

1983 February 15

[TRIANAFYLLIDES, P., A. LOIZOU, MALACHTOS, JJ.]

GENERAL CONSTRUCTIONS CO. LTD.,
Appellants.

v.

THE DISTRICT SOCIAL INSURANCE OFFICER,
Respondent.

(Criminal Appeal No. 3682).

THE ATTORNEY-GENERAL OF THE REPUBLIC,
Appellant.

v.

GENERAL CONSTRUCTIONS CO. LTD.,
Respondents.

(Criminal Appeal No. 3683).

5 *Building and Works of Engineering Construction (Safety, Health and Welfare) Regulations, 1973, regulation 109(2)—Carrying scaffold under electrically charged overhead cable—Instructions by foreman to employees to carry it horizontally to avoid contact with cables—Whether they amount to “practicable precautions” in the sense of the said regulation 109(2)—And whether there is failure to comply with such regulation if the foreman after giving his instructions does not remain there to supervise their carrying out.*

10 While some employees of the appellants were pushing, in the grounds of the State Fair in Nicosia (Makedonitissa), a metal scaffold on wheels along a path from one pavilion, which was at that time under construction, to another pavilion, such scaffold came into contact with overhead electrically charged cables with the result that there occurred an electrical discharge which caused
15 the death of one of the employees and seriously injured two other

employees. As a result the appellants were prosecuted and convicted of the offence of failing to take all practicable precautions to prevent persons employed by them from coming into contact with electrically charged overhead cables, contrary to regulation 109(2)* of the Buildings and Works of Engineering Construction (Safety, Health and Welfare) Regulations 1973, which were made under section 66(1) of the Factories Law, Cap. 134. 5

According to the version of the appellants at the trial, a foreman of the appellants, who was at the time in charge of the employees concerned, instructed one of such employees, Antonakis Perentis, to move the scaffold by carrying it sideways and horizontally, and not by pushing it and wheeling it along the path, and for this purpose there were assigned to this task, in addition to the said Perentis, another five employees of the appellants; also, Perentis was told by the foreman that he could secure, if necessary, the assistance of six or eight more employees, who were working at the time at the site in question, by requesting this from the chief foreman of the appellants. 10 15

In convicting the appellants the trial Court took the view that the fact that a foreman in the employment of the appellants had given instructions as regards the mode in which the scaffold was to be moved safely from the one pavilion to the other did not amount to due compliance with the requirements of the aforequoted regulation 109(2), because in the opinion of the trial Judge the words in such regulation "all practicable precautions shall be taken to prevent such danger either by the provision of adequate and suitable placed barriers or otherwise" envisaged more than precautions by way of express instructions and required the taking of practical measures. 20 25 30

Upon appeal against conviction:

Held, that the wording of regulation 109(2) is not such as to exclude on all occasions proper instructions from being "practicable precautions" in the sense of such regulation; and that, therefore, the conviction of the appellants was based on an erroneous interpretation and application by the trial Court, to the facts of the present case, of the said regulation 109(2); ac- 35

* Regulation 109(2) is quoted at p. 264 post.

cordingly the appeal must be allowed and the conviction set aside.

5 *Held*, further, that because the foreman did not remain there to supervise the carrying out of his instructions, it cannot be said that it has been established, with the certainty required in order to convict, that, in the circumstances of this particular case, the appellants failed to take "all practicable precautions", in a manner amounting to a breach of regulation 109(2).

Appeal allowed.

10 Cases referred to:

Perentis v. General Constructions Co. Ltd. (1981) 1 C.L.R. 1 at pp. 15, 16, 17.

Appeals.

15 Appeal against conviction by General Constructions Ltd. who were convicted on the 23rd December, 1975 at the District Court of Nicosia (Criminal Case No. 8309/75) on one count of the offence of failing to take all practicable precautions to prevent persons employed by it from coming into contact with electrical-ly charged overhead cables, contrary to regulation 109(2) of the
20 Buildings and Works of Engineering Construction (Safety, Health and Welfare) Regulations, 1973, and appeal by the Attorney-General of the Republic against the inadequacy of the sentence of £40.- fine imposed by HjiConstantinou, S.D.J.

