

Action No.: 161039979P1
E-File No.: ECP17HAYAHOMES1
Appeal No.: _____

IN THE PROVINCIAL COURT OF ALBERTA
JUDICIAL CENTRE OF EDMONTON

HER MAJESTY THE QUEEN

v.

HAYA HOMES LTD.
SAHIB CONTRACTING INC.
SUKWINDER SINGH NAGRA

Accused

P R O C E E D I N G S

Edmonton, Alberta
November 1, 2017

Transcript Management Services, Edmonton
1000, 10123 99th Street
Edmonton, Alberta T5J-3H1
Phone: (780) 427-6181 Fax: (780) 422-2826

TABLE OF CONTENTS

Description	Page
November 1, 2017 Afternoon Session	1
Discussion	1
SULINDER SINGH , Sworn as an Interpreter in the Punjabi Language	1
Sentence	2
Certificate of Record	12
Certificate of Transcript	13

1 Proceedings taken in the Provincial Court of Alberta, Law Courts, Edmonton, Alberta

2

3 November 1, 2017

Afternoon Session

4

5 The Honourable

Provincial Court of Alberta

6 Judge Doyle

7

8 A. Elliott

For the Crown

9 P. G. Parker

For the Accused

10 T. Hurdle

Court Clerk

11

12

13 **Discussion**

14

15 THE COURT:

Good afternoon.

16

17 MS. ELLIOTT:

Good afternoon.

18

19 MR. PARKER:

Good afternoon, Your Honour.

20

21 THE COURT:

Mr. Parker, did you wish Mr. Nagra to be

22 seated with you at counsel table?

23

24 MR. PARKER:

With your permission, yes, ma'am.

25

26 Mr. Nagra, would you come forward, please.

27

28 MS. ELLIOTT:

And we do have an interpreter present. I don't

29 know if he needs to be sworn or if he can sit at counsel table. I'll leave it to Mr. Parker

30 to address that.

31

32 THE COURT:

Yes, I will ask that the interpreter be sworn.

33

34 MR. PARKER:

Yes.

35

36 THE COURT:

Mr. Nagra, you can be seated.

37

38 **SULINDER SINGH, Sworn as an Interpreter in the Punjabi Language**

39

40 THE COURT:

Mr. Singh, would you be good enough to be

41 seated beside Mr. Nagra.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36
37
38
39
40
41

THE INTERPRETER: Yes, ma'am.

THE COURT: And Mr. Interpreter, if I'm speaking too quickly, please, just put your hand up and I'll slow down.

THE INTERPRETER: Because it's going to be word by word, so we have to be really slow.

THE COURT: I'll do my best.

THE INTERPRETER: Thanks.

Sentence

THE COURT: All right.

Sahib Contracting Inc. has pleaded guilty to an offence as follows:

On or about April 28, 2015 at or near Edmonton, Alberta, being an employer, did fail to ensure as far as it was reasonably practicable to do so the health and safety of Frederick Tomy, a worker engaged in the work of that employer, contrary to Section 2(1)(a)(i) of the *Occupational Health and Safety Act*.

Sukhwinder Singh Nagra has pleaded guilty to an offence as follows:

On or about April 28, 2015, at or near Edmonton, Alberta, being a worker engaged in an occupation, did fail to take reasonable care to protect the health and safety of Frederick Tomy, another worker present while he was working, contrary to Section 2(2)(a) of the *Occupational Health and Safety Act*.

The facts according these guilty pleas are outlined in extensive detail in an Agreed Statement of Facts filed as an exhibit in these proceedings. I do not propose to review those facts in detail again in these reasons.

In summary fashion, the facts are that Sahib Contracting Incorporated was contracted by Haya Homes Ltd. to connect water and sewer lines in a construction project. This required the excavation of a trench which was subcontracted to Sahib Contracting Incorporated.

