

Citation: *R. v. Saffa Engineering Incorporated*,
2024 YKTC 17

Date: 20240717
Docket: 22-05832
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before Her Honour Judge Caldwell

REX

v.

SAFFA ENGINEERING INCORPORATED and
SYED IFTIKAR AHMAD

Appearances:

David McWhinnie and Stuart Leary
Luke Faught

Counsel for the Territorial Crown
Counsel for the Defence

REASONS FOR SENTENCE

[1] Saffa Engineering Inc. (“Saffa”) and Mr. Syed Ahmad, president of the corporation, have pled guilty to various offences flowing from the tragic death of Mr. Usman Khan, a driller employed by Saffa Engineering Inc.

[2] This is my judgment on sentence. I am imposing a total financial penalty of \$80,000.

Background

[3] Mr. Usman Khan not only was an employee of Saffa but also a friend of Mr. Ahmad. Mr. Ahmad, through his counsel, Mr. Luke Faught, described Mr. Khan as akin to a son and brother. Mr. Ahmad had known Mr. Khan since Mr. Khan was a child. The families are closely connected in their mutual home country of Pakistan. It was Mr. Ahmad that accompanied Mr. Khan's body back to Pakistan. I have no doubt that Mr. Khan's death has affected Mr. Ahmad profoundly on a personal level.

[4] Harsh though it may sound, however, the fact that Mr. Ahmad has been profoundly affected by Mr. Khan's death cannot dictate the outcome of this sentencing process.

The Charges

[5] Saffa has pled guilty to offences under section 44(1) of the *Occupational Health and Safety Act*, RSY 2002, c. 159, ("OHSA"), specifically:

1. Failing to ensure that effective guards are in place on rotating machine parts with which workers may come into contact or exposure contrary to para. 7.06 (1)(a) of the Yukon *OHSA Regulations*, O.I.C. 2006/178; and
2. Failing to ensure, so far as is reasonably practical, that machinery and equipment under the employer's control were safe and without risks to health as required by para. 3(1) of the *OHSA*.

[6] Mr. Ahmad has pled guilty to:

1. Failing, as an employer, to take all reasonable precautions and implement measures to prevent an occupational injury to Mr. Khan by eliminating hazards where possible, as required by para. 1.04(a) of the *OHS*A regulations.

Background Facts

[7] In November 2021, Saffa was conducting geotechnical drilling on highway roadbeds under contract to the Yukon Government, Department of Highways and Public Works (“HPW”). This was Saffa’s third Yukon contract though the company was based in Markham, Ontario. The company was fairly new to the Yukon as the first contract had been completed just the year prior.

[8] In order to obtain HPW contracts, Saffa must have valid safety certifications issued by a third party, the Northern Safety Network Yukon (“NSNY”). Obtaining such certification requires senior Saffa personnel completing specified courses, submitting for review a Health and Safety Manual, as well as undergoing an independent inspection and audit process conducted by an outside agency. All results are reviewed by the NSNY.

[9] Another Saffa employee, Mr. Fawad Khan, was qualified as a Site Supervisor after completing the courses. Site Supervisor is an NSNY designation, and his duties were included in the Field Supervisor responsibilities outlined in Saffa’s safety manual. He was the only Saffa employee working in the Yukon who had these qualifications. He

also served as the Safety Administrator, also described in Saffa's manual, and he was a driller's helper.

[10] Roughly one month before the accident, Mr. Fawad Khan returned to Ontario for reasons unknown to Mr. MacWhinnie and Mr. Leary, Department of Justice counsel. His driller's helper role was taken over by another individual. Mr. Usman Khan continued as a driller but also took on the role of Site Supervisor though he did not have the certification required by the NSNY.

[11] The safety manual signed by Mr. Ahmad was approved by the NSNY and a temporary certification letter was granted to Saffa at the time of the 2020 contract, allowing the company to operate for up to 180 days pending the completion of the audit portion.

[12] COVID intervened and through no fault of the company the audit process was delayed. Approval was extended to the audit date which ironically had been scheduled for the day after Mr. Usman Khan's death.

[13] The audit never was completed as Saffa ceased its Yukon operations immediately after Mr. Usman Khan's death.

[14] Mr. Usman Khan told Saffa that he was an experienced driller in Pakistan though Saffa did not obtain a resume or any confirmatory information. HPW's project manager, Mr. Lorenzie, told investigators that Mr. Khan appeared very professional and seemed to have prior drilling experience.

