

# TRANSCRIPT OF PROCEEDINGS

INDUSTRIAL MAGISTRATES COURT

SMITH BL, Industrial Magistrate

MTIS-MAG-00001529/09

MINING AND QUARRYING SAFETY AND  
HEALTH ACT

Complainant

and

APIMELEKI NIUBASAGA RABUKA

Defendant

MOUNT ISA

..DATE 16/09/2009

..DAY 1

**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.

DELISSA PIGLIAFIORI APPOINTED AS RECORDER.

1

BENCH: I'm dealing with a matter set down for trial today, a matter under the Mining and Quarrying Safety and Health Act, I believe section 31. The complainant is a - in the name of Daniel Joseph Hunt and the defendant's name - please excuse my pronunciation, defendant - I believe is Mr Apimeleki Niubasaga Rabuka, R-A-B-U-K-A. I apologise for the mispronunciation. The matter's listed for hearing for the next - today and the next few days. Would you please announce your appearance for the record?

10

MR MACKENZIE: May it please the court, your Honour, my name is MacKenzie, initials DR, barrister, instructed by the Crown Law Office in relation to this matter.

BENCH: Thank you, Mr MacKenzie.

20

MR SAVU: Yes. Please the court my name is Savu, initial T, I appear on behalf of the defendant Mr Rabuka.

BENCH: Thank you, Mr Savu. Gentlemen, any preliminary matters to be disposed of before we start?

MR MACKENZIE: I think we made use of the time this morning to dispose of those matters, your Honour.

BENCH: Thank you.

30

MR MACKENZIE: I'm in a position to give a - an outline, an opening of the Crown case in this matter-----

BENCH: Thank you.

MR MACKENZIE: -----the prosecution case.

BENCH: Thank you.

40

MR MACKENZIE: Your Honour, mining is inherently a dangerous activity, and the Mining And Quarrying Safety and Health Act was passed in the late 1990s to shift responsibility for health and safety at a corporate level to all those participating in mining by way of a joint obligation which, under the auspices of the Act, is spread right down from the senior site executive to the lowest paid work. Mr Rabuka has been charged pursuant to section 31 of the Act with breaching one of these obligations. And further, in doing so by way of a circumstance of aggravation, caused the death of Michael Earl Auld.

50

It's important to note, in my respectful submission, that Mr Rabuka is not charged with a criminal offence like manslaughter; he's rather charged with breach of a statutory duty. Classic criminal defences, such as those outlined in section 23 and section 24 of the Queensland Criminal Code, do not apply specifically to this legislation. The defences are



found primarily in section 45 of the Act, where the onus is upon Mr Rabuka to establish on the balance of probabilities either that (1) he took reasonable precautions and exercised proper diligence to prevent the contravention, if it's so found; or (2) the commission of the offence, that is the breach of the contravention, was due to causes which - beyond which he had no control. Now, in order to limit the factual matrix that might flow in this matter, the parties have agreed to some joint admissions and I might tender those at this stage, your Honour.

BENCH: Thank you.

MR MACKENZIE: They have been signed by an officer from the Crown Law Office and by the defendant himself. They are self explanatory, but in effect take away some of the issues that might loom large in one of these prosecutions.

The charge before the court is that on or about the 17th day of January 2008 at the BHP Belington Cannington mine site, it's given the mine lease number, in the Magistrates Court of Cloncurry the defendant, a person on whom safety and health obligations were imposed, failed to discharge those obligations contrary to section 1 of the Act. And the contraventions caused the death of Michael Earl Auld.

Now from that, in my respectful submission, there are effectively four elements that need to be proved beyond a reasonable doubt. First of all, that the BHP Billiton Cannington mine was a mine which, from those admissions, is in effect tidied up in my respectful submission. (2) The defendant was subject to health and safety obligations which, once again, is cleared as an issue through those admissions. (3) The defendant failed to discharge such safety and health obligations under the Act - of course, that's not by admission. And (4) The circumstance of aggravation, that this failure caused the death of Mr Auld. Now, others might have a different view of what the elements of this offence are, but in my respectful submission it's relatively straightforward.

