Damday Pty Ltd v Work Health Authority [2014] NTSC 7

PARTIES:	DAMDAY PTY LTD
	v
	WORK HEALTH AUTHORITY
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NO:	JA 26 of 13 (21245996)
DELIVERED:	11 March 2014
HEARING DATE:	13 September 2013
JUDGMENT OF:	SOUTHWOOD J
APPEAL FROM:	LOWNDES M

CATCHWORDS:

CRIMINAL LAW – APPEAL AGAINST SENTENCE – fine for a regulatory offence – manifestly excessive – general deterrence – subjective factors – prior good character – statutory interpretation – s 55 *Workplace Health and Safety Act* (NT) – appeal dismissed

Workplace Health and Safety Act (NT) s 55

JKL v The Queen [2011] NTCCA 7; *Kelly v The Queen* (2000) 10 NTLR 39, followed

REPRESENTATION:

Counsel:

Appellant:	J Adams
Respondent:	R Murphy

Solicitors:

Appellant:	Pipers Barristers & Solicitors
Respondent:	Murphy & Associates

Judgment category classification:	B
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Damday Pty Ltd v Work Health Authority [2014] NTSC 7
No. JA 26 of 13 (21245996)

BETWEEN:

DAMDAY PTY LTD
Appellant

AND:

WORK HEALTH AUTHORITY
Respondent

CORAM: SOUTHWOOD J

REASONS FOR JUDGMENT

(Delivered 11 March 2014)

Introduction

[1] On 5 April 2013, following a plea of guilty, the appellant was convicted by the Court of Summary Jurisdiction of an offence contrary to s 55 of the *Workplace Health and Safety Act* (NT), fined $120,000 and ordered to pay a victim assistance levy of $200. At the time of the offence, the maximum penalty for a corporation was a fine of $685,000.

[2] The appellant has appealed against the sentence. The notice of appeal pleaded the following grounds of appeal.

1. The sentencing magistrate erred by imposing a sentence that was manifestly excessive in all the circumstances of the offender and the offence.

2. The sentencing magistrate erred by placing too much weight on general deterrence.

3. The sentencing magistrate erred by calculating the fine based on the 20 percent rule, thereby placing too much weight on the authorities that were placed before him, and little or too little weight on the circumstances of the offending in the Northern Territory.

4. The sentencing magistrate erred by characterising the appellant as having positive good character and neglecting to reflect that in the sentence.

5. The sentencing magistrate erred by failing to quantify, and then provide a proper discount for the plea of guilty, which was indicated at the earliest opportunity.

[3] When the appeal was heard, the appellant abandoned ground 3 and was given leave to argue the following ground.

6. The sentencing magistrate erred by taking into account in sentencing *the results* of the offending when sentencing for a breach of s 55 of the *Workplace Health and Safety Act*.

Section 55 of the Act

[4] The *Workplace Health and Safety Act* has been repealed, but was in force at the time the appellant committed the offence. Section 55 of the Act stated:

> (1) An employer has a duty (the *employer's general statutory duty of care*) to ensure as far as reasonably practicable, that workers and others are not exposed to risks to health or safety arising from the conduct of the employer's business.
>
> (2) If the employer is a natural person working in the employer's own business, the employer is to be regarded as a worker to whom the general statutory duty of care is owed by the employer him/herself.

(3) An employer carries out the general statutory duty of care by proceeding, in a systematic way, to:

(a) identify hazards; and

(b) identify, and assess the seriousness of, risks resulting from the hazards; and

(c) determine appropriate risk management measures:

(i) to eliminate, as far as reasonably practicable, avoidable risks; and

(ii) to minimize, as far as reasonably practicable, unavoidable risks; and

(d) carry the risk management measures into effect; and

(e) monitor and review the effectiveness of the measures.

(4) An employer who fails to comply with the employer's general statutory duty of care is guilty of an offence.

[5] The section creates a general statutory duty of care which is owed by employers to their workers and others; specifies the manner in which the statutory duty is to be carried out; makes it an offence for an employer to breach the general statutory duty of care; and provides a significant penalty for a breach of the duty of care.

[6] The particulars of the count to which the appellant is taken to have pleaded guilty are as follows.