Facts on November 13, 2021

[15] On November 13, 2021, Mr. Usman Khan was operating a geotechnical drill on the North Klondike Highway, close to Stewart Crossing in the Yukon. By the late afternoon, he was drilling his sixth hole.

[16] The Saffa safety manual required that the driller's helper be present at all times while the drill rig was in operation; however, Mr. Usman Khan gave the helper permission to leave the rig in order to get a drink of water nearby. Also contrary to safety policy, Mr. Usman Khan continued to operate the drill alone.

[17] The helper returned approximately two minutes later to find Mr. Usman Khan on the ground with his arms detached from his body. One arm was wrapped around the rotating auger and the other was lying on the ground near Mr. Khan's body. The drill was still rotating as the drill lever was locked into position, allowing the drill to continue to rotate without the driller physically holding the lever.

[18] The helper screamed for assistance and attempted to shut off the rig but the emergency stop buttons did not respond. Eventually the rig had to be shut down by turning off the ignition key.

[19] In order to start the drill, the emergency stop system first had to be disengaged by switching the system toggle into an upright position. Once the drill was started, the toggle was supposed to be re-engaged by the driller by flipping the toggle downward. The emergency system also could be bypassed by flipping the toggle upward once again after the drill was started.

[20] None of the witnesses on scene had seen Mr. Usman Khan checking the emergency stops that day and there was no documentation that showed that any checks had been performed.

Subsequent Testing of the Drill Rig

[21] The drill is a Hetager GTD-003 Core/Auger Drill. It was purchased from Northeast Geotechnical based in Olyphant, Pennsylvania. It was in proper operating condition when delivered to Saffa. It was not equipped, however, with a guard as required by s. 7.06 of the *OHSA Regulations*.

[22] Furthermore, there was an overly lengthy protruding pin connecting the auger to a solid shaft. Proper pins were available but not used. RCMP investigation revealed that the cuff of Mr. Khan's glove had caught on the pin.

[23] Mr. Dave Lario, an engineer from Grande Prairie Alberta, conducted an inspection of the drilling rig and of the Ford F550 flat deck truck upon which the drilling rig was mounted. 44 deficiencies were noted ranging from relatively minor to very serious and dangerous.

Mr. Usman Khan's Actions

[24] No one knows how the accident occurred as no one was watching Mr. Usman Khan and the drill at the time.

[25] The most likely cause was that Mr. Usman Khan was attempting to clear dirt by hand from the rotating auger or was otherwise attempting to free the auger. This predominant theory flows from two facts. First, there were tools nearby suggesting he

was working on the drill. Secondly, Mr. Usman Khan had attempted to clear dirt by hand from the rotating auger in the past and had received a verbal warning not to engage in this practice. Mr. Fawad Khan gave this warning before he left the Yukon. Interviews with other employees revealed that Mr. Usman Khan continued this practice after Mr. Fawad Khan's departure.

[26] The other possibility is that Mr. Usman Khan slipped and fell into the unguarded rotating parts as the road was slippery that day.

[27] Subsequent testing revealed that the drill would only operate in a high-speed third gear though the drill's four-speed transmission was fully operational when the drill was sent to the Yukon. No one other than Mr. Usman Khan appeared to be aware of the transmission defect. Safe operation required that a low gear be selected at the start of drilling in order to prevent binding.

[28] As noted above, allowing the drill helper to leave the drill when the drill was operating and not re-engaging the emergency stop system were both contrary to safety policy.

Summary of the Relevant Saffa Safety Violations

[29] The following is a summary of the most relevant Saffa safety violations in the days preceding and on the day of the accident:

- The drill helper's permitted absence from the drill rig while it was operating;

- The absence from the site of a NSNY designated Site Supervisor;
- Mr. Usman Khan's operation of the drill while alone;
- Failure of Mr. Fawad Khan to document in an employee warning report Mr. Usman Khan's clearance of dirt from the auger while it was rotating;
- Failure by Mr. Usman Khan to adhere to the Preventative Maintenance Program;
- Failure of Mr. Usman Khan to engage the emergency stop system;
- Lack of a guard on the rotating equipment as required by Yukon regulation;
- Failure to install a proper sized pin between the auger and the shaft;
- Failure to address the 44 deficiencies found in the F550 and the drilling rig;
- Mr. Usman Khan's operation of the drill in 3rd gear at the commencement of drilling;
- Failure to rectify the deficiency in the drill rig's 4-speed transmission;
- Failure to level the drill rig which, in conjunction with operating the drill in third gear, increased the risk of binding and increased the likelihood of the auger becoming stuck.

