

IN THE PRIVY COUNCIL

O N A P P E A L

FROM THE COURT OF APPEAL OF HONG KONG

B E T W E E N :

KONG CHEUK KWAN

Appellant

- and -

THE QUEEN

Respondent

CASE FOR THE RESPONDENT

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1. This is an appeal by special leave of the Judicial Committee granted on the 24th day of May 1984 from a judgment of the Court of Appeal of Hong Kong (Hon. McMullin V-P, Li and Silke JJ.A.) dated the 9th day of March 1984 which dismissed an appeal by the Appellant from a judgment of the High Court of Hong Kong (Penlington J and a Jury) given on the 25th day of March 1983 whereby the Appellant was convicted unanimously of manslaughter.

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2. The Appellant was charged with manslaughter following a collision at sea near Lantau Island about 3 miles west of Fan Lau Point and 1.5 miles north west of Niu Tou Island in international waters between two hydrofoils, the "FLYING GOLDFINCH" and the "FLYING FLAMINGO", as a result of which four people died. The collision occurred on Sunday the 11th July 1982 at approximately 0926. At the time of the collision the Appellant, KONG Cheuk Kwan was Master of the "FLYING GOLDFINCH" and was steering the vessel. Madam WU Yuk-ngan, a passenger in the "FLYING FLAMINGO", died as a result of the collision. The Masters and Mates of both vessels were charged with the manslaughter of Madam WU Yuk-ngan. The trial took place between the 7th and 25th

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March 1983 before Mr Justice Penlington and a jury of 7. A submission of no case to answer was upheld in respect of the 2nd accused NG Yui-kin, the mate aboard the "FLYING GOLDFINCH". He was acquitted and released. Submissions in respect of the remaining 3 accused including the Appellant were rejected.

3. The jury retired to consider their verdict. The 4th Defendant, John Coull, Captain of the "FLYING FLAMINGO" was acquitted by a majority of 5 to 2, the 3rd Defendant HO Yim-pun, the mate aboard the "FLYING FLAMINGO" was acquitted unanimously. The 1st Defendant, the Appellant was convicted unanimously.

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4. The principal issues raised in this appeal (as extracted from the Appellant's Petition for Special Leave) are:-

A. Whether the Learned Judge misdirected the jury on the ingredients of the offence of manslaughter.

B. Whether the Learned Judge improperly directed the jury in relation to the statements of the Appellant.

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C. Whether the Learned Judge ought to have directed the jury that there was no case for the Appellant to answer.

D. Whether the Learned Judge failed to give a proper direction to the jury on the expert evidences to any material extent.

E. Whether this is a case in which it would be appropriate to apply the proviso on the ground that "no miscarriage of justice has actually occurred".

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A. Ingredients of the Offence of Manslaughter

5. The Learned Judge prepared a written direction setting out the ingredients of the offence of manslaughter. He gave copies to the jury. It was in these terms:-

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p.773 1.37
to p.774
line 19

"... this is the direction on the question of manslaughter by negligence. That is that the defendant and, of course, each of them considered separately, is guilty of manslaughter if the Crown have proved beyond reasonable doubt, firstly, that at the time he caused the deceased's death and, of course,

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10 you must be satisfied that each of the
accused did cause the deceased's death,
there was something in the circumstances
which would have drawn the attention of an
ordinary prudent individual and in this case
you would consider the ordinary prudent Deck
Officer or helmsman in the position of the
defendant, to the possibility that his
conduct was capable of causing some injury
albeit not necessarily serious to the
deceased including injury to health, which
does not apply here, and that the risk was
not so slight that an ordinary prudent
individual would feel justified in treating
it as negligible and that, secondly, before
the act or omission which caused the
deceased's death, the defendant either
failed to give any thought to the
possibility of there being any such risk or
having recognised that there was such a risk
20 he, nevertheless, went on to take the risk,
or was guilty of such a high degree of
negligence in the means that he adopted to
avoid the risk as to go beyond a mere matter
of compensation between subjects and showed
in your opinion, such disregard for the life
and safety of others as to amount to a crime
against the state and conduct deserving
punishment."

30 6. The direction was taken from that suggested
in the then current cumulative supplement to
Archbold, 41st edition paragraph 20-49. That was
the second supplement. Paragraph 20-49 of the
present supplement, which is the eighth, is in the
same terms, although it now refers to the decision
of the House of Lords in R v Seymour [1983] 2 AC
493: see also paragraph 20-266. It is submitted
that the direction contains no error of law.

40 7. It is submitted that the following
propositions of law are correct:-

- (a) A person is guilty of manslaughter if he causes the death of another by his gross negligence.
- (b) Gross negligence is negligence of a character which is more serious than the mere breach of a duty of care owed to the deceased.
- (c) Gross negligence has been otherwise described (in varying contexts) as culpable, criminal, wicked, clear, or complete.