> From 1 to 16 December 2011 at Darwin in the Northern Territory
>
> Being an employer, you did expose workers, namely Patrick BIRD and three others to health and safety risks arising out of the conduct of your business when it was reasonably practicable for you to have eliminated or minimised that risk.

Particulars

(a) Your business is the installation and maintenance of air-conditioning.

(b) In the conduct of your business you required or allowed workers to store pressurised flammable gas cylinders containing acetylene gas and MAPP gas in enclosed vehicles, namely four Toyota Hi-Ace vans. Those vehicles did not have sufficient ventilation to prevent the build-up of flammable gas that may escape from the pressurised gas cylinders.

(c) In requiring or allowing your workers to store pressurised gas cylinders in unventilated enclosed vehicles you did expose those workers to risk of death or serious injury from explosion caused by the ignition of those built up flammable gases.

[7] The appellant was not charged with an aggravated offence so that s 82 of the *Workplace Health and Safety Act* has no application in this appeal.

The facts

[8] The facts of the offending are as follows.

[9] Since October 2007, the appellant has conducted an air conditioning installation and maintenance service from its premises at Berrimah. A significant proportion of the appellant's business requires attendance at worksites throughout the greater Darwin area and the use of oxy acetylene equipment.

[10] As at December 2011, the appellant employed over 48 employees. Nine of those employees were refrigeration mechanics. The appellant supplied some of those mechanics with vehicles to be used in the course of their employment and allowed them to garage those vehicles at home overnight.

In total there were five such vehicles, namely, four Toyota Hi-Ace vans and a Toyota utility.

[11] Each of the appellant's Hi-Ace vans was fitted with an *open steel cabinet* that was used to store two D size gas cylinders each weighing 9.5 kilograms and having a height of 585 millimetres and diameter 175 millimetres. One of the cylinders contained oxygen and the other acetylene. The cylinders were stored standing up, side by side in the cabinet and held in place by a steel restraining bar. The steel cabinet was mounted on the inside of each van at the rear driver's side of the vans.

[12] Each of the appellant's Hi-Ace vans had a driver and passenger door, which allowed access to the front of the vehicle, a sliding door located on the rear passenger side of the vehicle and a rear door, both of which allowed access to the vehicle's load space from the side and rear of the van respectively. The only ventilation for each of the vans consisted of the driver and passenger windows, which could be opened and closed either partially or fully, and the doors of the van which could be left open.

[13] It was normal practice for the appellant's workers to pick up E size acetylene gas cylinders each weighing 21 kilograms with a height of 929 millimetres and a diameter 215 millimetres from the supplier and transport them to various job sites throughout Darwin. The vehicle normally used for this purpose was the appellant's Toyota utility. On or about

7 December 2011 the appellant's utility broke down and was off the road until after 15 December 2011.

[14] The appellant's workers then began transporting E size acetylene tanks in the appellant's vans by laying them down on the floor of the van. They were transported to and from jobsites in this manner and secured in each of the vans overnight. This practice continued until 15 December 2011.

[15] On the evening of Wednesday 14 December 2011, Patrick Bird, a refrigeration mechanic employed by the appellant, drove one of the appellant's Hi-Ace vans home, parked it in his driveway and secured it for the night. Located in the load space of the van at this time were 7 pressurised gas cylinders.

[16] Located in the van's open cabinet were two D size cylinders, one contained oxygen, and the other acetylene. Located on the floor of the van were two E sized cylinders, one contained acetylene and the other oxygen; two D size cylinders both of which contained nitrogen; and one 16 ounce cylinder containing MAPP gas.

[17] Nitrogen and oxygen are inert gases and are not flammable. Acetylene and MAPP gas are both highly flammable. Throughout the night, and following morning, either acetylene gas escaped from the E sized gas cylinder located on the floor of the van, or MAPP gas escaped from the 16 ounce gas cylinder also located on the floor of the van and the interior of the van filled with flammable gas.

[18] At 6.30 am the following morning, Mr Patrick Bird approached the van. He stopped directly opposite the driver's side door and activated the van's keyless entry device. When he did so, a spark from the van's door locking mechanism or the interior light ignited the gas that had built up inside the van overnight causing an explosion.

[19] The explosion was of such force that Mr Bird was killed. His body came to rest 10 meters away. The work van was also destroyed, and the vehicle parked next to the van and Mr Bird's house were significantly damaged, as were some of the windows in the surrounding houses.