[30] Many of the violations resulted from Mr. Usman Khan's actions, however, responsibility for those actions falls to the company as he was a Saffa employee.

[31] Further, the *OHSA* provisions exist in part to protect employees from themselves. If some of the safety violations listed above had not occurred, then potentially Mr. Usman Khan's own actions would have been different that day. An obvious example is the absence of a qualified Site Supervisor.

Position of the Parties

[32] Mr. McWhinnie submits that a total financial penalty of \$100,000 is warranted. Mr. Faught argues that a much lower total sum of \$30,000 is appropriate.

Objective of Sentencing

[33] It is clear that general deterrence is the primary objective of sentencing in *OHSA* and similar types of cases.

[34] This objective was clearly stated in the 1982 Ontario Court of Appeal decision, *R. v. Cotton Felts Ltd.* (1982), 2 C.C.C. (3d) 287 (Ont. C.A.). Both parties agree that this is the governing first principles decision in the Yukon.

[35] The case notes that such legislation is essential in the public interest. The fine amount must be large enough to achieve the objective of general deterrence. In determining an appropriate amount, the court must balance various factors such as company size, the scope of the economic activity in issue, the extent of both actual and potential harm to the public, and the prescribed maximum penalty.

[36] *R. v. Westfair Foods Ltd.*, 2005 SKPC 26, applies the broad *Cotton Felts* principle to the occupational health and safety context. It notes that protection of both the employee and the general public is the primary focus of such legislation.

[37] The case also outlined numerous specific factors which can be considered in occupational health and safety cases. I will assess the application of these factors to the facts in this case.

The Size of the Business

[38] I was not provided with any specific financial information for either Mr. Ahmad nor for Saffa. I have no information about what income Mr. Ahmad received from the company, nor do I know the company's profit for the years prior or subsequent to the accident.

[39] I am told that the company employees 15 people. I recognize that Saffa is not a large corporation; I find it is a moderately sized operation.

[40] I was provided with a short letter from Mr. Golam Mowla, the company's accountant. I cannot put great weight on the conclusions in that letter without further detail.

[41] Mr. Mowla stated that "I noticed that the performance of the company was hit hard [in 2021 and 2022]" and he goes on to conclude that the cause was the "unfortunate death incident of the employee and subsequent retention of the company rig for investigation". He also concludes that the accident "caused the company to lose several contracts and business opportunities during those years".

[42] My understanding is that the company engages in geotechnical engineering and thus tests samples and issues reports. The company would subcontract the drill work. In July 2020, at the encouragement of Mr. Usman Khan, they purchased their first rig. It had been in operation for sixteen months at the time of Mr. Khan's death. Branching into drilling was a new venture for the company.

[43] I appreciate that the company purchased the rig and then had to forfeit its use during the ten-month investigative retention period. I accept that the loss of the rig meant that the company could not make income from the use of the rig.

[44] Having said that, presumably the company was able to operate as before, and sub-contract the drilling work.

[45] I am unable to put much weight on the accountant's conclusory statements that the economic downturn of the company directly flowed from the accident and loss of the rig. As pointed out by Mr. McWhinnie, COVID was also in full swing during the relevant time frame. The specifics which led to that conclusion would need to be provided in order to give that submission much weight.

[46] In conclusion, then, I find that the company is moderate in size, and this must be factored into the impact of the fine amounts. I am unable on the basis of the material provided to me to assess in any meaningful way the actual financial impact of such fines.

The Scope of the Economic Activity in Issue

[47] This heading focuses on whether the violations were done to further profit. Obviously there is a strong public policy interest in discouraging corporations or individuals from putting their employees' safety in jeopardy because the cost of safeguarding that safety would negatively impact profits.

[48] Nothing before me leads me to conclude that the failure to install guards and a proper sized pin on the auger flowed from a cost saving measure. Similarly, I find the failure to fix the 44 deficiencies were not for cost saving reasons. It is agreed that Mr. Usman Khan had a company credit card and was given full authority to have all equipment repairs done.

The Gravity of the Offences

[49] The gravity of the offences is very high. Mr. Usman Khan lost his life. As has been stated in previous cases, no sentence can bring Mr. Khan back to life, nor is any fine amount reflective of the value of his life. The fact that Mr. Khan died, however, does increase the seriousness of the offences and is factored into the fine amounts.