1
2 On April 28, 2015, Mr. Nagra was a director of Sahib Contracting, along with other
3 members of his family. Mr. Nagra was the sole listed employee of Sahib Contracting.
4

5 Mr. Nagra hired Mr. Tomyn as a casual labourer to work on this project with him.
6 Mr. Tomyn can only be described as an extremely vulnerable worker. He was a day
7 labourer who worked for cash. There were no forms or paperwork associated with his
8 employment.
9

10 I am advised that Mr. Tomyn was an AISH recipient, suggesting that he had some form
11 of severe handicap. On occasion, Mr. Tomyn was sent for casual labour through the
12 assistance of the Bissell Center in Edmonton, although, I am advised that Mr. Nagra did
13 not retain him from the Bissell Center on this date. Mr. Tomyn was paid between 12 and
14 \$15.00 per hour for his labour.
15

16 I am advised that Mr. Nagra has no formal training in construction, including in
17 excavation and he learned his duties "on the job".
18

19 On April 28, 2015, Mr. Nagra took Mr. Tomyn to the work site at 10746-123rd Street.
20 Mr. Nagra operated the backhoe and excavated a trench. Mr. Nagra oversaw the entirety
21 of this work. Mr. Tomyn worked exclusively on his direction. Mr. Tomyn entered the
22 trench, which was several feet deep, in order to connect water and sewer lines. This
23 trench was not braced or supported in any fashion.
24

25 The trench collapsed, burying Mr. Tomyn alive. It took several hours for emergency
26 personnel to retrieve Mr. Tomyn's body. In his hand was the equipment that he required
27 to connect the lines.
28

29 Neither Sahib Contracting Inc. nor Mr. Nagra were aware of any safety regulations with
30 regard to excavation. Sahib Contracting offered no training to their employees, and there
31 was no health or safety program in place. It appears plain to this Court that neither Sahib
32 Contracting Inc. nor Mr. Nagra had exhibited any motivation to learn of or comply with
33 any of the safety regulations that would apply to their work. Further, since Mr. Tomyn's
34 death, Sahib Contracting has taken no steps to implement the directions of the
35 occupational health and safety regulators in order to address a stop work order that was
36 placed upon them.
37

38 Mr. Nagra advised the Court through his counsel that he is receiving disability as the
39 result of a knee injury that is not related to the April 28, 2015 catastrophe.
40

41 The penalty for these offences is outlined in Section 41(1) of the *Occupational Health and*

1 *Safety Act*, which reads as follows:
2

3 A person who contravenes this Act, the regulations or an adopted
4 code or fails to comply with an order made under this Act, the
5 regulation or an adopted code or with an acceptance issued under
6 this Act is guilty of an offence and liable
7

8 (a) for a first offence,
9

10 (i) to a fine of not more than \$500,000 and in the
11 case of a continuing offence, to a further fine of not
12 more than \$30,000 for each day during which the
13 offence continues after the first day or part of a day,
14 or (ii) to imprisonment to a term not exceeding 6
15 months, or to both fines and imprisonment, and
16

17 (b) for a 2nd or subsequent offence,
18

19 (i) to a fine of not more than \$1 000 000 and in the
20 case of a continuing offence, to a further fine of not
21 more than \$60,000 for each day or part of a day
22 during which the offence continues after the first day,
23 or (ii) to imprisonment for a term not exceeding 12
24 months or to both fines and imprisonment.
25

26 In this case, the Crown seeks a fine from Sahib Contracting Incorporated of \$425,000.00
27 along with a victim fine surcharge in the amount of \$63,750.00 for a total fine of
28 \$488,750.00. The Crown also seeks a fine from Mr. Nagra of \$40,000.00 along with a
29 \$6,000.00 victim fine surcharge for a total penalty of \$46,000.00. In default of payment
30 of the fine and surcharge with regard to Mr. Nagra, the Crown is seeking a sentence of
31 180 days in prison.
32

33 There is not a joint submission before me, which was confirmed during counsel's
34 submissions.
35

36 Defence counsel, acting on behalf of both defendants seeks a smaller fine than that
37 proposed by the Crown.
38

39 Neither Sahib Contracting Inc. nor Mr. Nagra have been convicted of any previous
40 offence under the *Occupational Health and Safety Act*.
41

1 I am advised that Sahib Contracting Inc. is essentially without assets. It significantly
2 strains credulity to surmise that this corporation will ever pay any portion of any fine that
3 I impose. Similarly, Mr. Nagra has made it clear that he has little income and requires
4 significant time to pay any fine that I impose.

