



**SHERIFF APPEAL COURT**

**[2023] SAC (Crim) 2  
SAC/2022-300/AP**

Sheriff Principal N Ross  
Appeal Sheriff G Wade KC  
Appeal Sheriff P Hughes

**OPINION OF THE COURT**

delivered by Appeal Sheriff P Hughes

in

Appeal by Stated Case

by

KEVIN BOWIE

Appellant

against

PROCURATOR FISCAL, FALKIRK

Respondent

**Appellant: Shand; Faculty Appeals Edinburgh Unit (for Westcourts, Greenock)  
Respondent: McKenna (sol adv); Crown Agent**

28 March 2023

**Introduction**

[1] On 31 March 2022, following an eight-day trial the appellant was convicted of the following charge:

“On 27 September 2018 at Balkerach Street, Doune, FK16 6DE you KEVIN BOWIE, being a director of Precision Decorating Services (Scotland) Ltd, a body corporate and employer within the meaning of the aftermentioned regulations and an offence under Section 33(1)(c) of the aftermentioned Act having been attributable to neglect

on your part, in that you did fail to ensure that that work being carried out at height by the now deceased Michael McArthur at said address was properly planned, appropriately supervised and carried out in a manner that was, so far as reasonably practicable, safe in that you did fail to ensure that suitable measures were in place to effectively segregate a NIFTY HR12 mobile elevated work platform (MEWP) from vehicular traffic travelling on Balkerach Street, Doune, while the said Michael McArthur was working at height on said MEWP and in consequence thereof said MEWP was struck by a bus travelling on said public highway and said Michael McArthur was ejected from the basket of said MEWP and as a result he fell a distance of around 8 metres to the ground and sustained severe injuries from which he died, you are by virtue of Section 37(1) of the Health and Safety at Work etc Act 1974 guilty of said offence: CONTRARY to Work at Height Regulations 2005, Regulation 4(1) and Sections 33(1)(c) and 37(1) of the Health and Safety at Work etc Act 1974"

[2] The appellant now appeals against that conviction. The stated case in its final adjusted version identifies the following questions:

1. Was the sheriff entitled to have regard to issues of planning and supervision in assessing the appellant's guilt?
2. Was the sheriff entitled on the evidence to be satisfied that the failure to carry out the work in a manner which was so far as reasonably practicable safe was attributable to neglect on the part of the appellant as director of PDS?
3. Was the sheriff entitled on the evidence to find it established beyond reasonable doubt that the death of Michael McArthur was in consequence of neglect on the part of the appellant?
4. [Not insisted upon]
5. Was the sheriff entitled to find that this offence was attributable to neglect by the appellant as sole director of the company, he having failed (i) to ensure that the work was done safely by arranging segregation of the MEWP from traffic, (ii) failed to properly plan the work, specifically by applying for a

permit from the local authority, or carrying out a risk assessment, and

(iii) failed to provide appropriate supervision in the form of a banksman?

6. Was the sheriff entitled to find that the bus struck the knuckle of the elevating arm of the MEWP because the driver misjudged its position relative to the position of her vehicle, a misjudgement contributed to by the knuckle having no vertical component to link its position in the air with a fixed position on the ground?
7. Was the sheriff entitled to find that the death was in consequence of the appellant's said neglect, in that his failure to ensure segregation of the MEWP from traffic made a significant or material contribution to the death occurring?
8. Was the sheriff entitled to find that due to the appellant's previous hire of the MEWP and instruction in its use, the appellant knew or ought to have known that the knuckle of the extending arm was liable to overhang the base of the MEWP in the course of normal operation?
9. Was the sheriff entitled to find that the appellant did not contact the local authority to apply for a permit as he should have done, due to its obstruction of the eastbound lane of the public carriageway?
10. Was the sheriff entitled to find that the risk was obvious and should have been obvious to the appellant, regardless of whether the deceased appreciated or acted upon it?

**Facts**

[3] At the time of the offence the appellant owned and was sole director of the company named in the charge (hereafter "PDS"). He contracted on behalf of PDS to prepare and paint windows on the second floor of a house at the locus, which is a busy high street. To do so he hired a 'Nifty HR12' mobile elevated work platform ("the MEWP"). This had a two-axle rigid chassis base on which was mounted an elevating arm. The elevating arm comprised two main sections jointed with a knuckle, and ending with a work basket.

[4] Two months prior to this offence the appellant had hired the MEWP for another job and had been given a 15-minute demonstration of how it operated. The appellant hired the deceased Mr McArthur, then aged 26, who in April 2017 had completed a day-long "novice basic training" course in how to operate the MEWP.