The Degree of Risk and Extent of the Danger and its Foreseeability

[50] I find all three elements to be very high in this case. In particular, operating a piece of machinery with the rotation power of the auger without a guard clearly is dangerous. Similarly, leaving the site under safety supervision of a non-NSNY certified site supervisor also was clearly both risky and dangerous, particularly given that the

previous site supervisor found it necessary to warn Mr. Usman Khan about the dangers of his actions. Both of these risks and dangers were foreseeable.

The Maximum Penalty Prescribed by Statute

[51] At the time of these offences, the maximum fine penalty was \$150,000. The *Act* was amended recently to increase the maximum to \$500,000. Obviously the prior ceiling applies to this case. Both the high original maximum and the current fine maximum reflect the seriousness of these offences.

The Range of Fines in the Jurisdiction for Similar Offenders in Similar Circumstances

[52] I was provided with a number of cases that had some overlap factually and I found them to be helpful. Of course none contained facts that were identical to those before me.

[53] *R. v. Stuart Placers Ltd.*, 2023 YKTC 38, resulted in a total penalty of \$89,750. *Yukon (Director of Occupational Health and Safety) v. Yukon Tire Centre Inc., North 60 Petro Ltd., and Frank Taylor*, 2014 YKTC 19, resulted in a total penalty of \$94,750. *R. v. Procon Mining & Tunnelling Ltd.*, 2012 YKTC 100, resulted in an \$85,000 fine after a joint submission on sentence. *R. v. Langenburg Redi-Mix Ltd.*, 2022 SKQB 40, involved a \$560,000 fine which was upheld on appeal.

[54] The total penalty I am imposing is well within the range for similar offenders in similar circumstances, with the exception of *Langenburg Redi-Mix Ltd.* in which a much higher fine was imposed.

[55] All of these cases involved a fatality.

The Ability to Pay or the Potential Impact of the Fine on the Employer's Business

[56] I have nothing before me to allow me to assess impact. As I noted above, the letter from Mr. Mowla is conclusory and totally lacks numerical specifics.

[57] In such a case, and bearing in mind the predominant principle of general deterrence, the lack of detail gives me no basis to lower the fines.

The Past Diligence in Complying with or Surpassing Industry Standards

[58] Saffa was relatively new to the Yukon thus there has not been time to build up a safety record. I have not heard, however, of any safety issues with their original two Yukon contracts nor have I heard of any issues in other jurisdictions, most obviously Ontario.

Previous Offences

[59] There is no prior record.

The Degree of Fault (Culpability) or Negligence of the Employer

[60] There is a significant degree of fault. Mr. Fawad Khan, the only NSNY certified employee, was removed from the site without an appropriate replacement. There is an inference of a disregard for the importance of the NSNY certification process.

[61] The site was left under the supervision of Mr. Usman Khan himself without, it appears, appropriate attempts being made to ensure that he possessed the necessary

training to safely operate the drill. Mr. Khan essentially was left with the task of supervising himself and he appears to have been woefully unqualified for that role.

[62] That lack of qualification appears to have impacted the failure to repair the deficiencies with the drill. Mr. Usman Khan may have been the only individual in the position to know of these deficits, yet it appears that he was not experienced enough to comprehend the risks. It is agreed that an experienced driller would have known, for example, not to operate the drill in third gear in these circumstances.

[63] This legislation exists in part to protect employees from themselves. There was a significant lack of such safeguards in this instance.

The Contributory Negligence of Another Party

[64] There is no such negligence in this case. It is agreed that Northeast Geotechnical delivered the rig in proper operating condition. There was no guard on the rig but ensuring the installation of the guard was the responsibility of the employer. I am told that not all jurisdictions require such a guard. It is the responsibility of the employer to ensure compliance with all of the safety regulations of the jurisdiction in which the equipment is operating.

The Number of Breaches

[65] This was an isolated instance.

The Employer's Response Including Reparations to the Victim or Family, and Measures Taken to Prevent Re-Occurrence

[66] Saffa has filed an amended Health and Safety Policy. That policy appears to address the safety deficiencies apparent in this case. Mr. McWhinnie urges caution in placing weight on these amendments as they were done only a few weeks prior to this sentencing. I note, however, that Saffa ceased operations in the Yukon immediately after the accident thus I am not prepared to draw negative conclusions from the failure to amend the policy sooner.