25 *T. Papadopoulos* with *P. Ioannides*, for the appellants in Criminal Appeal 3682 and for the respondents in Criminal Appeal 3683.

30 *A. Frangos*, Senior Counsel of the Republic with *G. Constantinou (Miss)*, Counsel of the Republic, for the respondents in Criminal Appeal 3682 and the appellant in Criminal Appeal 3683.

Cur. adv. vult.

35 TRIANTAFYLIDIS P. read the following judgment of the Court. The appellant company challenges, by means of Criminal Appeal No. 3682, its conviction, by the District Court of Nicosia, of the offence of failing to take all practicable precautions to prevent

persons employed by it from coming into contact with electrically charged overhead cables, contrary to regulation 109(2) of the Buildings and Works of Engineering Construction (Safety, Health and Welfare) Regulations 1973, which were made under section 66(1) of the Factories Law, Cap. 134.

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The appellant Attorney-General of the Republic has appealed, by means of Criminal Appeal No. 3683, against the sentence of a fine of C£40 which was imposed on the appellants and contends that such sentence is inadequate.

These two appeals were heard together in view of their interrelated nature.

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The appellants were prosecuted because while some employees of theirs were pushing, in the grounds of the State Fair in Nicosia (Makedonitissa), a metal scaffold on wheels along a path from one pavilion, which was at that time under construction, to another pavilion, such scaffold came into contact with overhead electrically charged cables with the result that there occurred an electrical discharge which caused the death of one of the employees, Andreas HjiStefani, and seriously injured two other employees.

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The aforesaid regulation 109(2) reads as follows:

“(2) Εἰς περίπτωσιν καθ’ ἣν ἠλεκτρικῶς πεφορτισμένον ἐναέριον καλώδιον ἢ συσκευὴ δυνατὸν νὰ ἀποτελέσῃ αἰτίαν κινδύνου δι’ ἀπασχολούμενα πρόσωπα κατὰ τὴν διάρκειαν οἰωνδῆποτε ἐργασιῶν εἰς τὰς ὁποίας ἐφαρμόζονται οἱ παρόντες Κανονισμοί, εἴτε ἐνεκεν τῆς λειτουργίας ἀνυψωτικῆς συσκευῆς ἢ ἄλλως πως, δεόν ὅπως λαμβάνωνται ὅλαι αἱ δυναταὶ προφυλάξεις διὰ παρεμπόδισιν τοῦ τοιούτου κινδύνου εἴτε διὰ τῆς παροχῆς ἐπαρκῶν καὶ καταλλήλως τοποθετημένω περιφράξεων εἴτε ἄλλως πως”.

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(“(2) Where any electrically charged overhead cable or apparatus is liable to be a source of danger to persons employed during the course of any works to which these Regulations apply, whether from the operation of a lifting appliance or otherwise, all practicable precautions shall be taken to prevent such danger either by the provision of adequate and suitably placed barriers or otherwise.”).

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In convicting the appellants the trial Court took the view that the fact that a foreman in the employment of the appellants had given instructions as regards the mode in which the scaffold was to be moved safely from the one pavilion to the other did not amount to due compliance with the requirements of the afore-
5 quoted regulation 109(2), because in the opinion of the trial judge the words in such regulation "all practicable precautions shall be taken to prevent such danger either by the provision of adequate and suitable placed barriers or otherwise" envisaged
10 more than precautions by way of express instructions and required the taking of practical measures.

According to the version of the appellants at the trial a foreman of the appellants, who was at the time in charge of the employees concerned, instructed one of such employees, Antonakis Perentis,
15 to move the scaffold by carrying it sideways and horizontally, and not by pushing it and wheeling it along the path, and for this purpose there were assigned to this task, in addition to the said Perentis, another five employees of the appellants; also, Perentis was told by the foreman that he could secure, if necessary,
20 the assistance of six or eight more employees, who were working at the time at the site in question, by requesting this from the chief foreman of the appellants.

