

*Ridge v WMC (Olympic Dam) Pty Ltd* [2006] SAIRC 59

**MAGISTRATES COURT OF SOUTH AUSTRALIA  
(INDUSTRIAL OFFENCES JURISDICTION)**

RIDGE, Simon Luigi John

v

WMC (OLYMPIC DAM) PTY LTD

**JURISDICTION:** Prosecution

**FILE NO/S:** 1516 of 2006

**HEARING DATES:** 29 June 2006

**JUDGMENT OF:** Industrial Magistrate M Ardlie

**DELIVERED ON:** 1 September 2006

**CATCHWORDS:**

*Prosecution - Guilty plea to three counts - Failure to provide a safe system of work, a safe working environment and adequate information, instruction and supervision - Underground mining operation - Two approaching tunnels being dug - Proximity of the two tunnel faces unknown - Drilling into one face caused explosion at the other face - Systems in place not adhered to and inadequate - First offence under s 19(1) Occupational Health Safety and Welfare Act 1986 - Plea of guilty - Three employees put at risk - One employee fatally injured - Held - Convictions recorded - Discussion as to relevance of conviction under different legislation - Interaction of s 18A and 19(3) of Criminal Law (Sentencing) Act 1988 considered - Fine of \$153,000 (15 per cent reduction) plus levy and costs - Compensation awarded and apportioned - S 19(1) Occupational Health Safety and Welfare Act 1986 - Ss 3(1), 18A, 19(3), 53 Criminal Law (Sentencing) Act 1988.*

*Veen (No 2) v The Queen* (1988) 164 CLR 465

*R v Gibbings* (1936) SASR 36

*Tame v Fingleton* (1974) 8 SASR 507

*R v Baverstock* [1993] 2 All ER 32

*R v Michael Robert Morgan* BC 9700125

*Ticala v Police*, Unreported 16 July 1997, Lander J

*Rang v SA Police*, Unreported 12 November 1993, Mullighan J

*Police v Curtis & Marshall* [2004] SASR 184

*Vougamalis v Nixon* (1991) 56 SASR 574

*Softwood Holdings Limited v Stevenson* [1997] 64 SAIR 457

**REPRESENTATION:**

Counsel:

Complainant: Mr J Powell

Defendant: Mr R J Whittington QC with Mr E Edwardson and  
Mr J Fotheringham

Solicitors:

Complainant: Crown Solicitor's Office

Defendant: Griffin Hilditch Lawyers

## **Introduction**

- 1 The defendant operates a mine at Olympic Dam some 570 kilometres north west of Adelaide. The mine is the largest underground mining operation in Australia.
- 2 Currently the mining operation employs about 1350 employees and in addition there are 750 contractors on site.
- 3 Within the mining operations existed a department called the Development Department whose function is to create roads or facilitation networks within the underground mine.
- 4 On the 19 July 2005 three of the defendant's employees namely Karl Eibl, Phil Child and Victor Buza were engaged in constructing a horizontal tunnel at the 57th level underground.
- 5 The process involved two tunnels being constructed towards each other to eventually become one long tunnel. Exhibit C1 is a diagram depicting the two tunnels, one tunnel referred to as 57-MF-5-2 Front Extraction Drive Development Heading ("right tunnel"), the other 57-MF-5-2 Rear Extraction Drive Development Heading ("left tunnel").
- 6 At the commencement of the shift on 19 July 2005, the Shift Supervisor, Mark Whittaker, in company with Child went into the right tunnel to mark locations on the face in a grid pattern for drilling.
- 7 Whittaker also measured the length of the tunnel with a laser operating device recording the measurement at 87 metres, (which measurement was incorrect), that is about eight metres short of its full length.
- 8 Child drilled the holes as marked by Whittaker and then journeyed to the left tunnel to carry out the drilling process in that location.
- 9 Eibl arrived in the right tunnel, soon after Child had drilled the holes, in order to install the explosive charges.
- 10 Whittaker was required to attend a supervisors' meeting and requested Buza to mark locations on the face in the left tunnel for drilling and to measure the length of the left tunnel.
- 11 Buza measured the length of the left tunnel to be a distance of 34 metres, that is about two metres short of its full length.