[20] During the investigation of this matter the appellant was directed under s 72 of the *Workplace Health and Safety Act* to provide documents pertaining to the storage and transport of pressurised flammable gas cylinders. In compliance with that direction the appellant provided the following documents to NT WorkSafe: (1) the Chemical Register which listed the chemicals used by the appellant in the course of its business, in particular acetylene and MAPP Gas (Heat Craft); (2) the Material Safety Data Sheets pertaining to those chemicals, in particular MAPP Gas and acetylene, which both advise to "keep container in a well-ventilated place"; and (3) the Safe Work Method Statement # 20 entitled, *"Safe Handling/Storage of Gas Cylinders."*

[21] The Safe Work Method Statement required the appellant's workers to refer to the material safety data sheets, the Australian Code for the Transport of

Dangerous Goods and statutory state requirements. It also identified *"escaping gas fire and explosion"* as hazards when transporting the gas cylinders and stipulated various "safe procedures" to be used when transporting the gas cylinders. However, none of those procedures pertained to adequate ventilation of the vehicle when storing or transporting pressurised flammable gas cylinders.

[22] The appellant's workers were not made aware of or provided with training in Safe Work Method Statement # 20 prior to the explosion.

[23] At the time of the offence, it was reasonably practicable for the appellant to have eliminated or minimised the hazards associated with the build-up of flammable gases in its enclosed vehicles. Some reasonably practicable measures that may have been employed by the appellant to eliminate or minimise that hazard include:

1. Having pressurised gas cylinders containing flammable gas delivered to and retrieved from the jobsites by the gas supplier as required.

2. Using a utility, trailer or other open vehicle to collect, distribute and retrieve pressurised gas cylinders containing flammable gas as required.

3. Installing in each of its vans a purpose built sealed compartment that provides adequate ventilation of any leaking gas to the outside of the vehicle and providing work place instruction and training to its workers requiring them to stow pressurised gas cylinders containing flammable gas in the purpose built cabinet.

[24] Immediately following the explosion, the appellant removed all gas cylinders from its remaining enclosed vehicles, implemented a work place

instruction banning staff from transporting all gas cylinders in enclosed vehicles and commenced a workplace practice where gas cylinders were delivered to and retrieved from worksites as required in an open vehicle.

[25] Since that time the appellant has installed sealed vented gas cabinets in each of its work vans, updated its safe work method statements and provided training to its staff in accordance with the safe work method statements.

Objective seriousness

[26] In my opinion, given the purpose of s 55 of the *Workplace Health and Safety Act*, the main factors which affect the level of objective seriousness of an offence against s 55 are: (1) the level of harm or danger to which workers and others are exposed by an employer breaching the general statutory duty of care; (2) the likelihood or risk of harm occurring; (3) the prevalence of such breaches: (4) the length of time the particular breach has continued to occur; (5) the number of workers and others potentially affected by the breach; (6) whether the breach was easily identified; (7) whether the breach was inadvertent or the result of an oversight or deliberate; (8) whether the potential hazard can be easily managed; and (9) whether the employer has a system in place for reviewing or monitoring the management of the relevant hazard.

[27] The offending in this case was serious offending. The maximum penalty was a fine of $685,000. Acetylene and MAPP gases are very dangerous substances. They are highly flammable. There was a considerable amount of

acetylene gas in the van which was unrestrained and on the floor of the van. The worker had no option but to transport the gas in the way that he did. The appellant conceded in the Court of Summary Jurisdiction that leakage in acetylene cylinders increases when they are not restrained and it is most likely that the E sized cylinder of acetylene gas, which was unrestrained and on the floor, was the gas cylinder that leaked. As is demonstrated by the damage and harm which occurred in this case, the method being used to transport the gas was very dangerous and there was a risk of great harm to workers and others. Four of the appellant's employees were exposed to the risk for nine days or thereabouts. Flammable gas was regularly carried in the appellant's four vans over the nine day period. There was a risk of great harm to people, other than workers, as the workers driving the vans did work at people's homes and garaged their vans at their homes overnight. The risk was easily and inexpensively managed and averted by making any of the arrangements referred to at [23].