5
6 In 2009, Justice Sanderman said the following in *R. v. Independent Automatic Sprinkler*
7 *Ltd.* at paragraph 6:

8
9 The purpose of the *Occupational Health and Safety Act* is to
10 protect workers while they are engaged in their employment within
11 the province. It is to ensure that all work sites are safe and free
12 from conditions that might cause harm to any worker. The
13 legislation takes an extremely broad view of worker safety at any
14 work site. In order to ensure that the safety of workers is
15 achieved, responsibilities are placed upon every employer to
16 ensure that workers can carry out their functions without risk of
17 danger. Employers control the workplace and the work that is
18 carried out there is done for the ultimate benefit of the employer,
19 therefore onerous but reasonable expectations are placed upon all
20 employers. In this province, there are many high-risk types of
21 employment that require the vigilance of a responsible employer to
22 ensure that no harm comes to any worker.

23
24 The legislature of this province has, within the past decade, seen
25 fit to increase the limit of the penalties that can be imposed when
26 an employer fails to live up to its statutory responsibility. A first
27 offence can now attract a penalty of up to \$500,000.00. The
28 legislature has permitted significant penalties to be imposed in
29 order to emphasize the goal of creating safe work environments
30 throughout the province. In serious cases, serious penalties must
31 be imposed in order to underscore the responsibility placed upon
32 all employers.

33
34 Since 2009, courts have reiterated repeatedly that deterrence is the primary principle of
35 sentencing that has to be applied in cases such as these. Indeed, in 1986, Justice Dea in
36 the case of *R. v. Tech-Corrosion Services Ltd.* outlined three primary factors that are still
37 relevant for consideration when sentencing the defendant in an occupational health and
38 safety case. These factors are:

39
40 1. *The offence*:: What duty was imposed upon the accused --
41 under what circumstances did the accused fail to carry out the duty

1 imposed? What knowledge did the accused have -- was the
2 operation of the employer a high-risk operation or a low risk
3 operation? Consider all aspects of the offence and its commission
4 to assess and weigh the negligence of the accused as simple or
5 gross or something in between. Gross negligence should attract a
6 higher fine -- less, a lower.

7
8 In consideration of this first factor, I find that the riskiness of this operation would be
9 patently obvious to anyone, even to the untrained. Putting a human being into a 12-foot
10 trench without employing some form of bracing or support and taking no safety
11 precautions is obvious gross negligence, in my view.

12
13 Mr. Nagra oversaw, directed and bore witness to this entire operation. It is inconceivable
14 that he would not have been aware of the danger that he was putting Mr. Tomyn in for
15 the benefit of his family business. I find that Mr. Nagra took no steps whatsoever to
16 preserve Mr. Tomyn's safety.

17
18 The second factor is an assessment of the injuries, and Justice Dea says as follows:

19
20 It is often argued that one should punish for the offence, not the
21 consequences of the offence. There is logic in that argument but
22 the life of the law remains experience, not logic. A breach of the
23 regulations which results in no injury to anyone will obviously not
24 attract the same punishment as a breach of the regulations which
25 results in a workman's death. So the second factor is a
26 consideration of the injuries sustained. Minor injuries need not
27 lead to heavy fines nor custodial sentences. Death and serious and
28 permanent injury ought to attract heavy fines and in appropriate
29 circumstances (perhaps second offences) custodial terms.