Now, your Honour, before the court is a complaint and summons. Unfortunately, I do need to make an application to amend these particulars - I understand it's not opposed - the reason being is that late yesterday afternoon in a conference with the principal Crown witness in this matter, a Mr Box, I was in - either the prosecuting authorities were informed for the first time that Mr Box's recollection was that the horn on the subject vehicle was sounded, which is in compliance with a - a safety obligation, in effect. That means that as particularised, the case against Mr Rabuka had two heads: One was pursuant to section 36 (1)(a) and one was pursuant to section 36 (2)(b). The (1)(a) clearly particularised the horn - or the not blowing of the horn as the particular of the 36 (1)(a) provision. That can now longer be - can now no longer be sustained and, accordingly, I would ask that the paragraphs (5) and (6) be deleted from the complaint and summons as particulars. And also in paragraphs 10 and - the reference to sounding of the horn, and paragraphs 11, the word

contraventions in its plural form be reduced to its singular form and the words - and section 36 (1)(a) be deleted from paragraph 11. I've had - I've taken the liberty of actually making red deletions, for the assistance of the court, to show the variation to the particulars that I seek leave to make and I understand that that's not opposed.

1

BENCH: Is that by consent, Mr Savu, that the copy tendered by Mr MacKenzie does seem to in fact agree with - with what he indicated, deleting (5) and (6), amending (10) and (11) in the way in which it's shown?

10

MR SAVU: Well, that supposedly is the logical fall - order to fall back on.

BENCH: And that's - certainly seems to me saying - very well. By consent I formally, then, amend the particulars in that - as indicated by Mr MacKenzie and as outlined in the sheet that he's tendered for my convenience.

20

MR MACKENZIE: Thank you. Your Honour, I did have some copies of the legislation but I seem to have not brought them to court. I'll-----

BENCH: I've taken the liberty of - of copying it off myself.

MR MACKENZIE: All right.

BENCH: Thank you.

30

MR MACKENZIE: I was just going to take your Honour to - to some particular sections.

BENCH: Okay, I'll-----

MR MACKENZIE: I'll do that after lunch.

BENCH: That'll be fine.

MR MACKENZIE: It's just for your assistance.

40

BENCH: Yes.

MR MACKENZIE: The relevant sections, of course, are section 31, section 36 and section 45. I had copies but I-----

BENCH: That's all right.

MR MACKENZIE: Now, your Honour, just - now that the prosecution case has been, in effect, slightly reparticularised, the apposite section is 36 (2)(b) which says this : "A worker or other person at a mine has the following additional obligations at the mine" and (b) "To ensure, to the extent of the responsibilities and duties allocated to the worker or other person, that the risk of injury or illness to any person is managed in the work and activities and under the worker's or other person's control, supervision or leadership so that the risk isn't" - "is at an acceptable level." It's

50



really the last line, "that the risk is at an acceptable level" which explains the prosecution's position in this matter. Now, I'll come back to the specific factual particulars that the Crown relies on after I've outlined the - the witness evidence.

1

Your Honour, I have a document which I won't tender, but I'll hand up for the assistance of the court. It is a list of all of the witnesses and all of the exhibits that are proposed to be tendered and called in this matter.

10

BENCH: Thank you, that will be helpful.

MR MACKENZIE: It might be of some assistance; and I really only propose in this opening to speak generally to that list.

The first witness is Hermann Fasching, who is the local district inspector of mines and the chief investigating officer in this matter. He will give evidence from (sic) the court that he was informed, as was required under the legislative provisions, of the death of Michael Earl Auld on January the 17th 2008.

20

He attended at the mine site and went about gathering evidence. He collected a number of items which are the exhibits - which will be exhibits tendered without consent - with consent, through him. The first, of course, is the life extinct form from the Flying Doctor, Dr Alison Murphy, who attended. The second is an autopsy certificate - it's probably a bit of duplication but it certainly indicates the cause of death, which is accepted in the agreed admissions. The third document is a scale plan which might be of some assistance. It is complemented by two other documents, which are a plan view and a section view of where this incident took place. There will be two series of photographs, those taken on the 18th of January 2008 and those taken on the 20th of January 2008. A pre-start book seized from the Volvo IT, which is the piece of machinery, the subject piece of machinery, a service tag taken from that machinery and then, an important piece of evidence, will be an electronically recorded interview which tookplace between the defendant and Mr Hermann on the 6th of February.

30

40

Now, just dealing with those bodies of evidence, if I could - if I could just hand up to the court, please, your Honour - this is just by way of opening - the first photograph, which is photograph No 1, is actually a photograph of the scene where this incident took place. A Toyota Landcruiser utility which, if I could quickly ask your Honour to go to indeed the last photograph, photograph No 41, which is depicted there, was parked not - not as it is in photograph 41 but nose in, in line with the concrete slab that comes down in photograph No 1. This is a view from the back of that Toyota. That's to give your Honour just some idea of the area that we're dealing with. It was 375 metres below ground at the 375 metre level.