- (d) The negligence must, in the opinion of the jury go beyond the mere matter of compensation between subjects and show such disregard for the life and safety of others as to amount to a crime.
- (e) A person who acts recklessly is guilty of gross negligence.
- (f) A person who appreciates the relevant risk and intends to avoid it is guilty of manslaughter if he is guilty of gross negligence in attempting to avoid it.

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Those propositions are derived from R. v. Bateman 19 Cr. App. R. 8 and Andrews v. D.P.P. [1937] A.C. 576. In particular propositions (c) and (d) are derived from R v. Bateman. In Andrewsv. D.P.P. Lord Atkin recognised the apparent difficulty inherent in proposition (d) of saying that negligence is only sufficiently serious to amount to a crime if the jury thinks that it amounts to a crime. He nevertheless approved it, saying that the approach had "generally been adopted by judges in charging juries in all cases of manslaughter by negligence whether in driving vehicles or otherwise".

[1937] AC
576 at
p. 583

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8. Before the decisions of the House of Lords in R v. Caldwell [1982] AC 341 and R v. Lawrence [1982] AC 510 it was sufficient to direct the jury that a person was guilty of manslaughter if his gross negligence caused the death of the deceased provided that it was made clear to the jury that gross negligence was something more serious than simple lack of care: see e.g. R v. Stone & Dobinson (1977) 64 Cr. App. R 186. It is submitted that those decisions of the House of Lords do not invalidate the previous approach of the courts.

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9. It is in any event submitted that the direction in the present case is consistent with R. v. Caldwell and R. v. Lawrence and is not inconsistent with the more recent decision of the House of Lords in R. v. Seymour. That decision was not available to the Learned Judge. The direction was substantially in the terms suggested by Counsel for the Appellant at the trial.

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p.593

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10. The first part of the direction which is now complained of by the Appellant is as follows:-

App.Pt.I
Vol.II.p.
773 1.44
to p.774
1.5

"... you must be satisfied that there was something in the circumstances which would have drawn the attention of an... ordinary

prudent Deck Officer or helmsman in the position of the defendant to the possibility that his conduct was capable of causing some injury albeit not necessarily serious to the deceased... and that the risk was not so slight that an ordinary prudent individual would feel justified in treating it as negligible..."

10 The Appellant complains that that direction is inconsistent with the direction suggested by Lord Diplock in R v. Lawrence:-

"... the jury must be satisfied of two things:-

[1982] AC
510 at p.
526H

First, that the defendant was in fact driving the vehicle in such a manner as to create an obvious and serious risk of causing physical injury..."

20 11. It is submitted that there is no distinction in principle between the above passages. It is submitted that it is sufficient that there is a risk of some physical injury to the deceased. In R. v. Lawrence (which was a case of reckless driving) Lord Diplock merely said that the risk had to be a risk of causing physical injury. In R. v. Governor of Holloway Prison ex parte Jennings [1983] 1 AC 624 it was held by the House of Lords that the ingredients of the offences of causing death by reckless driving and of manslaughter were identical: see per Lord Roskill at p.644B and E.

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40 12. It is submitted that the House of Lords also so held in R v. Seymour. Lord Roskill said (at pp.505 and 506) that the ingredients of the offences were indistinguishable. He expressly approved the direction given by the trial judge in that case (set out at page 504D-H). That direction reflected both the decision of the House of Lords in R. v. Lawrence and the speech of Lord Atkin in Andrews v. D.P.P. It referred only to the risk of causing physical harm. It did not refer to a risk of death. It follows that the House of Lords cannot have taken the view that a high or a very high risk of death was an essential ingredient in the offence of manslaughter.

13. It is submitted that when Lord Roskill referred to a high or very high risk of death he was not referring to one of the ingredients of the offence but to the circumstances in which it

would ordinarily be appropriate to charge 'motor manslaughter' instead of causing death by dangerous driving: see in particular per Lord Roskill at p.507A. It is submitted that in spite of the last part of the answer to the certified question in that case (at p.508D) the statement that the risk of death being caused by the manner of the defendant's driving must be very high was not part of the ratio decidendi. That is made clear by Lord Roskill not only in the earlier part of his speech in R. v. Seymour but also in R. v. Governor of Holloway Prison ex parte Jennings when he said (at p.644C):-

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"No doubt the prosecuting authorities today would only prosecute for manslaughter in the case of death caused by reckless driving of a motor vehicle on a road in a very grave case."