[28] Although the level of risk, as opposed to the extent of harm, has not been quantified in this case, it is very significant to note that it was the simple and everyday act of the worker activating the van's keyless entry device at 6.30 am before to going to work that is likely to have caused the spark that caused the explosion.

[29] The objective seriousness of the offending is qualified by the fact it was the appellant's usual work practice to use a Toyota utility with an open tray to collect, distribute and retrieve the pressurised gas cylinders containing

flammable gas. However, the Toyota utility had broken down and no alternative arrangements were made while it was being repaired. The decision to then transport acetylene gas cylinders on the floor of the vans appears to have been the result of an inadvertent lapse in the standard of care or oversight rather than a deliberate choice to ignore the hazard while the Toyota utility was being repaired.

[30] In my opinion, the submission of counsel for the appellant in the Court of Summary Jurisdiction, which was adopted by counsel for the appellant in the Supreme Court, that the objective seriousness of the offending is qualified by the fact the hazards created by such work activities are less prescriptively regulated in the Northern Territory than they are interstate, cannot be sustained. Knowledge of how dangerous both acetylene gas and MAPP gas are does not stop at the border and there is a clear duty imposed on the employer under s 55 of the *Workplace Health and Safety Act* to safely manage the use of hazardous substances.

Subjective factors

[31] The appellant was an outstanding corporate citizen. It is a small business that employs 48 people. This was the first breach of the general statutory duty of care that was committed by the appellant in its five years of operation. The offending was out of character. The appellant suffered a significant financial loss as a result of its breach of duty. However, counsel for the appellant, Mr Adams, fairly and frankly conceded that the appellant

had the capacity to pay the fine that was imposed by the Court of Summary Jurisdiction.

[32] The appellant was remorseful, immediately remedied the breach after the incident which is the subject of this appeal and engaged in a number of restorative acts. The first act of the proprietor of the appellant, Mr Peters, was to volunteer to identify the body of the deceased worker. Within the week he called the deceased worker's family in Ireland and spoke to them about the tragedy. He fully cooperated with NT WorkSafe. He organised on-site psychologists for all his staff, the death notice in the newspaper, and flowers for the Catholic mass held the next day. He gave assistance to the deceased's family in organising the embalming process so the deceased's body could be repatriated to his family in Ireland. He assisted the family in liaisons between the police and the Coroner. He set up a special award at Charles Darwin University. The award was set up because Mr Peters wanted the safety issue to be in the forefront of all apprentices' minds. He sponsors an on-going award called the Paddy Bird Memorial Prize for Best Final Year Air Conditioning Apprentice with a Consideration to Safety.

[33] In the days following the explosion he liaised directly with NT WorkSafe about how to rectify the ventilation issue once it was determined to be the likely cause of the explosion. He modified the appellant's work vehicles and installed appropriate storage boxes and vent kits.

The remarks of the sentencing magistrate

[34] During his remarks on sentence, the sentencing magistrate made the following statements which are of relevance to this appeal.

> I think I should start, firstly, with some analysis of s 55 of the Act, in that the prosecution took the view that it was permissible for the court to take into account the fact that the breach of the duty of care resulted in the death of a person. I think that's an important issue because it potentially bears upon the penalty to be imposed by the court or it may affect the appropriate penalty.
>
> It's noted that the offence, contrary to s 55, the gravamen of that offence is exposure to risks to health or safety. So, it does not, in itself, concern itself with a result, as such, in terms of injury or other harm, or even death. It seems to me that, even if a risk did not materialise, then a company would still be exposed to criminal liability, under that provision.
>
> I'm also mindful that s 82 of the *Workplace Health and Safety Act* deals with aggravated offences and subs (1) provides an offence against this Act is aggravated if the person who commits the offence does the act and makes the omission, giving rise to the offence, intentionally. And, the person ought to know that the offence may result in death or serious injury. And, the offence, in fact, results in the death of a person.
>
> If those circumstances exist then the maximum penalty is increased. At the end of the day I believe that, when I come to sentence the defendant corporation, I cannot take into account the fact that this incident tragically resulted in Mr Bird's death. I think if I were to do that, then I would be treating the present offence with which the company has been charged, as an aggravated offence.
>
> Not only that, I that if I were to take into account the fact of death, then I would be running afoul of what the high court said in *De Simoni's Case*, and that is that when sentencing an offender for a particular offence, regard must not be had to a circumstance that would lay a foundation for a more serious offence.
>
> So I think, on those twin bases, I don't believe the court can take into account the fact that this incident resulted in a person's death.