- 12 After Buza had marked up the face in the left tunnel Child commenced drilling, completed the first hole and whilst in the process of drilling the second hole an explosion was heard.
- 13 It was subsequently ascertained that the drill bit triggered one charge and in turn two other charges detonated in the right tunnel, tragically resulting in Eibl's death.

### **Summary of allegations made by counsel for the complainant**

- 14 The defendant is charged with three separate counts alleging breaches of s 19(1) of the *Occupational Health, Safety and Welfare Act 1986*.
- 15 The three counts arose from the one incident. Eibl was killed by the explosion, Child and Buza were placed at risk given their proximity to the explosion and were later exposed to and affected by blast fumes having gone to investigate the situation in the right tunnel.
- 16 Buza was hospitalised for a period of three days eventually making a full recovery. Child was not injured.
- 17 What is alleged in all three counts is a failure to:-
  - provide a safe system of work;
  - provide a safe working environment; and
  - provide adequate information, instruction and supervision.
- 18 Exhibits C3, C4 and C5 are work instructions relating to the work being carried out at the time of the incident. Whilst Exhibit C4 contains a warning about ceasing drilling or charging if within three cuts of another active area (each cut approximating four metres) nowhere in any of the documents are instructions as to how to determine when the three cut distance was being approached or reached.
- 19 Investigations revealed a series of documents referred to as "mark up memos" each containing a plan of the two tunnels and located in three different places. (See Exhibits C6, C7 and C8).
- 20 An examination of the mark up memos revealed no consistency in the three separate plans as to the relative positions of the right and left tunnels as at the date of the incident.
- 21 The reality was that the two tunnels were approximately two cuts apart or less, the distance estimated to be just over five metres.

- 22 Further documents located at the site (Exhibits C9, C10 and C11) provided no indication of the extent of the work in progress of the left and right tunnels as at the date of the incident.
- 23 Whittaker, on the day of the incident, using a laser operated measuring device measured the right tunnel to be 87 metres. This turned out to be incorrect, with the actual measurement being in fact just short of the 95 metre mark.
- 24 Buza, in the absence of Whittaker who had left to attend a meeting, measured the left tunnel to be 34 metres, a distance of two metres short of its full length.
- 25 There was no system or any adequate system in place which enabled employees to know where the two tunnels were relative to each other at any given time.
- 26 There was no system in place to enable employees to know when to stop, at which face they should stop and when they should be working one tunnel only.
- 27 The defendant was aware of the dangers as appears from Exhibit C6, wherein it states “no multiple same firing of any headings ... within 12 metres of another”.
- 28 The defendant’s surveyors when interviewed stated that there was no formal procedure for keeping the mark up memos up to date and it was only on a once a month basis that exact measurements of tunnels were carried out.
- 29 By allowing employees to work within a dangerous proximity to each other the defendant failed to provide a safe working environment.
- 30 The defendant’s failure to provide information, instruction and supervision particularly relates to Whittaker. Whittaker should have been instructed how to measure accurately both tunnels and he should have been in communication with all employees as to the nature of the work being carried out. Also in this context Buza was unaware that both tunnels were being worked and none of the employees knew of the proximity of the tunnels to each other.

#### **Summary of submissions of counsel for the defendant**

- 31 It was conceded that the employees were unaware of the close proximity of the approaching faces.

