Farnden, anything arising?

MS FARNDEN: No, thank your Honour.

HIS HONOUR: Mr Rowney, anything arising.

MR ROWNEY: No, thank your Honour.

HIS HONOUR: Thank you each for your assistance. Adjourn the court.