However, having said that, I believe it is entirely proper, to take into account that in this particular case the type of risks contemplated by s 55, in fact did materialise and did result in harm, but go no further than that.

I think that a distinction needs to be drawn between cases where there is a potentiality for harm and an actuality of harm. And so to that limited extent, I think it is permissible to take into account what materialised here as a result of the breach of the statutory duty, but to do no more than that.

It is largely left to individual and companies, to ensure they comply with the statutory duty, which I must say is spelt out in fairly clear and explicit terms. There seems to be no ambiguity about the nature of the duties. The legislation, in my view, makes it quite clear what companies and individuals are expected to do in this particular aspect of the industry. However, I do accept that the problems that emerged here are not as highly regulated as they are in other places.

However, I am satisfied, on all the material before me, that in this particular case, the defendant corporation did not ensure as far as reasonably practicable that workers and others would not be exposed to risks to health and safety.

In my view, the defendant company could have reasonably foreseen the occurrence of the incident and the attendant risk to the health and safety of its workers. … I am satisfied on the evidence before me that the defendant company failed to comply with the statutory duty of care.

I think in this particular case specific deterrence does not loom large as a sentencing consideration. The defendant company, in my view, previous to this incident, has from all appearances conducted its business in a responsible manner and has always had safety at the forefront.

[*The sentencing magistrate also noted, elsewhere in his sentencing remarks, that prior to this incident the appellant had been a good corporate citizen that had contributed to the local community.*]

Unfortunately, on this particular occasion, it seems to me that more practical measures could have been taken to either eliminate or

reduce the risk. But I think that it is important that hitherto the company has acted, in my view, responsibly and in a safe manner.

Since the incident the defendant company has, in the opinion of the court, reacted responsibly to this tragic incident. And I think it should be given due credit for being reactive in the way that it has.

All that suggests to me that, on this particular occasion, the failure of the company to comply with the statutory duty is something that is out of the ordinary and out of character for this company; in other words, an aberration.

General deterrence is of course another aspect of deterrence. Courts must always be mindful, when sentencing offenders for a contravention of a statutory provision, indeed a regulatory offence, to try ensure as best they can that people or companies that are engaged in particular industries, ensure that they do comply with statutory duties of care.

General deterrence requires, in the individual case, that a penalty be imposed which is designed to discourage others from not complying with statutory duties. So I think in a case like this, as in many cases involved with a regulatory offence, general deterrence is a paramount consideration.

[*The sentencing magistrate noted that counsel for the appellant had raised but not strenuously pressed a no conviction disposition. He then went onto state the following.*]

The court must have regard to the need for general deterrence, the seriousness of the offence in question and, bearing in mind that s 55 creates a regulatory offence, in my view, a no-conviction order would not be appropriate. … a conviction serves the purpose of general deterrence. It is a punishment in itself; it is stigmatic and in my view a foremost tool for giving expression to general deterrence.

In my view, this case … warrants a conviction.

[*The sentencing magistrate then took into account: the early guilty plea, which he considered to be an indication of remorse; the appellant's remorse and contrition; the lack of criminal history; the*

defendant's good corporate character; and the defendant's acceptance of responsibility. He reminded himself of the matters referred to in s 5 of the Sentencing Act, denunciation and protecting the community; *and he then went on to state the following*.]

The usual penalty for a defendant corporation for an offence of this type is a monetary penalty. One must, of course, have regard to s 17 of the *Sentencing Act* which governs the exercise of the power to fine. Relevantly s 17(1) provides that where a court decides to fine an offender, it must, in determining the amount of the fine, take into account as far as practicable (a) the financial circumstances of the offender; and (b) the nature of the burden that its payment will impose on the offender. Subsection 17 (2) provides that a court is not prevented from fining an offender only because it has not been informed about the matters referred to in s 17(1).

In this particular case, there is evidence before the court that, as a result of this incident, the company has suffered a dramatic decline in its economic viability in terms of its income or earning capacity, and its economic turnover or financial turnover. That evidence is not contested and, on the material before me, I am satisfied that as a direct result of this incident there has been a downturn in the earning capacity of the company.

