

**IN THE SUPREME COURT OF SAMOA
HELD AT APIA**

BETWEEN:

PAPALII JOHN RYAN,
General Manager, Ports Authority
Informant

AND:

**ARUN BHARDWAJ &
MOBIL SHIPPING AND TRANSPORTATION**
Defendants

Counsel: Ms L. Tuala for the Informant
Mrs R. Drake for the Defendants

Hearing Date: 13 December 1999

SENTENCING REMARKS OF WILSON J.

On 11 August 1999 the Motor Tanker Saucon No.7321 (hereinafter called "the vessel") was anchored in Apia Harbour at the tanker mooring buoys (approximately 200 yards from the wharf). The Master of the vessel was Arum K. Bhadwaj (the first defendant). The Owner of the vessel is Mobil Shipping and Transportation Company (the second defendant).

According to the vessel's records, it arrived (the night before) in Apia with 663.74 metric tonnes of Dual Purpose Kerosene (DPK).

At some time between 8.05 p.m. and 8.45 p.m. on the 11 August, in the course of pumping DPK to shore, spillage of the product was observed on the starboard side of the vessel. At 8.45 p.m. the vessel's automatic spill alarm (which activates when any petroleum or oil substance leaks on to the deck of the vessel) sounded, and spillage was observed by the crew of the vessel. The Samoa Ports Authority was immediately informed of the spillage.

What had happened was that spillage occurred from one of the valves on the starboard side of the vessel due to a valve blank flange (plate) having been removed and inadvertently left in the open position. In the spill, DPK was discharged into the waters of the harbour as pumping occurred.

As soon as the spillage was observed, the pumping was stopped.

The valve blank flange (plate) was subsequently refitted by members of the crew of the vessel, and the Samoa Ports Authority then authorised the recommencement of the pumping. The re-start of the discharge of DPK occurred at 11.05 p.m. and the pumping was completed at 2.15 a.m. the next day.

Based upon the vessel's own records, the amount of DPK which spilt into Apia Harbour was approximately 86.65 metric tonnes.

Not surprisingly and especially because an oil spill can have enormous implications not only for a harbour like Apia Harbour and associated waterways, but also for the environment as a whole, many authorities responsible for the Port, for environmental matters, and for hazards that could occur were notified and took appropriate action. The various statutory agencies which were informed included the Ministry of Transport, the Environment Division of the Department of Lands, Survey and Environment, the Fire Service, the Ports Authority and the Attorney General's office. The total expenses and costs incurred by Government departments and agencies in investigation, in clean-up, in administration, in stand-by measures, in field inspection, consultation and sample collection, in committee meeting, and in preparation of reports exceeded ST\$125,000.00.

The defendants (the Master and the Owner) are charged with the offence of throwing, discharging or depositing into the waters of Apia Port a harmful substance, namely Kerosene Aviation Fuel, in contravention of section 57 of the Ports Authority Act 1998. This offence may be described as one of marine pollution.

The maximum penalty for such an offence is a fine of not more than \$25,000.00 or imprisonment for a term not exceeding 2 years or both. Upon conviction a defendant is liable to pay such an amount as the Court may assess in respect of expenses and costs that have been incurred or will be incurred in removing or cleaning up or dispersing of the harmful substance.

Each of the defendants pleaded guilty to the charge he or it (as the case may be) faced and did so at a reasonably early stage. Each defendant now stands convicted.

It is noted (and it needs to be emphasised) that the Informant did not seek imprisonment as a penalty in respect of the first defendant. I can well understand and give effect to that decision.

The offence for which the two defendants are to be sentenced is an offence of strict responsibility. An offence is committed even if, as was the case here, neither the Owner nor the Master knew that a harmful substance was being discharged into the Port. The purpose of the enactment in question is to punish and thereby try to prevent, reduce or control even negligent conduct or any conduct at all which actually leads to a marine spill and pollution. Of course, if a defendant had knowingly discharged a harmful substance into the Port, that would be an aggravating factor, and more severe punishment would be called for. "Harmful substance" is defined in the relevant legislation (the Shipping Act 1998) as including any substance which may create hazards to human health, or may harm living resources or marine life, or may damage amenities, or may interfere with other legitimate uses of the sea.

I have turned my mind to the existence of any (and, if so, what) aggravating circumstances here.

Whilst the size of a spill is a relative consideration, I assess the size here as moderate. That, together with the enormous implications and repercussions referred to earlier, is an aggravating circumstance.

Another aggravating circumstance is to be found in the fact that this spill occurred in Samoa's major port adjacent to moorings and loading facilities for boats involved in Samoa's domestic fishing activities and commercial fishing industry.