50



Now, the next witness from whom your Honour will hear evidence, and I'll go back to the interview with Mr Rabuka shortly, is a Graham Charles Box. Mr Box's evidence is important because he is the only person left of three people, apart from the accused, that can give evidence of what actually took place. He will tell the court that on that day, and it seems it was the first this trio had worked together, he, Mr Auld and the defendant were sent to perform what's called an inversion or an isolation of air on the 375 level. They attended another job first and then he, driving the Toyota LV it's referred to, for light vehicle, and Mr Auld, the deceased, drove the Toyota to the area and shortly afterwards the defendant arrived driving a piece of machinery called a Volvo IT. IT stands for integrated transit carrier.

Now, if I could just ask your Honour to go to photograph No - just trying to find a good photograph, perhaps photograph No 12, your Honour - you'll see the piece of machinery that I'm talking about. It is fitted with what is called a tool box cage, or a carrying cage, at the front and it is designed for transporting equipment around a mine, but it also has the ability to lift work - used as a raised platform so that individuals might work from it at a height. Your Honour will see it's quite a tall piece of machinery. It's about 3.5 metres tall, there's about a clearance of less than a metre above that. That's the height at which they were working off the ground to repair a piece of pipe which, if I could just ask your Honour to go over to the next group of photographs, it's photograph No A that were taken on the 20th of January, to effectively put a valve in at that height. Yes, that's the one.

BENCH: Yes.

MR MACKENZIE: Now, Mr Box will tell the court that the defendant arrived driving the Volvo IT. He is unclear as to whether or not he parked the vehicle. If I could take your Honour back to photograph No 1 - in fact, probably photograph No 2 is a little better. He's a little unclear from his recollection as to whether or not he parked the vehicle effectively as it appears in the photograph now, facing towards what was the back of the Toyota LV or whether he parked it around the corner but either way, Mr Rabuka, the defendant, was instructed by Mr Auld, who was the senior person and his mentor in safety, to get the IT and bring it close to the back of the Toyota Landcruiser. Mr Auld was standing at the back of the Landcruiser on the passenger side; Mr Box was standing a little closer, more adjacent to the driver's side of the rear of the Toyota LV.

The vehicle had to travel somewhere in the order of 10 metres. It came forward. Mr Box's recollection now is that the horn sounded before the vehicle moved off, which is consistent with the Traffic Rules - Underground. But he and Mr Auld had their backs turned and were working and looking at equipment that had to be taken from the back of the Toyota and placed into the box on the front of the Volvo IT. When the box was about a very short distance behind him, about half a metre to a

metre, he turned and realised it was there. It was coming in onto the back of the utility of the Toyota at an angle, which might be more consistent with it coming around the corner than coming straight on, but nevertheless what happened was Mr Auld, the deceased, was crushed by the cage of the box. It wasn't particularly high off the ground against the back of the Toyota Landcruiser. But Mr Box wasn't. His arm initially - he put his arm up to signal to the driver of the IT, who is the defendant, to stop; his arm was pinned. He managed to get it free. He signalled to the driver, the defendant, to reverse back which he did. Mr Auld sort of collapsed to the ground and received crush injuries to his chest. He indicated that he needed to get to the surface. All of the emergency procedures went in place. The rest of what took place is really not an issue. He was treated. He was taken to a fresh air emergency treatment area, he was treated by nurses and emergency staff. Eventually he was taken to the surface but on the surface was pronounced dead, he had died as a result of those crushing injuries. That really will be Mr Box's evidence of what took place.

BENCH: Can I just ask you one - I know we haven't started on evidence proper-----

MR MACKENZIE: Yes.

BENCH: -----but I'm trying to - when the vehicle was parked here, what - can you just repeat what you believe the evidence will be in relation to where they - Mr Box - is it B-O-X?

MR MACKENZIE: Yes, your Honour.

BENCH: And where the deceased were standing?

MR MACKENZIE: Can I be of more assistance, perhaps, to the court if I take your Honour to the second lot of photographs, right at the very end on the 20th? There was an attempt to reconstruct what took place on the limited amount of material that they had. Your Honour will see two men.

BENCH: Sorry, No 20, is it?

MR MACKENZIE: It's photograph No P.

BENCH: P? Sorry, that's - there is one there.

MR MACKENZIE: Yes; your Honour will see two men standing?

BENCH: Yes.

MR MACKENZIE: The younger man would be the deceased and the older man would be Mr Box's position.

BENCH: Thank you.

MR MACKENZIE: Now, that is a reconstruction on the evidence that was available.