- 32 BHP Billiton was the ultimate corporate entity responsible for the mining activities and it had a very substantial commitment to safety (see Exhibit D1 comprising a summarised description of BHP's activities with respect to safety matters).
- 33 As regards safety at the Olympic Dam site there was evidence of a very good safety record. An audit in late 2004 led to renewal of the self-insurance licence under the *Workers Rehabilitation and Compensation Act 1986* for the maximum renewal period of three years.
- 34 There were written procedures (see Exhibits C3, C4 and C5) in place for drilling development faces and such procedures had been communicated to all employees. In particular paragraph 8.6 of Exhibit C4 contains a caution. The advance of one face is to be stopped if the pillar separating the two faces is three cuts or 12 metres or less.
- 35 Critical measurements on the day of the incident were not taken by one person and not communicated between the two people (Whittaker and Buza) who undertook the measurements. If there had not been the breakdown in communication then there would have been an appreciation that the pillar separating the two tunnels was less than three cuts and work on one face would have stopped.
- 36 It was conceded that Buza was unaware that there was any tunnelling in effect behind what was a pillar.
- 37 It was accepted that the maps available depicting the location of the faces were inconsistent as between different maps.
- 38 This is a first offence. A plea of guilty has been entered.
- 39 The defendant reacted appropriately and cooperated fully following the incident. The defendant's response included:-
  - Notification of relevant authorities including the police and Workplace Services;
  - Setting up a crisis room and evacuating the mining operations;
  - Arranging for counsellors to fly up to the site;
  - Arranging for a charter plane to fly Workplace Services to the site;
  - Arranging for an internal investigation team to attend the site;
  - Contacting Eibl's wife and other family members;

- Arranging counselling for certain family members resident in Geelong;
- Arranging a charter flight for Mrs Eibl and her children to attend upon site;
- Bringing out from the UK Mrs Eibl's uncle to provide her with some support;
- Arranging a charter flight to the site for other family members;
- Assisting in arranging and paying for a memorial service; and
- Helping to establish the Eibl family trust.

40 The defendant undertook a complete internal and external audit of its procedures.

41 Development headings are now plotted on a day-by-day basis and are routinely checked by a surveyor to ensure accuracy. There is a once a week audit of the working plans.

42 The pillar distance between the advancing tunnels has been increased from 12 metres to 24 metres.

43 There is now a specific procedural document dealing exclusively with tunnelling that will intersect.

44 There are development stops which can only be lifted by the Manager of Mine Development.

45 A procedural document has been developed to provide an overview of all development activities going on and their interaction.

46 The various procedures, systems and steps taken since the incident would eliminate or greatly reduce the chance of such an incident happening again.

47 This is an appropriate matter for the application of the provisions of s 18A of the *Criminal Law (Sentencing) Act 1988*.

### **Summary and Reasons for Decision**

48 The defendant pleaded guilty to three separate counts relating to breaches of s 19(1) of the *Occupational Health Safety and Welfare Act 1986*, all three counts arising from the one incident.

49 Each count carries a maximum penalty of \$100,000 for a first offence with no minimum penalty.

- 50 The duty imposed upon the defendant as employer is to protect against the risk of injury or impairment to health. The risk herein, given the involvement of explosives, was that of fatal consequences.
- 51 Subsequent to the incident it was established that the drill bit in the right hand side of the jumbo drill being operated by Child in the left tunnel struck a detonator in one of the charge holes that had been packed by Eibl in the right tunnel.
- 52 The various personnel involved in the operation were unaware of the close proximity of the approaching faces of the two tunnels.
- 53 Prior to the incident there existed various safety standards and evidence of a commitment towards safety (see Exhibit D1).
- 54 In existence at the time of the incident was a system whereby the advance of one face was to be stopped when the barrier separating the two faces was three cuts or 12 metres.
- 55 The system that existed at the time of the incident was inadequate. The various maps or diagrams depicting the location of the two approaching faces were inconsistent as between different maps. There was no certainty amongst those using the maps as to which particular map was operational or current.
- 56 On the day of the incident Whittaker, the relief supervisor, located in the right tunnel measured the distance from a reference point such distance being calculated as eight metres from the corner depicted on the various maps or diagrams.
- 57 Buza separately measured the left tunnel producing a measurement of two metres from the corner. The end result was a gap of about 10 metres separating the two tunnel faces, a distance less than the three cuts or 12 metres. In fact the actual distance separating the two tunnel faces was even less than 10 metres given that the effective reach of the drill bit was four metres. If the system in place at the time was working effectively the work on one face should have been stopped.
- 58 There was no communication between Buza and Whittaker, the latter having left the scene to attend a supervisors meeting.
- 59 The subsequent systems put in place by the defendant highlights the fact that there were readily available obvious remedial measures. I indicate that I am satisfied, given the introduction of the systems following the incident, that such an incident is unlikely to happen again.