30
31 In this case, Mr. Tomyn lost his life. His family have lost a son and a brother. In *Tech-*
32 *Corrosion Services Ltd.*, Justice Dea opined that, perhaps, second offences would attract
33 custodial terms. I find that this comment is, obviously, obiter and even appears in the
34 decision in parentheses.

35
36 The Crown made reference to this comment when asked in submissions to articulate when
37 a custodial sentence was appropriate in an occupational health and safety prosecution. I
38 note that Justice Dea's comments are contradicted by the plain beginning of Section 41 of
39 the *Occupational Health and Safety Act*, which not only permits imprisonment for a first
40 conviction, but permits twice the maximum imprisonment for a second or subsequent
41 offence.

1
2 It is clear to this Court that the legislature intended that imprisonment be a live
3 consideration for a sentencing court, even when dealing with a first offender.
4

5 Factor number 3. *The purpose of the Occupational Health and Safety Act*: The purpose of
6 the Act is to protect the worker in the workplace. The punishment meted out for offences
7 under the Act will advance or detract from that purpose. In short, the punishments under
8 the Act will have a deterrent effect upon the person punished and on all engaged in
9 similar activity. This is not to say that other facts such as rehabilitation of the accused,
10 the attitude of the public to this kind of crime, etc., ought not to be taken into account.
11 But the factor of deterrence is the factor in sentencing which deserves the greatest
12 emphasis in offences under the Occupational Health and Safety Act.
13

14 In *R. v. Fiesta Party Rentals*, Judge Lamoureux outlined several relevant factors when
15 assessing a fit and proper sentence. Her decision was upheld on appeal to the Court of
16 Queen's Bench and was cited with approval by Justice Sanderman in the Independent
17 Sprinkler case. The factors that Judge Lamoureux enumerated are the special
18 circumstances of the victim, the intent or degree of negligence involved, the extent of the
19 accused's attempts to comply with the legislation, the element of risk involved in the
20 activity, the remorse expressed by the accused, the record of the accused, the extent of
21 harm caused, and, the economic impact of the fine upon the accused business.
22

23 In this case, the special circumstances of this victim are compelling. Mr. Tomyn was a
24 worker who had no agency or union protecting his interests advocating on his behalf in
25 the interests of preserving his safety. Mr. Tomyn had no human resource department to
26 complain to if he was concerned about the safety of his working conditions. Mr. Tomyn
27 was a worker, like many workers in this province, who was dependant upon the
28 responsibility of their employer and on the enforcement of provisions of the *Occupational*
29 *Health and Safety Act* to preserve his safety while he was on the job. As a day labourer,
30 Mr. Tomyn was ill-equipped and unable to advocate for himself. Mr. Tomyn's choice was
31 to accept the job or decline the job. It is highly doubtful that Mr. Tomyn had the
32 financial security to readily decline work.
33

34 In these circumstances, in my view, there is an increased need to ensure that there is a
35 deterrent aspect achieved in sentencing. If an employer chooses to engage casual day
36 labourers who are, themselves, vulnerable workers, they must understand that there will be
37 a heavy price to pay for ignoring applicable safety legislation that governs their activities.
38

39 As already noted, these two accused made no effort whatsoever to comply with
40 legislation. The activity was inherently and obviously treacherous. The harm caused was
41 extreme.

1
2 In this case, both accused have entered guilty pleas. This is mitigating. I am advised that
3 there were litigable issues in this case, although, I was not made aware of any specific
4 issues with the prosecution. A guilty plea, however, is always mitigating because it
5 spares the state from having to present evidence at a trial where the outcome is never
6 certain.

7
8 I, however, do not find that there is any remorse on the part of either Sahib Contracting
9 Inc. or Mr. Nagra. There has been no effort by Sahib Contracting Inc. to take the
10 remedial steps necessary to lift the stop work order. Mr. Nagra's father when asked to
11 speak on behalf of the corporation asked the Court to spare his son. Mr. Nagra asked for
12 time to pay his fine. Counsel have advised the Court that he has no funds in trust to pay
13 any portion of any fine that I might impose.