BENCH: I knew they were on either side and I - and that's clarified what you were saying was correct, thank you.

1

MR MACKENZIE: But that appears to be about the height that the box would've come through. It has to be lifted off the ground, but the usual course is that it's not lifted very far from the ground.

BENCH: So that photo shows it sitting on the ground, but to move forward it's lifted up. Is that right?

10

MR MACKENZIE: Yes.

BENCH: Okay. And is it - Mr Box had which arm pinned? Is he saying - do you know?

MR MACKENZIE: His arm that was pinned was the one that is closer to the deceased because of the angle that it came in at.

20

BENCH: So left arm?

MR MACKENZIE: Yes, his left arm.

BENCH: Okay, thank you.

MR MACKENZIE: I might just quickly go back to the interview, the electronically recorded interview with the defendant. It is an interview where clear details of precisely what took place are not clear from the questions and answers because in attendance at the interview was a Mr Seymour, a solicitor, and on legal advice, as he is perfectly entitled to do, Mr Rabuka did not answer directly questions about the immediacy before and at the time of the incident which involved a crushing of the deceased. It's admitted - it contains a number of things in relation to the background of what was happening during the day and that's why it's being played, but in terms of actually gleaning a factual account of Mr Rabuka's discussions with the investigating officer it won't be found in that interview, if that's of some assistance to the court. It - there are certain things that happened that - that he talks about which are slightly relevant, but in terms of an actual factual scenario of what took place it's not clear from the interview. And, your Honour, at the end of the day, with the deepest of respect, will have to instruct yourself not to take any adverse inference, in accordance with the Petty and Maiden rules, of the fact that this man has elected not to speak to authorities about things. And that's the prosecution's position at the outset - I'm sorry, it was Mr James Simpson, I apologise, I'll correct - that was the name of the lawyer that was with him.

30

40

50

Now, your Honour, we might have to start with the witness after lunch, a Mr Shane Rodney Johnson. He's organised to be video-linked from Cannington mine. He has some essential responsibilities today. There are a number of documents that are to be admitted through him. He will-----



BENCH: What time is he scheduled for?

1

MR MACKENZIE: Well, 2 o'clock we have, hopefully, a meeting, a conference with him to have everything set up.

BENCH: Okay.

MR MACKENZIE: Mr Johnson is a BHP Billiton employee. The reason he's being called is to explain to the court the relationship between BHP Billiton and EROC. Now, EROC, now called Redpath, were the employers of all of these three relevant men, but BHP Billiton had a series of requirements in relation to the way the mine was operated that were transposed and adopted and accepted by EROC, so it's necessary to produce some documents, which are BHP Billiton documents, through Mr Johnson. His evidence is hopefully relatively uncontroversial, but it's necessary to produce these documents through him on the video-link. Your Honour will see that they're documents in relation to the operation of mobile equipment underground, safe work instructions, fatal risk protocols and the training records that BHP hold of Mr Rabuka.

10

20

The next witness we hope to have today is a Mr Larry Wilson, who's a local diesel fitter and maintenance operator from Mount Isa Diesel - sorry, it's Isa Diesel and Earthmoving Repairs. He actually inspected the Volvo IT after the incident and found that everything was in fairly much clear operating order. There were a couple of minor defects but nothing would've - that would've had any bearing on a loss of control of this vehicle.

30

The next witness is a Mr Rodney Stephen Seymour. He was the deputy superintendent of EROC on the day in question and in fact the boss, if you like, of these three men. He will give evidence in relation to the relationship with BHP and how these people that worked for EROC were also served by BHP.

Similarly, a man by the name of Malcolm Edward Campbell will come to give evidence, probably tomorrow morning with Mr Seymour. He's a co-worker of these three, and will give evidence of his understanding of the defendant's ability to use the IT and other matters generally involving how safety regimes were put in place for workers.

40

The next witness tomorrow will be an expert, Trudy Tilbury. She has degrees and is ergonomic expert. She did an ergonomic assessment of the Volvo L120D tool carrier and provided a report. She was specifically looking at the possibility of someone erroneously pressing down on what is a - what's called a diff lock cover, mistakenly pressing that as opposed to the brake, as one possible explanation as to how all of this happened and she will provide an expert opinion that that's an error that is unlikely.

50

Timothy Paul Westendorf was the training officer for EROC. He is being called to introduce a number of training certificates and the training history and to provide evidence that in his opinion, the defendant was a sufficiently trained and competent operator of the IT Volvo.