We are of the opinion that the wording of regulation 109(2) is not such as to exclude on all occasions proper instructions
25 from being "practicable precautions" in the sense of such regulation; and that this view is correct can be derived also, from the following passage of the judgment of one of us - A. Loizou J. - in *Perentis v. General Constructions Co. Ltd.*, (1981) 1 C.L.R. 1 (at pp. 15, 16 and 17):

30 . "The trial Court concluded that the respondent Company by effecting the preparatory work for the removal of the scaffold horizontally, by the giving of express and clear instructions to this effect to a competent, trustworthy and sensible employee and by the assignment of the right number of
35 persons for the due execution of these instructions, took all possible measures for avoiding any danger from live overhead lines and therefore there was no breach of the afore-said regulation.

40 Under the aforesaid regulation what is demanded of an employer is to take all practical precautions to prevent

persons employed from coming into contact with electrically charged overhead cables and this is clearly what the respondents did.

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In our case the duty imposed by the aforesaid regulation and in particular sub-paragraph 2 thereof is to take all practicable precautions to prevent such danger. 'Practicable' has been defined as meaning that it is feasible, that it can be done; and in the case of *Lee v. Nursery Furnishings Ltd.* [1945] 1 All E.R. 387, Lord Goddard referred to the Oxford dictionary as to the meaning of the word 'practicable' as being 'capable of being carried out in action' or 'feasible', and Hallett, J. said in *Schwalb v. Fass (H.) & Son Ltd.* [1946] 175 L.T.345:

'Clearly, the fact that the use of the appliances would slow up production does not render their use impracticable; and I have no right to substitute for the word 'impracticable' expressions such as 'difficult', 'not too easy' or 'inconvenient' or any other word'.

Regulation 109 by its very wording leaves room for the measures to be taken by the employer to be other than the provision of adequate and suitable placed barriers and such measures were in the circumstances adequately taken as found by the trial Court and we see no reason to interfere with its conclusion that there has been no breach of the aforesaid regulation."

In the *Perentis* case, supra, an Appeal Bench of this Court - composed of A. Loizou, Demetriades and Savvides JJ. - upheld a judgment of the District Court of Nicosia dismissing a claim of the said Antonakis Perentis, against the appellants in the present proceedings, for damages suffered due, inter alia, to a breach of the aforesaid regulation 109(2), which had allegedly occurred in the course of exactly the same events which gave rise to the prosecution of the appellants in the case now before us.

We have, therefore, reached the conclusion that the conviction of the appellants was based on an erroneous interpretation and application by the trial Court, to the facts of the present case, of the said regulation 109(2).

It is correct that the trial Court went on to say in its judgment that even if the express instructions given to the foreman, as aforesaid, could amount to "practicable precautions" in the sense of regulation 109(2), in his view "all" practicable precautions were not in fact taken, as required by such regulation, because it was not sufficient to give instructions only to Perentis, who was one of the employees involved in moving the scaffold and, also, because the foreman did not remain there to supervise the carrying out of his instructions.

We do not agree with the above view of the trial Court because we are of the opinion that once the foreman had given to Perentis, who was the most senior of the employees concerned, express and clear instructions as to how to move the scaffold safely and had, also, indicated that more assistance could be secured by requesting it from the chief foreman, it cannot be said that it has been established, with the certainty required in order to convict, that, in the circumstances of this particular case, the appellants failed to take "all practicable precautions", in a manner amounting to a breach of regulation 109(2); and the above view of ours finds support in the already quoted passage from the judgment of the *Perentis* case, supra.

We do not lose sight of the fact that the said *Perentis* case is a proceeding separate and distinct from the present criminal appeals which are now being determined by us, but we find that the approach adopted by another Appeal Bench of this Court to practically the same legal issue and facts with which we have to deal in the present instance affords us considerable and valuable guidance; and if in the cognate civil proceedings in the *Perentis* case both a Full District Court in Nicosia, as the trial Court, and an Appeal Bench of this Court have not found a breach of regulation 109(2) by the appellants, a fortiori we would not be justified in finding that such a breach has been established, in the present criminal proceedings, beyond reasonable doubt.

For the foregoing reasons we have decided to set aside the conviction of the appellants and, therefore, we need not deal with the appeal of the Attorney-General of the Republic concerning the adequacy of the sentence imposed on the appellants as a result of a conviction which we have just set aside.

Appeal against conviction allowed. Conviction set aside.