14
15 Mr. Nagra indicated that Mr. Tomyne was a friend. I am skeptical of this suggestion.

16
17 Sahib Contracting and Mr. Nagra exhibited no interest at all in securing the safety of this
18 worker that Mr. Nagra calls a friend. I find that both accused were purposefully unaware
19 of any regulations that might apply to their daily work. Even while accepting their
20 protestations of ignorance of legislation or regulations, however, I cannot contemplate that
21 the extreme danger of this work site would not be obvious to anyone on site.

22
23 An analysis of all of the relevant facts leads this Court to the conclusion that this
24 corporation and Mr. Nagra exploited the vulnerability of a vulnerable worker for their
25 own profit and chose to put their own pecuniary interest ahead of any legislation or
26 regulations. Mr. Tomyne paid for that disregard with his life.

27
28 What is a fit sentence for this conduct?

29
30 The Court has been provided with various sentencing authorities to assist with the
31 assessment of a fit and proper sentence. *R. v. V. J. Bishop Excavating Ltd., et al, is a*
32 *2017 decision of Judge Gaschler. It is the most similar of the cases on the facts.*

33
34 This case involved a worker suffering serious injuries when a trench collapsed upon him.
35 This project had initially included the services of an individual who had significant
36 experience in excavation work and this individual provided extensive safety advice and
37 assistance on the trenching project. The initial excavator was also a trained and skilled
38 excavator. The individual accused charged with the offences had no previous experience
39 with trenching and was not competent to work in that field. There were several workers
40 on site at this project. There does not appear in the facts to have been any special
41 vulnerability associated with any of the workers.

1
2 At the time of the incident, the experienced individuals were no longer engaged in the
3 project. The defendant in that case conducted the excavation and part of the trench
4 collapsed causing serious injuries to a worker. That defendant received a fine of
5 \$30,000.00 and a \$4,500.00 victim fine surcharge.
6

7 This was not a case where the defendant made no effort to alleviate the safety risk in the
8 trench. That defendant had also received considerable safety information from the
9 previous experienced worker and made some effort to secure the safety of the workers,
10 efforts which were obviously deficient.

11
12 The sentencing judge expressed some initial concern accepting the guilty plea because of
13 the efforts. He noted that the defendant in hindsight ought to have stopped work and
14 reassessed the situation.
15

16 I find that the moral culpability of that defendant is not comparable to that of the two
17 defendants in this case.
18

19 Cases involving sentences of corporations exclusively are helpful when evaluating the fine
20 that would be appropriate for Sahib Contracting Inc. In this case, I am satisfied that with
21 respect to Sahib Contracting Inc. a fit and proper sentence is that proposed by the Crown,
22 a fine in the amount of \$425,000.00 along with the victim fine surcharge of \$63,750.00.
23 Obviously, a monetary penalty is the only available option for a corporate defendant.
24 This is near the maximum allowable under Section 41, which I find is appropriate to the
25 egregious circumstances of this case.
26

27 The likelihood that Sahib Contracting Inc. will never pay this fine is obviously distressing.
28 Nonetheless, a fine of this magnitude will continue to have a deterrent impact on
29 corporations that might be motivated to conduct their business in the fashion of Sahib
30 Contracting Inc. This is a fine that communicates the message that companies that
31 conduct their business in purposeful ignorance of safety legislation that cause the death of
32 a vulnerable worker on their work site can expect to receive a punishing monetary
33 penalty, a penalty that would cause many small businesses to go bankrupt. This is as it
34 should be.
35

36 Sahib Contracting Inc. will forfeit and pay a fine in the amount of \$425,000.00 together
37 with a victim fine surcharge in the amount of \$63,750.00. There will be enforcement in
38 default of payment of the fine and surcharge.
39