[5] On the morning of 27 September 2018 the appellant was present when the MEWP arrived and was parked on the road's eastbound carriageway, obstructing vehicular traffic. No measures were taken to segregate the MEWP from traffic or to control traffic. The appellant left the locus and Mr McArthur began operating the MEWP alone and unsupervised. At around 10.23am Mr McArthur was working in the MEWP's basket at a height of 6.12 metres from the ground. As he did so the "knuckle" of the MEWP's elevating arm was overhanging its base, and was struck by the nearside rear view mirror of a single deck tour bus being driven in the eastbound lane along Balkerach Street. This collision caused Mr McArthur to fall out of the basket to the ground, sustaining fatal injuries. He had not been wearing a safety harness or hard hat whilst working.

## Relevant Law

### Work at Height Regulations 2005

4. – (1) Every employer shall ensure that work at height is –

- (a) properly planned;
- (b) appropriately supervised; and
- (c) carried out in a manner which is so far as is reasonably practicable safe,

and that its planning includes the selection of work equipment in accordance with regulation 7.

### Health & Safety at Work Act 1974

Section 33(1) - It is an offence for a person [...] (c) to contravene any health and safety regulations ... or any requirement or prohibition imposed under any such regulations (including any requirement or prohibition to which he is subject by virtue of the terms of or any condition or restriction attached to any licence, approval, exemption or other authority issued, given or granted under the regulations);

Section 37(1)(1) - Where an offence under any of the relevant statutory provisions committed by a body corporate is proved to have been committed with the consent or connivance of, or to have been attributable to any neglect on the part of, any director, manager, secretary or other similar officer of the body corporate or a person who was purporting to act in any such capacity, he as well as the body corporate shall be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

## Submissions

[6] In terms of the first and ninth questions in the stated case, counsel for the appellant submitted, under reference to the authorities of *Cleveland Structural Engineering Ltd v Hamilton* 1994 SLT 590 and *Joseph Johnston & Sons Ltd v Ingram* 1976 SLT (Notes) 30, that the terms of the charge had referred only to the failure to ensure segregation from traffic; consequently, fair notice had only been given of that element. The sheriff had erred in finding the failure to have been additionally constituted by the lack of a permit or of a banksman.

[7] The second, fifth, eighth and tenth questions all related to whether the offence by the company was attributable to the neglect of the appellant as director. The appellant's position is that he himself was not expert in the use of MEWPs and had delegated the task to a person – the deceased - whom he reasonably believed to be appropriately qualified to operate one.

[8] The third, sixth and seventh questions raised the issue of whether - assuming that the company's failure was attributable to the appellant's neglect – that failure had caused Mr McArthur's death. It was submitted that for the court to make such a finding it would have had to have been proven that but for the lack of segregation, the accident would not have happened.

[9] The advocate depute invited us to refuse the appeal. The sheriff's conclusions were clearly supported by the evidence heard at trial. The danger presented by the circumstances of the MEWP's operation had been obvious at the time, and the sheriff had been entitled to form his own assessment of that danger from photographs lodged in evidence. At trial it had been a matter of agreement that there was no record of the appellant having applied for

a permit for the works. Every act of PDS had been under the appellant's control and there was ample evidence from which to infer neglect on his part.

### **Analysis & Decision**

[10] In the course of the hearing it became clear that the central thrust of the appeal was directed at the question of the appellant's neglect as director, i.e. at the second, fifth, eighth and tenth questions, and we shall address this matter first. Our own researches identified the decision of the United Kingdom Supreme Court in *R v Chagot* [2009] 1 WLR 1 as providing useful guidance on the issue of directors' liability under Section 37 HSWA and we invited parties to make submissions.

[11] Having regard to that authority, and in particular to the opinion of Lord Hope at paragraphs 32-34, it is clear that in prosecutions under Section 37 the first matter to be established is whether the body corporate of which an accused person is an officer has committed an offence under one of the other provisions in that Part of the Act. If so, consideration must then be given to the accused officer's state of mind, and to whether the body corporate committed the offence with that officer's consent or connivance, or its commission was attributable to any neglect on the officer's part.

[12] In considering this issue, the question is whether the accused officer should have been put on inquiry, so as to have taken steps to determine whether or not the appropriate safety procedures were in place. The more remote the circumstances were from the officer's control, the harder it will be to infer consent, connivance or neglect on the officer's part. Conversely, if those circumstances were under the direction or control of the officer - particularly where he was in day to day contact with what was done - relatively little evidence will be required to draw that inference.

