

**IN THE DISTRICT COURT
AT WHANGĀREI**

**CRI-2015-088-001566
[2016] NZDC 12296**

WORK SAFE NEW ZEALAND
Prosecutor

v

CHRISTOPHER GRAHAM ANGUS
Defendant

Hearing: 16 June 2016
Appearances: T McGuigan and S Symon for the Prosecutor
K Bailey for the Defendant
Judgment: 16 June 2016

NOTES OF JUDGE K J GLUBB ON SENTENCING

[1] Christopher Graham Angus, you appear before the Court today for sentence having pleaded guilty to two charges; one of operating an unregistered amusement device and the second of deceiving a health and safety inspector.

[2] The facts are that on a date prior to 5 December 2014, a flying fox was erected at Angus Entertainment Fun Park situated near Whangārei. On 5 December 2014 you were the sole shareholder and director of a number of companies that had responsibility for the ownership of the flying fox and other equipment and structures on the park.

[3] On 5 December 2014 you were the person in charge of all of the activities at the park. On that day, the flying fox was physically used in the morning by four people and you facilitated that use. That day a group of people from the

Far North Holdings Limited booked to use the activities of the park. The first activity used by that group was the paintball activity. Mr Tohu, the deceased in this matter did not participate in that activity. Following paintball there was a luncheon. By agreement the no alcohol policy was relaxed for those who were to participate in the next activity and they were permitted a small amount of alcohol with lunch.

[4] When the members of this group began making their way towards the clay bird shooting, which was to have been the next activity, Mr Tohu started to walk towards the flying fox. You told other members of the group from the Far North Holdings Limited that the flying fox was locked.

[5] The device was not locked when Mr Tohu and Mr Voorhoeve arrived at the launch platform. Someone appears to have altered the configuration of the device, but it is not clear when that occurred. When Mr Boakes later arrived at the carriage way, which is the part of the flying fox that supports the weight of the person flying down the fox on the guide wires, it was moving freely.

[6] Mr Tohu was able to take hold of the straps, overcome the hydraulic resistance and then ride the flying fox before falling to his death. There was no impediment or restriction preventing access to the device by unauthorised guests. It would seem that as he was going down the flying fox he lost his grip and as a consequence, fell to the ground.

[7] Shortly after the accident police personnel arrived at the park and during the initial scene examination photographs were taken of the flying fox in situ. Similarly a health and safety inspector arrived and also took preliminary photographs and the intention was to return the following morning.

[8] That same night, you phoned an engineer by the name of Shane Speight and requested him to register the flying fox as an amusement device. At some point between the accident on 5 December and the visit by Work Safe personnel on 6 December 2014, you retrieved the flying fox carriage way from where it was located on the wire, you attached a padlock to the lanyards that hung beneath the carriage way and you sent it back down the wire.

[9] During their visit on 6 December 2014, you told Work Safe inspectors that a padlock had been attached to the flying fox. As the inspectors and you began searching for the padlock it could not be located. The flying fox was then retrieved by you and the padlock was found attached to those lanyards which suggested that Mr Tohu had somehow disabled it and overcome the locking mechanism. You then demonstrated to the inspectors how Mr Tohu could have disabled or overcome that locking mechanism and padlock.

[10] Faced with this accident and the pending health and safety inquiry, you went to a significant effort to interfere with the scene and then embarked on an elaborate charade to obstruct and deceive inspectors. None of that does you any credit Mr Angus.

[11] When I look to the aggravating factors of the machinery charge, there is the fact that the device was not locked and that park guests had unrestricted access to it. Secondly, and as acknowledged by your counsel, is the fact that someone died as a consequence of using that unregistered device. It is also the impact on the victims, the family of the deceased and a number of them are here today and I acknowledge their presence.

[12] A large number of victim impact statements have been placed before the Court, I have read them all. They are all heartfelt and moving. Nothing that this Court does will undo that hurt, but what is clear is that the ripples from this tragic accident continue to radiate out amongst the family and their anguish is very real.