As to determining what the financial capacity of the company is, that becomes more difficult. I have other evidence before me which gives some general indications as to what would be the ability of the company to meet the fine. In this case there are no balance sheets or profit and loss statements which might, if they were before the court, give the court a clearer view of the current capacity of the company to pay any particular fines that the court might be considering. Although I can take into account the diminished economic capacity of the company, I am left in a very grey area as to what that capacity actually is.

I must also take into account the size of the company. In my view, that is a relevant consideration. It seems to me that a distinction must be drawn between mega corporations and corporations that are in effect small businesses wearing corporate clothes. This is a small business or maybe a small to medium business. … the defendant company is really the alter ego of Mr Peters. I think that again is a relevant consideration.

> I have been given some comparable sentences to act as a rough guide as to how the court should deal with this matter. Comparable sentences really are only an extremely rough indication as to penalties. … at the end of the day, every case turns on its own individual circumstances.
>
> I must say that, having looked at the range of comparable sentences that the court has been provided with, at the end of the day, I think that the court can only assess the appropriate penalty, having regard to the particular offender and the particular circumstances.
>
> … having regard to all of those matters and having regard to the maximum penalty of $685,000, of course the maximum penalty only exists for the worst type of offence and the worst type of offender. Clearly, in this particular case, all things considered this is not the worst manifestation of this type of offence, nor is the defendant company the worst type of offender, far from it.
>
> In the opinion of the court, it is appropriate to record a conviction and impose a fine of $120,000, which on my estimate, represents and I have not actually done the estimate, correct me if I am wrong, I think it is probably around about less than 20 percent. In the court's view having regard to all of the circumstances of the case that is the appropriate penalty in this matter.

Grounds 1, 2 and 4 – manifestly excessive

[35] In ground 1 of the appeal the appellant contends that the sentence imposed by the Court of Summary Jurisdiction was manifestly excessive. In grounds 2 and 4 the appellant contends that: (a) the sentencing magistrate placed too much weight on general deterrence and (b) neglected to reflect the appellant's prior good character in the sentence that was passed. Grounds 2 and 4 are in reality particulars of ground 1 and it is convenient to deal with all three grounds together.

[36] It is well established that general deterrence is a paramount consideration in sentencing offenders for regulatory offences particularly in the area of work safety. Over a period of more than a decade, Commonwealth and State Governments have gone through a process of abrogating common law claims for negligence in the workplace and replacing them with statutory duties that are enforceable in the criminal jurisdiction. Statutory duties are now intended to have the deterrent effect that actions for negligence once had. However, despite the relatively insignificant level of fines, in many cases, compared to what may have been an award of damages for negligence, it is an important principle of sentencing, even in the case of regulatory offences, that "deterrence must give way to proportion. Deterring unknown future offenders from committing a like offence is not a sufficient reason for imposing a disproportionally higher sentence than the particular offence requires."[1] However, within the range of what is a proportional penalty, it is permissible for the sentencing court to give significantly more weight to general deterrence than to the prior good character of the offender, even if the offender is of very positive good character This is particularly so where the risk and extent of harm is very high.

[37] If allowance is made for the discount for a guilty plea, the starting point of sentence may have been a fine as high as $160,000. In my opinion, such a fine is not clearly and obviously, as opposed to merely arguably, excessive. It has not been shown that the sentencing magistrate was in error or acting

[1] Fox and Freiberg, Sentencing State and Federal Law in Victoria (2nd ed. 1999 Oxford University Press) at 3.406.

on a wrong principle. The sentencing magistrate clearly took into account the appellant's prior good character but within the proportional range of sentences gave paramount consideration to general deterrence.

[38] These grounds of appeal are not made out.

Ground 5 – discount for the plea of guilty

[39] The appellant submitted that while the learned sentencing magistrate stated that he took into account the appellant's early plea, his Honour failed to quantify and allow an appropriate discount for the early plea of guilty.

[40] As to the plea of guilty the sentencing magistrate made the following remarks:

> There are a number other factors that the court *must* give weight to, that is the early guilty plea, which is always an indication of remorse. But, apart from that, there is clear and (inaudible) evidence, in this case, as to the defendant's remorse and contrition. Again, those aspects are set out in the written submissions of counsel for the defendant.
>
> [and]
>
> I think I have already adverted to the defendant company's acceptance of responsibility for its failure to comply with the statutory duties. And all of those matters must be taken into account when deciding the appropriate punishment in this matter.