And that really is a run down of the evidence, your Honour. Much of it is the introduction of documents and background, and much of it, in my respectful submission is probably not going to be particularly controversial. It is the inferences of fact that might be drawn from those matters that will be relevant in these proceedings.

Now, unless there's any specific factual issue that your Honour wishes to touch upon I'd like to state, for the assistance of the court, the factual basis upon which the prosecution relies in this matter and it essentially is this: The defendant failed to manage the risk of injury to the deceased and, accordingly, did not reduce the risk to an acceptable level by doing one of four things - or not doing one of four things. Firstly, he trammed, that's T-R-A-M-M-E-D, which really is moved, the subject Volvo IT towards the deceased at an unsafe speed, knowing that the deceased could potentially be caught between the IT and the Toyota LV. Secondly, as the Volvo IT continued to move forward he failed to keep a proper look out for the deceased, knowing that the deceased could potentially be caught between the Volvo IT and the Toyota LV; (3) as the IT continued to move forward he failed to correctly apply the service brake, knowing that the deceased could be potentially caught between the Volvo IT and the Toyota LV; and (4) as the IT continued to move forward he failed to apply the hand brake or put the transmission into reverse or operate some other mechanism to stop the vehicle, knowing that the deceased could potentially be caught between the Volvo IT and the Toyota LV. I can have those four matters typed up and provided to the court if that's of some assistance.

BENCH: Yes, that maybe helpful. I've made some notes, but that's the basis on which you're relying.

MR MACKENZIE: They're the four - yeah, they're the four bases on which the prosecution says the risk was not maintained at an acceptable level. In effect, what the prosecution says is this man should've told those pedestrians to get away before he even moved off in that vehicle. Unless I can be of any further assistance, your Honour-----

BENCH: No, thank you.

MR MACKENZIE: -----that really is the outline of the prosecution's position. I'm not sure if it's even worth starting with Detective Fasching-----

BENCH: No. Are you going to tender the exhibits through the various witnesses?



MR MACKENZIE: Yes, your Honour.

1

BENCH: Are you?

MR MACKENZIE: Yes, as outlined in this document.

BENCH: All right. And - okay. So, I take it that Mr Fasching will tender Exhibits A through to J?

MR MACKENZIE: Yes, your Honour.

10

BENCH: On the next it starts off with No 3. I don't know what that means, I'm confused.

MR MACKENZIE: That's just simply a typographical error.

BENCH: That's going to be 2, is it? That's the second witness?

MR MACKENZIE: I don't know what it is. I apologise, I didn't check - I checked this document but obviously not very well.

20

BENCH: So is that meant - is that meant to indicate simply the next witness?

MR MACKENZIE: Yes, your Honour; there should only be eight.

BENCH: And there's no Take 5 document dated the 16th day of January '08, what's that mean?

30

MR MACKENZIE: That's a document that Mr Box will recognise.

BENCH: All right.

MR MACKENZIE: It's a document that's a safety-----

BENCH: So he'll tender that document, and Mr Johnson will tender those - the ones-----

MR MACKENZIE: Four-----

40

BENCH: Okay.

MR MACKENZIE: -----four training record matters.

BENCH: All right. Now at this stage, then, do you want to adjourn for - at this stage, if that's the opening? Unless Mr Savu wants to - are you happy with that opening, Mr Savu?

MR SAVU: Your Honour - no, your Honour, I - I believe - I believe my colleague, my learned friend, from the document they're - just a clarification. The Take 5 document that's dated under the second witness on the second page-----

50

BENCH: Yes.

MR SAVU: -----is that the same one that's under - the same one  
for Seymour on page-----

1

MR MACKENZIE: They're both to be [indistinct].

MR SAVU: Okay, so - no, that's fine. And also I'd just ask  
my learned friend, your Honour, was when the ground was typed  
up and given a copy - the court a copy-----

MR MACKENZIE: Yes, [indistinct].

10

BENCH: Okay. Okay, does it have - suit everyone to - to -  
how about we meet back at 2 o'clock, just over an hour, and we  
shall go straight through for a number of hours until, you  
know, 4.30?

MR MACKENZIE: Could I ask for it to be about five past 2?

BENCH: Five past 2?

20

MR MACKENZIE: Just so we can get that - that video-link  
organised.

BENCH: Very good, five past 2, and then we can probably go  
through till 4.30 or so.

MR MACKENZIE: That's right.

BENCH: Just a couple of hours to make some progress.

30

MR SAVU: That's fine.

BENCH: Thank you. Adjourn the court, thank you.

THE COURT ADJOURNED

40

50