40 With regard to Sukhwinder Nagra, in my view, Mr. Nagra's culpability is extremely high.
41 I find that a monetary penalty does not achieve the deterrent impact that is a primary

1 sentencing principle in cases such as these, let alone a fine that is approximately one-tenth
2 of the maximum available for a first offender. Mr. Nagra was not just a worker, he was a
3 director of Sahib Contracting Inc. His pecuniary interests were engaged on this job. He
4 was in complete control of this work site and Mr. Tomy's duties at this work site. He
5 was the only person that had contact with Mr. Tomy. Individuals who manage work
6 sites, especially work sites that employ workers that are vulnerable to exploitation need to
7 be reminded that there will be a personal price to pay for their conduct when it
8 contributes to the creation of, obviously, treacherous working conditions in violation of
9 clear safety requirements. The price may not be a monetary penalty. Such an individual
10 can expect to pay for their conduct with their freedom.

11
12 Mr. Nagra, you are sentenced to four months in prison. You will also forfeit and pay a
13 victim fine surcharge. It will be in the amount of \$100.00.

14
15 Mr. Parker, do your clients request time to pay the fines and surcharges?

16
17 MR. PARKER: He could pay the victim fine surcharge today.

18
19 THE COURT: Thank you.

20
21 MR. PARKER: Thank you.

22
23 THE COURT: There will be no time to pay. In default of
24 payment of the fine, there will be a sentence of one day consecutive.

25
26 Anything further, counsel?

27
28 MS. ELLIOTT: If the remaining counts can be withdrawn.

29
30 THE COURT: The remaining counts will be withdrawn.

31
32 Mr. Parker, any objection?

33
34 MR. PARKER: No, thank you, Your Honour.

35
36 We are not requesting any time to pay the fine, Your Honour, so.

37
38 THE COURT: Thank you very much.

39
40 MR. PARKER: Deemed time.

41

1 THE COURT:
2 remaining counts?

All right. No objection to the withdrawal of the

3
4 MR. PARKER:

No, thank you, ma'am.

5
6 THE COURT:

They will be withdrawn.

7
8 MS. ELLIOTT:

Thank you.

9

10

11 PROCEEDINGS CONCLUDED

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28

29

30

31

32

33

34

35

36

37

38

39

40

41

1 **Certificate of Record**

2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36
37
38
39
40
41

I, Taylor Hurdle, certify that the recording is the record made of the evidence in the proceedings in Provincial Court held in courtroom 447, at Edmonton, Alberta, on the 1st day of November, 2017, and that I was the court official in charge of the sound-recording machine during the proceedings.

1 **Certificate of Transcript**

2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36
37
38
39
40
41

I, Gail Debenham, certify that

(a) I transcribed the record, which was recorded by a sound-recording machine, to the best of my skill and ability and the foregoing pages are a complete and accurate transcript of the contents of the record, and

(b) the Certificate of Record for these proceedings was included orally on the record and is transcribed in this transcript.

Digitally Certified: 2017-11-22 18:45:50
Gail Debenham, CSR(A)
Order No. 110604-17-1

Pages:	15
Lines:	586
Characters:	19777

File Locator:	99ae55eccfee11e7a62d0017a4770810
Digital Fingerprint:	c9e34fcaca3c301c6efab3fa57ffd075ec5d2ef954226cffc4b602b7953c7099

Wed Nov 22 18:36:06 2017

Detailed Transcript Statistics	
Order No. 110604-17-1	
Page Statistics	
Title Pages:	1
ToC Pages:	1
Transcript Pages:	13
Total Pages:	15
Line Statistics	
Title Page Lines:	52
ToC Lines:	6
Transcript Lines:	528
Total Lines:	586
Visible Character Count Statistics	
Title Page Characters:	527
ToC Characters:	144
Transcript Characters:	19106
Total Billable Characters:	19777
Multi-Take Adjustment: (-) Duplicated Title Page Characters	19250