14. It does not follow from that that there must be a high risk of death. So to hold would narrow what have hitherto been understood as the principles governing the general law of manslaughter: see the discussion in [1983] Crim. L.R. 744. Those are that it is sufficient that there was a risk of physical injury to another person: R v. Larkin [1943] 1 All ER 217 per Humphreys J, cited with approval by Salmon LJ in Gray v. Barr [1971] 2 All ER 949 at p.961, and R v. Stone and Dobinson where Geoffrey Lane LJ said:-

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(1977)
64 Cr.App.
R. 186 at
p.193

"The duty which a defendant has undertaken is a duty of caring for the health and welfare of the infirm person. What the prosecution have to prove is a breach of that duty in such circumstances that the jury feel convinced that the defendant's conduct can properly be described as reckless. That is to say a reckless disregard of danger to the health and welfare of the infirm person. Mere inadvertence is not enough. The defendant must be proved to have been indifferent to an obvious risk of injury to health, or actually to have foreseen the risk but to have determined nevertheless to run it."

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15. Before the decision of the House of Lords in R. v. Seymour there had been no suggestion that a high or very high risk of causing death was a necessary ingredient in the offence of manslaughter. A risk of physical injury was enough. It is submitted that that remains the case, although it is recognised that in a motor manslaughter case the Crown will only prosecute where there is a high or

very high risk of death. If the Court of Appeal in the instant case went further then it is submitted that it went too far.

App. Pt. I
Vol. II pp.
845 to 846

10 16. The Appellant further complains that the Learned Judge said merely that the risk must not be "so slight that an ordinary prudent individual would feel justified in treating it as negligible" whereas Lord Diplock said that the risk must be "obvious and serious". It is submitted that these two statements are not inconsistent: see e.g. R v. Caldwell per Lord Diplock at p.354D. If the risk is not so slight that it can be disregarded as negligible then it is a serious risk. In either case the risk (whether slight or serious) might be obvious. In R. v. Lawrence Lord Diplock equated an 'obvious and serious risk' with a 'real' risk. A risk which is not slight is a real risk and therefore, as that term is used by Lord Diplock, an 'obvious and serious risk'.
20 Thus it is submitted that the Appellant's criticism of this part of the summing up is ill-founded.

App. Pt. I
Vol. II
p.774 1.3

[1982] AC
510 at p.
526

17. The second part of the Learned Judge's direction was as follows:-

30 "... secondly, before the act or omission which caused the deceased's death, the defendant either failed to give any thought to the possibility of there being any such risk or having recognised that there was such a risk he nevertheless went on to take the risk..."

App. Pt. I
Vol. II p.774
lines 5-11

In R. v. Lawrence the equivalent part of the direction proposed by Lord Diplock is:-

40 "... Second that in driving in that manner the defendant did so without having given any thought to the possibility of there being any such risk or having recognised that there was some risk involved, had nonetheless gone on to take it."

[1982] AC
510 at p.527A

It is plain that there is no difference between this part of the direction of the Learned Judge and the direction proposed by Lord Diplock.

18. For the above reasons it is submitted that the first two parts of the direction of the Learned Judge are consistent with the decisions of the House of Lords in R v. Caldwell, R v. Lawrence,

R. v. Governor of Holloway Prison ex Parte Jennings and R v. Seymour. They together amount to a proper direction on recklessness even though the word reckless was not used by the Learned Judge. It is submitted that that omission is immaterial. It is in any event submitted that on any view of the facts of the instant case (a) the navigation of the "FLYING GOLDFINCH" at full speed until collision necessarily involved a high or very high risk of death and (b) that risk was both obvious and serious however those adjectives are defined.

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19. The third part of the Learned Judge's direction which is complained of is as follows:-

App. Pt.I
Vol. II p.
774 line 11

"... or was guilty of such a high degree of negligence in the means that he adopted to avoid the risk as to go beyond a mere matter of compensation between subjects and showed in your opinion, your opinion such disregard for the life and safety of others as to amount to a crime against the state and conduct deserving punishment."

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It is said on behalf of the Appellant that the risk must have been created by the Appellant. It is however submitted that that is wrong. It does not follow from R v. Lawrence or from R v. Seymour or indeed from any of the other cases cited above. It is inconsistent with the speech of Lord Atkin in Andrews v. D.P.P. where he said (at p.583):-

"It is difficult to visualize a case of death caused by reckless driving in the connotation of that term in ordinary speech which would not justify a conviction for manslaughter: but it is probably not all-embracing, for "reckless" suggests an indifference to risk whereas the accused may have appreciated the risk and intended to avoid it and yet shown such a high degree of negligence in the means adopted to avoid the risk as would justify a conviction."

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Moreover it is inconsistent with principle, which requires that even where a situation of danger is created by a third party, a defendant who appreciates the situation of danger but is grossly negligent as to how he avoids it should be guilty of manslaughter.

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20. It is further objected on behalf of the Appellant that the directions given by the Learned Judge failed sufficiently to distinguish between

gross negligence and ordinary negligence or a mere breach of a duty to take care. Before reaching a conclusion on this question it is necessary to consider the summing up as a whole: R v. Bateman at p.16. It is submitted that if the summing up is viewed as a whole this objection is not made out.