[41] In the light of those remarks, and given that the sentencing magistrate was a very experienced magistrate, it may be inferred that his Honour would have allowed a significant discount for the appellant's plea of guilty. A failure to expressly quantify the reduction granted for a plea of guilty is not an error

but it is desirable that a sentencing court should indicate the extent to which a plea of guilty has been given any weight as a mitigating factor.[2]

[42] In the circumstances this ground of appeal cannot be upheld.

Ground 6 – the results of the offending

[43] The appellant submitted that the sentencing magistrate erred in taking into account the results of the offending because the explosion and death were not items of culpability under s 55 of the *Workplace Health and Safety Act*.

[44] While I accept the appellant's analysis of the elements of the offence as the appellant was not charged with an aggravated offence under s 82(1)(c) of the *Workplace Health and Safety Act*, I do not accept that the sentencing magistrate took the results of the offending into account in an incorrect way. The primary duty created by s 55 of the *Workplace Health and Safety Act* is a duty to ensure as far as reasonably practicable that workers and others are not exposed to risks to their health and safety arising from the conduct of the employer's business. It follows, that the greater the risk or hazard that workers and others are exposed to, as a result of an employer's failure to comply with the duty, the more serious the offence.

[45] As to this issue, the learned magistrate stated:

> I think I should start, firstly, with some analysis of s 55 of the Act, in that the prosecution took the view that it was permissible for the court to take into account the fact that the breach of the duty of care resulted in the death of a person. I think that's an important issue

[2] *JKL v The Queen* [2011] NTCCA 7 at 23; *Kelly v The Queen* (2000) 10 NTLR 39 at [26] and [27].

because it potentially bears upon the penalty to be imposed by the court or it may affect the appropriate penalty.

It's noted that the offence, contrary to s 55, the gravamen of that offence is exposure to risks to health or safety. So, it does not, in itself, concern itself with a result, as such, in terms of injury or other harm, or even death. It seems to me that, even if a risk did not materialise, then a company would still be exposed to criminal liability, under that provision.

I'm also mindful that s 82 of the *Workplace Health and Safety Act* deals with aggravated offences and subs (1) provides an offence against this Act is aggravated if the person who commits the offence does the act and makes the omission, giving rise to the offence, intentionally. And, the person ought to know that the offence may result in death or serious injury. And, the offence, in fact, results in the death of a person.

If those circumstances exist then the maximum penalty is increased. At the end of the day I believe that, when I come to sentence the defendant corporation, I cannot take into account the fact that this incident tragically resulted in Mr Bird's death. I think if I were to do that, then I would be treating the present offence with which the company has been charged, as an aggravated offence.

Not only that, I that if I were to take into account the fact of death, then I would be running afoul of what the high court said in *De Simoni's Case*, and that is that when sentencing an offender for a particular offence, regard must not be had to a circumstance that would lay a foundation for a more serious offence.

So I think, on those twin bases, I don't believe the court can take into account the fact that this incident resulted in a person's death. However, having said that, I believe it is entirely proper, to take into account that in this particular case the type of risks contemplated by s 55, in fact did materialise and did result in harm, but go no further than that.

I think that a distinction needs to be drawn between cases where there is a potentiality for harm and an actuality of harm. And so to that limited extent, I think it is permissible to take into account what materialised here as a result of the breach of the statutory duty, but to do no more than that.

[46] This Court has said that on a number of occasions that the sentencing remarks of magistrates are not to be construed in the same manner as the terms of a statute. In my opinion, the sentencing magistrate only considered the result of the breach of general statutory duty of care in order to assess the extent of the hazard, or the extent of the danger, to which workers and others were actually exposed. In his opinion, what in fact materialised demonstrated the level of danger and the risk of harm to which workers and others were exposed in this case. This is a factor which must be taken into account. His Honour expressly stated that he could not take into account the death of Mr Bird and his analysis of s 55 of the *Workplace Health and Safety Act* was consistent with the submissions made by the respondent about the elements of the offence.

[47] This ground of appeal is not made out.

Conclusion

[48] In the circumstances, the appeal is dismissed and I will hear the parties further as to costs.