[67] I am not aware of any specific reparations that were made to Mr. Usman Khan's family. The family lives in Pakistan. I do consider, however, that Mr. Ahmad accompanied Mr. Khan's body back to Pakistan. That act illustrates great respect for both Mr. Khan and for his family. It also exhibits strength of character on Mr. Ahmad's part as I am certain that accompanying Mr. Khan's body and then undoubtedly meeting the family on arrival in Pakistan must have been a very difficult and painful experience, yet it was one that Mr. Ahmad voluntarily undertook.

A Prompt Admission of Responsibility and a Timely Guilty Plea

[68] Mr. Faught submitted that Mr. Ahmad and Saffa expressed an intention to plead guilty early on. The delay in entering that plea and moving to sentence solely related to the logistical issues involved in arranging Mr. Ahmad's attendance given that he is based in Ontario, not in the Yukon.

Conclusion

[69] The violations were serious and catastrophic. They resulted in the loss of a life. The risk, extent of danger and foreseeability were all high. Both of these factors demand a significant general deterrent response.

[70] In *R. v. Wholesale Travel Group Inc.* (1991), 67 C.C.C. (3d) 193, at para. 26, the Supreme Court differentiated regulatory offences from criminal offences in part by noting that the offences are “directed not to the conduct itself but to the consequences of the conduct”. Flowing from that concept, the Court in *R. v. Westfair Foods Ltd.*, 2005 SKPC 26, at para. 33, noted that the fine increases with the seriousness of the outcome.

[71] No outcome is more serious than a death and the penalty quantum must reflect that reality.

[72] I have no substantive information of the impact of any monetary penalty on the company or on Mr. Ahamad. This lack detracts from any mitigation on this basis.

[73] On the other hand, I consider Saffa’s lack of prior history of safety violations, the prompt intention to plead guilty, the size of the company which, though moderate, is not a massive corporation, and the fact that the violations did not flow from corporate cost-cutting initiatives.

[74] I also consider Mr. Ahmad’s genuine profound remorse.

[75] Applying the principle of totality, I find that a total fine amounting to just in excess of half of the maximum fine is in order. The total fine will be \$80,000.

[76] Both counsel recommend that a portion of the monetary penalty should be a donation to the NSNY. The facts in this case clearly highlight the need for the NSNY's programs. As a result, I will apply a 60% NSNY contribution/40% fine order ratio.

[77] Both counsel also agree that a probation order can be imposed in order to ensure that the donation is made. I will not undertake an analysis of the legality of imposing such an order. Both counsel are in agreement that one can be imposed, and such orders have been imposed in prior cases.

[78] The penalties will be as follows:

1. On Count #3, Saffa will pay a fine in the amount of \$12,000 plus the applicable 15% surcharge which results in a combined total of \$13,800. The company is given twelve months to pay. The company will be subject to a probation order for twelve months with the statutory terms as set out in the Yukon *Summary Convictions Act*, RSY 2002, c. 210, as well as a term requiring the company to make a contribution of \$18,000 to the NSNY within six months of the order's commencement;
2. On Count #4, Saffa will pay a fine in the amount of \$24,000 plus the applicable surcharge which results in a combined total of \$27,600. The company is given twelve months to pay. A twelve-month

probation order will apply with the same terms as in count #3 though the contribution term will be in the amount of \$16,000;

3. On Count #1, Mr. Ahmad receives a fine of \$4,000 plus the applicable surcharge which results in a combined total of \$4,600. He is given twelve months to pay. Mr. Ahmad also will be subject to a twelve-month probation order with the statutory terms as well as a term that he make a contribution of \$6,000 to the NSNY within six months of the order's commencement.

[79] The lower fine amount in relation to Mr. Ahmad is partly in recognition of the remorse which he has exhibited and in recognition of the personal impact that this accident has had upon him. To that extent, I find the principle of restraint applicable though I appreciate that it does not have the relevance in the regulatory context that is found in the criminal context.

[80] I also find that this fine amount reflects Mr. Ahmad's lack of presence on site.

[81] This is not a situation in which the safety deficits were allowed to continue under the direct supervision and knowledge of the owner. The penalty must reflect, however, that Mr. Ahmad was responsible for on-site safety violations given he is president of the company and signer of the Safety Plan.

CALDWELL T.C.J.