- 60 The defendant reacted immediately and appropriately as regards the needs of the relatives of Eibl following the incident. The provision of counsellors, the arrangement of chartered flights to convey various family members, payment of independent legal support, assisting with and paying the costs of a memorial service and the establishment of the Eibl Family Trust were all referred to. The defendant has clearly accepted responsibility and demonstrated concern and contrition.
- 61 This is a first offence under the provisions of s 19(1). The defendant entered a plea of guilty. The defendant fully cooperated with the Department during the course of the investigation.
- 62 Following the hearing of the initial submissions the Courts attention was directed to a previous conviction recorded against the defendant under s 11 of the *Dangerous Substances Act 1979*.
- 63 The incident giving rise to the prosecution under the *Dangerous Substances Act 1979* involved the conveyance of sulphuric acid through a pipe line. Sulphuric acid under pressure sprayed out of the pipe onto a workers body resulting in serious injuries.
- 64 The particulars contained in the Information and Summons allege a failure to provide adequate information, instruction, training and supervision, a failure to ensure that there were appropriate written procedures and a failure to ensure the performance of an adequate job safety analysis.
- 65 Counsel for the complainant submitted that the fact of the previous conviction disentitles the defendant to the credit it claimed as a first offender. It was a similar offence involving an injury at the workplace and should be taken into consideration when assessing penalty.
- 66 Counsel for the defendant alluded to the differing objectives of the *Dangerous Substances Act 1979* and the *Occupational Health Safety and Welfare Act 1986* to underpin the contention that the prior conviction against the defendant for a breach of the *Dangerous Substances Act 1979* has little or no relevance to the offence currently before the Court.
- 67 Section 19 of the *Occupational Health, Safety and Welfare Act 1986* contemplates an increase in penalty only in circumstances where there is a prior conviction for a breach against that Act.
- 68 Whilst s 10 of the *Criminal Law (Sentencing) Act 1988* directs a sentencing court to have regard to other offences the submission made

was that the significance of the other offence was diminished by the effect of s 19 of the *Occupational Health, Safety and Welfare Act 1986*.

- 69 The conviction under the *Dangerous Substances Act 1979* concerned an incident that took place on 21 September 1999. The inherent dangerous nature of the defendant's mining operations, the number of employees and the otherwise good record are significant considerations.
- 70 Counsel for the defendant referred to various authorities in the context of prior offending including: *Veen (No 2) v The Queen* (1988) 164 CLR 465 at 477 - 478, *R v Gibbings* (1936) SASR 36, *Tame v Fingleton* (1974) 8 SASR 507, *R v Baverstock* [1993] 2 All ER 32.
- 71 The defendant is a first offender under the provisions of s 19(1). I do not accept the submission made by counsel for the complainant, namely that the fact of the previous conviction under the *Dangerous Substances Act 1979* disentitles the defendant to the credit it claimed as a first offender. I do however agree with the submission made that it was a similar offence involving an injury at the workplace and should be taken into consideration when assessing penalty.
- 72 The principles from the various authorities relating to consideration of antecedent criminal history are:-
- Regard is to be had to the circumstances of each particular case and to the personal circumstances of the offender;
  - The nature of the previous offences and the recency or otherwise of their having been committed;
  - The deterrent effect of the sentences previously passed; and
  - Previous conviction may be taken into account in determining the sentence to be imposed but cannot be given such weight as to lead to the imposition of a penalty disproportionate to the gravity of the instant offence. See generally *Veen (No 2) v The Queen* (supra) *R v Gibbings* (supra), *Tame v Fingleton* (supra), *R v Baverstock* (supra).
- 73 The previous offence arose out of an incident at the workplace. The lapse of time between that offence (date of incident 21 September 1999) and the date of the incident before this Court (19 July 2005) is a relevant consideration. Whilst the fact of the previous conviction is to be included in my considerations I consider that my primary task is to assess the relative seriousness of this particular breach and impose a penalty accordingly.