[13] I look to the second charge and specifically the aggravating factors relevant to it. There is the planning and premeditation. Perhaps not significant planning, but considerable thought has been given to it. Aware that an investigation was underway and in a deliberate attempt to deflect liability and mislead the investigators, you interfered with that flying fox, applying a lock and then embarking on an elaborate charade to deceive the inspectors.

[14] What is the impact on the victim here, and the victim is the community actually. The investigators represent the community and they were initially

deceived; but for the photographs taken by attending emergency service personnel they would have been none the wiser. This had the potential to significantly influence the investigation and falsely. As such, this level of calculated deceit strikes the very heart of our system of justice and the investigation of serious incidents like this.

[15] When I look to your personal circumstances, there are no aggravating factors in that regard. I look to the prosecution submissions in terms of the fines and starting points and I acknowledge the approach that is favoured in the High Court decision of *DOL v Hanham* (2008) 6 NZELR 79.

[16] In terms of the machinery charge, Mr Symon for the prosecution submits that it is at its the most serious, \$5000 is where it should sit. He says for the health and safety charge it should be in the order of \$120,000 to \$140,000 and reparation of \$100,000. In the end, factoring in the reparation figure, he takes a global starting point in terms of fine of \$50,000 plus \$5000 for the machine charge, and then \$100,000 for reparations.

[17] The defence position is that this is a unique set of circumstances. He submits this will never happen again. It was a situation that arose from your perspective, by virtue of some confusion. He asks the Court to take account of the fact that you thought it was locked, that you did not expect this to happen and that you did not know of the level of Mr Tohu's intoxication, although acknowledging that you did note that he had been drinking. Also that subsequently you closed down the park for some two months out of respect for him. He submits that there is remorse. He also submits that you are essentially impecunious and that you have no ability to meet any financial penalty.

[18] As a lead up to sentencing I sought and received an affidavit which included a declaration made essentially pursuant to s 42 Sentencing Act 2002 which detailed your financial position. You are the sole shareholder and director of Angus Entertainment Limited which was the company that was running the amusement park. There were also two associated entities, companies used to

facilitate re-supply of Angus Entertainment Limited it would seem, however, the principal entity for present purposes was Angus Entertainment Limited.

[19] In the 2014 to 2015 tax year, the group of companies returned a net loss of \$936 on the total income of \$59,183. It is also apparent from a review of that material that you have no personal assets to your name and you are in arrears on the payment of the lease for the land upon which the amusement park rests for some three years of \$3000, it being a \$1000 a year lease, and rent arrears of \$2981 or almost three months' rent for the house that you tenant which is also on that land.

[20] Mr Symon for the prosecution was concerned whether that reflected the position as it was at the time of the accident, and certainly from an assessment of those papers, it seems that it does.

[21] I note you support yourself and your three minor children; you are not on any form of benefit, but you are, it seems clear, the beneficiary of a family trust set up by your mother that is in existence, the CGA Trust. That trust owns the land the amusement park it is situated upon and also the house occupied by you. The objects of that trust are to benefit you and your children for education, medical and approved business endeavours. Although I note that the original trust deed was amended on 19 December 2014, so very shortly after the accident, changing the objects of the trust by removing "personal support, benefit, maintenance, education and advancement of life".

[22] I also note from information provided by your mother that you also have a liability to her for a personal loan in the order of \$28,000. Consideration was given to calling for a reparation report. However, both counsel agreed that the full position was before the Court and nothing further would be achieved by calling for a report pursuant to s 33 Sentencing Act. Accordingly, I did not and we proceeded to sentence today.

[23] I have given careful consideration of s 40 Sentencing Act and your financial capacity. I refer in that regard to the Higher Court authorities of *R v Khan* CA312/05 which says, "The financial capacity is also a matter for consideration." Further I

take account of *R v Bailey* CA306/03 where the Court of Appeal held that the level of reparations awarded has to be realistic, given the financial circumstances of the person against whom it is made.

[24] The prosecution has placed a large number of authorities before me principally addressing awards of reparations, but also the imposition of fines. I observe that none reflect the factual situation or financial circumstances that you present. Specifically I refer to the *Department of Labour v Streetsmart Limited*, *Department of Labour v Fletcher Concrete*, *Work Safe New Zealand v Gerrickson* and *Department of Labour v Datt*. What I observe is that from those cases there is a \$60 to \$120,000 reparation order and an end penalty of \$110 to \$150,000.