I conclude that a mitigating circumstance exists in the fact that the harmful substance in question

dispersed naturally and quickly (by evaporation), albeit after creating some temporary, surface pollution and some air pollution in the form of the smell of kerosene in the Mulinuu area for at least 5 days. The smell of kerosene was, I think, a small "price to pay" for the realisation that the harmful substance was a non-persistent oil and one of the least harmful of the substances that are carried by tankers.

I have already observed that this pollution was not deliberate; it was due to human error or oversight. That is a mitigating circumstance, as is the fact that there was early reporting of the spill to the Ports Authority and the members of the crew were co-operative.

I have listened to the submissions as to penalty by Ms B. Heather, the Attorney General, for the Informant and by Mrs R. Drake, counsel for both defendants.

I have read the Summary of Facts and the Sentencing Memorandum submitted by and signed, respectively, by the Attorney General herself and by the Attorney General and Ms Leilani Tuala, junior counsel for the Informant. I have read the various statements of costs incurred by government agencies. I have perused the unreported judgment of Tompkins J. in the High Court of New Zealand dated 9 April 1990 in TSIBIDIS ANDREAS and SEATRANS NEW ZEALAND LIMITED v MINISTRY OF TRANSPORT.

I have read the Written Submission prepared, submitted and signed by Mrs Drake, counsel for the two defendants. Attached to those Submissions are a press cutting, some background information regarding the second Defendant, two references, two letters of commendation, a report by Mobil Samoa Manager dated 21 October 1999, a diary like report, and a report prepared by Mr Maselino Tommy Ulugia, the Shipping / Insurance Manager, dated 29 October 1999 (and attached invoices and receipts).

I give each defendant credit for their early plea of guilty and for their part in saving the costs of a trial. The second defendant is particularly regretful of the alarm it caused here in Samoa and on account of the damage to its credibility and good reputation. It goes to the second Defendant's credit that recently Mobil's Marine Manager and the General Manager – South West Pacific - travelled to Samoa to meet with various government officials to express Mobil's regret concerning the matter and to assure the Government of Samoa that it would do its best to ensure there is no repeat incident in the future.

The first defendant has been adversely affected in his career as a result of this incident. He was suspended immediately. That is some punishment in itself that I take into account. Fortunately for him, he will be returning to the vocation of Master Mariner but not of this particular vessel and up the basis of "one last chance."

The first defendant is a married man aged 39 years. He is a national of India. He had a short but successful career with Mobil Shipping Co. Ltd., having joined in February 1996 as a Chief Officer and having been promoted to Master in October 1996. Before that he had nearly 7 years experience with tankers. It is to his credit that he has had no previous convictions or involvement in spills.

The second defendant is a multi-national company which has had a long history of providing fuel to Samoa. It is to the credit of the second defendant that, in the 40 years that the Samoa Terminal has been in operation, there has never been any spill of product into port waters as a result of anyone board incident.

Subsection (3) of section 57 of the Ports Authority Act 1998 provides:

"(3) Every person who commits an offence against this section -

(a) Is liable upon conviction to a fine not exceeding \$25,000.00 or to imprisonment for a term not exceeding 2 years or both; and

(b) Is also liable upon conviction to pay such amount as the court may assess in respect of the expenses and costs that have been incurred in removing or cleaning up or dispersing any harmful substance to which the offence relates".

The words underlined by me are the important words. It was not the intention of the legislature that a defendant be liable for all expenses and costs incurred as a consequence of a spill. The liability for expenses to pay an assessed amount in respect of expenses and costs is limited to those that have been incurred "in removing or cleaning up or dispersing" the harmful substance.

There is no liability for the expenses and costs of investigation of a spill, or for legal fees, or for administration costs, or for standby costs, or for field inspection, consultation and sample collection, or for costs of committee meetings, or for preparation of reports.

Penalties which place some emphasis on deterrence are called for here.

The sentence of the Court for the first defendant is a fine of \$5,000.00, in default 3 months imprisonment - 1 month to pay; and for the second defendant is a fine \$8,000.00 - 1 month to pay.

I order the second defendant to pay to the Informant within 1 month from the date hereof the sum of \$3,500.00 by way of expenses and costs that have been incurred in removing or cleaning up or dispersing the DKT over and above the expenses and costs already incurred by the second defendant.

I have taken into account in fixing the penalty for the first defendant the fact that his fine is to be paid by the second defendant.

Had I considered it appropriate to view the forfeited bail as something in the nature of further punishment, then I would have reduced the fine for the second defendant further. But I view the forfeited bail money as arising out of an entirely distinct set of circumstances, that is to say the failure of the Master (the first defendant) to appear as required as he had 'promised' to do.

JUSTICE WILSON