- 74 There are three separate counts. I record a conviction on each of the three counts.
- 75 The defendant is entitled to receive discount for its plea of guilty. The amount of such discount is within the discretion of the Court and in this instance must be conservative given the overwhelming facts pointing to the guilt of the defendant. (See the remarks of Perry J in *R v Michael Robert Morgan* BC 9700125). I consider an appropriate discount to be 15 per cent.
- 76 I propose to impose one penalty pursuant to s 18A of the *Criminal Law (Sentencing) Act 1988*. There is also the limitation on sentencing powers to consider, as to the amount of fine that can be imposed.
- 77 As has been canvassed above there are few facts mitigating the objective seriousness of this particular offence. It is my view that this is a case that can be properly characterised as approaching the worst category of cases for which the maximum penalty is prescribed. I have however come to the conclusion that as this is not a case of the defendant deliberately disregarding safety procedures it is not a worst category of case attracting the maximum penalty.
- 78 Section 19(3) of the *Criminal Law (Sentencing) Act 1988* places limitations upon the sentencing powers of the Magistrates Court. Section 18A of the same Act deals with sentencing for multiple offences.

#### Section 18A

“If a person is found guilty by a court of a number of offences, the court may sentence the person to the one penalty for all or some of those offences, but the sentence cannot exceed the total of the maximum penalties that could be imposed in respect of each of the offences to which the sentence relates.”

#### Section 19

- “(1) The Magistrates Court does not, unless it is constituted of a Magistrate, have the power to impose a sentence of imprisonment.
- (2) If the Court, constituted otherwise than by a Magistrate, is of the opinion that a sentence of imprisonment should be imposed in any particular case, it may remand the defendant to appear for sentence before the Court constituted of a Magistrate.
- (3) The Magistrates Court does not have the power to impose-
- (a) a sentence of imprisonment that exceeds 2 years; or

(b) a fine that exceeds \$150,000.

- (4) Subsection (3) applies whether **the offence** to which the sentence relates is a summary offence or a minor indictable offence. (My emphasis).
- (5) If the Court is of the opinion in any particular case that a sentence should be imposed that exceeds the limits prescribed by subsection (3), the Court may remand the defendant to appear for sentence before the District Court.”

79 The interaction between ss 18A and 19(3) of the *Criminal Law (Sentencing) Act 1988* has been considered in various decisions of the Supreme Court.

80 The prevailing view (see for example *Ticala v Police*, Unreported 16 July 1997 Lander J, *Rang v SA Police*, Unreported 12 November 1993, Mullighan J and *Police v Curtis & Marshall* [2004] SASC 184, Gray J) as stated by Gray J in *Police v Curtis & Marshall* at par 34 is:-

“Section 19(3) limits the magistrate’s power to impose a sentence of more than two years for “an offence”. Section 18A allows one sentence to be imposed for multiple offending. Nothing in the wording of section 18A suggests that a magistrate sentencing pursuant to this section is limited by the terms of section 19(3) to impose the one sentence that does not exceed two years. On the contrary, the context of the legislation suggests that section 18A provides sentencing Magistrates with a practical alternative to imposing cumulative or concurrent sentences for separate offences on separate occasions.”

81 The maximum penalty of 2 years or \$150,000 is the maximum penalty to be imposed by a magistrate for *any single offence*. There are before the Court three separate offences each having a maximum penalty of \$100,000.

82 Taking into consideration all matters that I have referred to herein I impose as a starting point a notional fine of \$180,000 discounted by 15 per cent resulting in an actual fine of \$153,000.

### **Compensation**

83 Compensation has been sought by seven persons pursuant to s 53 of the *Criminal Law (Sentencing) Act 1988*. The total amount of compensation that can be awarded is limited to \$20,000 and is payable for “injury, loss

or damage resulting from the offence". "Injury" includes mental injury, shock, grief and distress resulting from the offence (s 3(1)).