[25] I take account of personal mitigation for you. I recognise that you were willing to participate in a restorative justice conference. The family were not prepared to do so and that is, of course, their right, but I acknowledge that you were prepared to do so and I would give a small credit for that. I also note that there is reparation that will be ordered and I give you credit for that. Importantly too, there is a favourable safety record, you have no prior offending of this nature and I give you credit for that. In essence, I give five percent for willingness to participate, five percent for reparations and 10 percent for a favourable safety record.

[26] I turn to the purposes and principles of sentencing. There is the need to take account of the gravity of the offending and in relation to the machine charge, whilst I recognise that is potentially a penalty that is imposed for all manner of offending under that Act, this does approach the most serious of cases. I need to impose a sentence which is consistent with other sentences, although none on all fours has been shown to me. I need to impose the least restrictive sentence and here where financial penalty only is available, one which pays proper account to your financial circumstances.

[27] In this case the pleas came at a late stage, but those pleas were entered after a significant alteration was made in terms of the timing and the allegation within the charge. The prosecution accepted at the time that as a consequence a full discount could be available. The prosecution also noted that up to 25 percent might be

available for personal mitigation. Today I reduce that slightly in light of the approach taken and noting remorse is not readily to the fore as is often the case.

[28] Your counsel asked me to pull back from the significant sentencing totals that the prosecution have advanced. He says that those penalties are imposed under the health and safety legislation which is aimed primarily at employers who have deep pockets. He submits you are not in that categorisation. He says any penalty that is imposed upon you will act as a deterrent and will have deterrent effect.

[29] The prosecution submits there is a need to deter and denounce so that others in your position have sheeted home to them that they cannot breach these provisions lightly.

[30] What I acknowledge is that this is a difficult case. It presents a number of problems in terms of sentencing and I must endeavour to achieve a balance in this process.

[31] First and foremost, I look to where I would set the reparation figure. The reparation figure that I adopt as a starting point is not the \$100,000 that is advanced by the prosecution, rather it is \$60,000. Noting the fact that the deceased conduct on that day played a significant part as acknowledged and looking to s 9(2)(c) referring to the conduct of the victim, I reduce that reparation figure by 25 percent. That brings the total down by \$15,000 to \$45,000. I look then to your capacity to meet any form of reparations, and I will adopt the same approach in terms of the fine. Recognising that you are essentially without means, I give a discount of 33 percent. Thirty-three percent brings me down by 14.85 to \$30,150. I would round that down to \$30,000 reparations.

[32] I then turn to the machinery charge. I do not set the starting point at \$5000 as advanced on me by the prosecution. I bring it down slightly to \$4000. I leave open the prospect that there may well be a more serious charge.

[33] I then look to the deception charge. Mr Symon for the prosecution submits that this is egregious. He submits that this should attract a penalty very significantly

above the \$100,000 mark. Whilst I recognise that is open on some of the authorities, the approach I take on this matter is I adopt a starting point of \$50,000, and together with the machinery charge, that is \$54,000 all up. I discount for personal the mitigation the factors that I have listed already by 20 percent which brings me down by \$10,800 to \$43,200. I also discount for your plea by 25 percent brings me down by the same figure \$10,800 to \$32,400.

[34] I then turn to consider your financial capacity as I did in terms of the reparation figure. Taking that into account, I reduce that further by 33 percent which is \$10,692 which brings me a total of \$21,708 which I round down in your favour to \$21,000.

[35] Mr Angus, I have to impose a penalty on each of these charges. On the charge of failing to register the amusement device you are convicted and fined the sum of \$3000 and ordered to pay Court costs of \$130. I also order you to pay reparations in the sum of \$30,000.

[36] On the charge of obstructing or deceiving the health and safety inspector, I convict you and fine you the sum of \$18,000.

[37] Mr Angus, I do not expect I need to say this, but you cannot afford to come back before the Court on any further matters such as this.



K J Glubb
District Court Judge