[13] Applying these principles to the present case, the appellant conceded that PDS had failed to comply with its Regulation 4 WHR 2005 duty to ensure that Mr McArthur's work at height was carried out in a manner that was so far as reasonably practicable safe; and that consequently the company (which was wound up prior to this prosecution being brought) would have been guilty of a contravention of Section 33 HSWA.

[14] The appellant submitted, however, that the company's failure was attributable to its employee Mr McArthur rather than to its director, the appellant. We reject that submission. The evidence before the sheriff was eloquent of the circumstances giving rise to the risk being under the control and direction of the appellant. He was the company's sole director; made the contract which necessitated the use of the MEWP; hired the MEWP; engaged the deceased to operate it; and was initially present as the work commenced, at which point it was apparent that no measure to segregate the MEWP from traffic – or indeed to ensure safe working through any other mechanism - was in place. Before us it was argued that the need for segregation would only have been apparent to someone who had received the same training as that undergone by the deceased Mr McArthur. Again we reject this argument. The sheriff had ample evidential support to decide otherwise; for example, one of the civilian eyewitnesses who saw the MEWP operating prior to the collision – a person without any experience of such equipment – had thought that “it doesn't look safe”, was “shocked” that the MEWP had nothing protecting it from traffic, and had said at the time “that's an accident waiting to happen”. The sheriff also had the benefit of numerous photographs and dashcam footage taken prior to the incident, real evidence which he was entitled to use as the basis on which to establish fact (*Gubinas v HMA* 2018 JC 45 per Lord Justice-General Carloway at paragraph 59). His conclusion was that:



“this evidence made clear – and with respect, abundantly clear - the exposed and obviously dangerous position of the MEWP in the absence of effective segregation from the traffic.”

[15] Having had regard to the evidence cited by the sheriff, we reject the submission that his findings in this respect can be faulted. The risk was obvious, the circumstances were known to and under the control of the appellant, and the sheriff was justified in finding that the company’s failure to comply with its duty was attributable to the appellant’s neglect. For the purposes of Section 37 HSWA, any degree of attributability will suffice (*Wotherspoon v HMA* 1978 JC 74 at 78 per Lord Justice-General Emslie). Company directors in the position of the appellant cannot simply slough off responsibility to their employees. For completeness we do not accept counsel’s characterisation of the deceased Mr McArthur as an expert in the operation of MEWPs; rather he was a young man trained as a “novice” some 18 months previously who had acquired a degree of experience in the intervening period. We find that the second, fifth, eighth and tenth questions in the stated case fall to be answered in the affirmative.

[16] We turn to consider the first and ninth questions regarding fair notice. We agree with the advocate depute’s contention that both *Cleveland Structural Engineering* and *Joseph Johnston & Sons* can be distinguished, as in both cases convictions were returned in respect of matters not libelled at all. We consider that in the circumstances of this case, the lack of planning and supervision are not separable, discrete elements but rather are linked to the lack of segregation. The Regulation 4(a) duty to ensure proper planning and the Regulation 4(b) duty to ensure appropriate supervision was linked with the Regulation 4(c) duty to ensure that the work was carried out in a manner which was, so far as reasonably practicable, safe.

[17] In terms of planning, had a permit been sought or a risk assessment carried out, the need for segregation would have been identified. The charge libels only a single day, but the neglect being prosecuted is not the failure to apply for a permit prior to that day, but allowing the work to proceed on that day in an unsafe manner. The lack of permit is simply one piece of evidence showing the appellant's negligent mindset. In terms of supervision, the appellant was present at the locus on the day in question and saw how the deceased was proceeding with the task in an unsafe manner in the absence of segregation, yet did not intervene. Whilst there was no evidence of the MEWP being moved, the platform was as its name makes clear mobile, and at the very least it must have been moved to arrive at the locus and in due course to leave it. We conclude that the lack of a permit and of a banksman were relevant factors for the sheriff to include in his assessment of whether the appellant's neglect contributed to the failure by PDS to ensure that the work was carried out in a manner which was, so far as reasonably practicable, safe. That being so, the first and ninth questions fall to be answered in the affirmative.

[18] In terms of the issue of causation identified in questions three, six and seven – an issue which does not bear on conviction but which may have relevance for sentence - we agree with the sheriff's analysis that there was no requirement for the Crown to prove that the failure arising from the appellant's neglect was the sole or even the main cause of the death. It sufficed if that failure made a significant or material contribution to the death - *Johnston v HMA* 2009 JC 227 at paragraph 54; *Environment Agency (formerly National Rivers Authority) v Empress Car Company* [1999] 2 AC 22 at 34F and 36B. We therefore answer these questions too in the affirmative.

[19] We refuse the appeal.