- 84 The seven claimants are Amanda Eibl (wife of the deceased Karl Eibl), Nicholas and Liam Eibl (the two children of the deceased), Nanette Joan Eibl (mother of the deceased), Bob Eibl (father of the deceased), Mark Eibl (brother of the deceased) and John Eibl (brother of the deceased).
- 85 Aside from the two children who were referred to in Amanda Eibl's victim impact statement all claimants provided to the Court a victim impact statement.
- 86 Counsel for the defendant requested the opportunity to make written submissions as to the application made for compensation by counsel for the complainant.
- 87 Subsequently the lawyers representing the defendant caused correspondence dated 17 July 2006 to be sent to the Court detailing the defendants intentions namely:-

The defendant:

- “1. does not wish to put any submissions in respect of the Complainant's Application for compensation to be paid to Amanda Eibl, Nanette Eibl, Bob Eibl, Mark Eibl and John Eibl pursuant to the Act.
2. accepts that the maximum amount that can be awarded is \$20,000.00 with any such amount to be apportioned to (sic) between the five applicants; and
3. that if your Honour is inclined to award compensation under the Act it does not wish to be heard as to how any compensation should be distributed amongst the abovementioned individuals.”

- 88 As I have indicated above the number of claimants is in fact seven.
- 89 Any award of compensation is not truly reflective of the injury, loss, or damage suffered by the claimants.
- 90 Olsson J in *Vougamalis v Nixon* (1991) 56 SASR 574 discussed the basis upon which the discretion to award compensation pursuant to s 53 of the *Criminal Law (Sentencing) Act 1988* was to be exercised and further discussed what was meant by the expression "compensation" and how compensation ought to be assessed. His Honour stated at p 578:-

*“S 53(3) expressly requires the Court to arrive at an appropriate amount of compensation having regard to any evidence before the Court and to any representations made by or on behalf of the prosecutor or the defendant”.*

91 There was no reason to restrict the natural meaning of the word “compensation”. His Honour went on to say at p 579:-

*“It must at once be recognised that any discretion to award compensation must be exercised on a proper judicial basis and subject to the express limitations imposed by the relevant legislation. That necessarily implies that the quantum of any compensation awarded must not be a figure plucked from the air, but one which is adequately justified by proper evidence. The onus lies upon the prosecutor who applies for an order for compensation to prove the validity of that for which he contends. The evidence contemplated by s 53(3) is material which is both relevant and admissible according to the normal rules of evidence. There is no power to dispense with a proper evidentiary base to found a compensatory order unless appropriate concessions are made by or on behalf of a defendant to warrant such a course”.*

See also the remarks made on the topic of compensation by Jennings SJ in *Softwood Holdings Limited v Stevenson* [1997] 64 SAIR 457 at pp 468 - 471.

92 Given the circumstances set out in the victim impact statements provided, which I will not canvas herein, I consider the maximum of \$20,000 should be awarded and apportioned as follows:-

- \$8000 to be paid to the wife of the deceased Amanda Eibl;
- \$3000 to be paid to a son of the deceased Nicholas Eibl;
- \$3000 to be paid to a son of the deceased Liam Eibl;
- \$2000 to be paid to the mother of the deceased Nanette Joan Eibl;
- \$2000 to be paid to the father of the deceased Bob Eibl;
- \$1000 to be paid to the brother of the deceased Mark Eibl; and
- \$1000 to be paid to the brother of the deceased John Eibl.

93 Compensation as ordered is to be paid within 28 days.

### Summary of penalties

94 I impose the following penalties:-

A conviction on each of the three counts.

Pursuant to the provisions of s 18A of the *Criminal Law (Sentencing) Act 1988* one fine of: \$153,000.00

Court Costs \$139.00

Levy (3 counts) \$105.00

Counsel Fee: \$750.00\*

**TOTAL: \$153,994.00**

28 days to pay

\* Payable to the Crown Solicitor's Office