10 21. The Respondent relies on the written direction given to the jury and on a number of further passages in the summing up:-

App. Pt.I
Vol. II pp.
773-4

(a) The first part of the written direction is a direction as to recklessness. The second part expressly refers to:-

20 "a high degree of negligence in the means that he adopted to avoid the risk as to go beyond a mere matter of compensation between subjects and should in your opinion, your opinion, such disregard for the life and safety of others as to amount to a crime against the state and conduct deserving punishment".

App. Pt.I
Vol. II p.
774 line 12

The jury can thus have been in no doubt from the written direction that the negligence must be of a very serious character before they could convict.

(b) The further relevant passages in the summing up are:-

30 (1) "... not only must the Crown prove in this case that the accused have acted in a negligent manner or have failed to act in a manner which involved gross negligence..."

App. Pt.I
Vol.II p.
772 lines
43 to 46

(2) The following passage immediately followed the written direction:-

40 "Now, as has been said to you, all of us, perhaps almost everyday, do something which if you reflected about it you may say, "Well perhaps that wasn't the proper thing to do". This may be involved in your work, the manner you drive a motor car, the manner you cross the road.

App. Pt.I
Vol. II p.
774 lines
20 to 36

We all make mistakes. Some of them could be mistakes which could involve

injury to other people, but these mistakes if they do result in injury are not brought before the criminal courts unless they are matters which or mistakes which are of a very gross nature that if you have been negligent in a duty which you owed to anybody, it is not merely an oversight, not merely a trivial mistake, it is a gross error.

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App. Pt.I
Vol.II p.
775 lines
6 to 21

The question is then, firstly, did they not exercise that high degree of care? Was it such an omission as to be gross negligence in your view and finally, as a result of that, did they cause the collision and the death of Mrs. Wu?

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It is a test which goes considerably beyond what would be the situation if this was a civil trial. If we were just considering the question of whether the passengers were entitled to damages, there it would only be, on a balance of probability for a start, the onus of proof and the degree of negligence would not have to be anything like as high as we are looking for in a criminal trial".

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(3) The Learned Judge concluded his summing up as follows:-

App. Pt.I
Vol.II p.
798 lines
30 to 42

"You must not, however, say "Well, because it was inexplicable, because it must have been negligence, therefore, somebody must be to blame". You have got to look at the evidence bearing in mind the law. Look at the evidence in respect of each of these accused and only if you are satisfied that that particular accused is grossly negligent and that gross negligence was a cause - it does not have to be the sole cause - was a cause of this tragic accident, only then can you convict him of this very serious crime of manslaughter."

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It is submitted that when the summing up is viewed as a whole the jury can have been left in no doubt that they must only convict if the Appellant was guilty of gross negligence. The Court of Appeal was accordingly right to reject this part of the argument for the Appellant.

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22. It is submitted that for all the above reasons there is no material ground for criticism of the

directions given by the Learned Judge relating to the law of manslaughter to be applied by the jury.

B. The Statements of the Appellant

10 23. The Learned Judge correctly directed the jury that they must reach their verdict on the evidence which they had heard from the witness box. He further correctly directed them that the statements made by an accused were evidence against that accused only. It follows that the jury were properly directed that they must not treat the statements of the other accused, in particular that of Captain Coull, as evidence against the Appellant. The Learned Judge further directed the jury that they could take account of the statements as evidence against the maker although they should bear in mind that they were not evidence which had been tested in the witness box.

App. Pt.I
Vol. II p.770
lines 37 to
49, and p.
771 line 46

ibid.

20 24. It is submitted that the direction of the Learned Judge relating to the statements by the Appellant was in no way prejudicial to the Appellant. At the time of the trial the principles relevant to the admission of statements at the instance of the prosecution were laid down in Cheng Chiu v. The Queen [1980] H.K.L.R. 50. Those were that an exculpatory statement admitted at the instance of the Crown was in evidence for all purposes and that it was for the jury to attach such weight to it as they thought fit as part of the general evidence put before them.
30 The decision in Cheng Chiu v. The Queen has since been held to be wrong by the Privy Council in Leung Kam Kwok v. The Queen [Privy Council Appeal No. 36 of 1983]. The Privy Council approved the following statement of James L.J. in R. v. Donaldson & Others (1977) 64 Cr. App. R. 59 at p.65:-

40 "In our view there is a clear distinction to be made between statements of admission adduced by the Crown as part of the case against the defendant and statements entirely of a self serving nature made and sought to be relied upon by a defendant. When the Crown adduce a statement relied upon as an admission it is for the jury to consider the whole statement including any passages that contain qualifications or explanations favourable to the defendant, that bear upon the passages relied upon by the prosecution as an admission, and it is

for the jury to decide whether the statement viewed as a whole constitutes an admission. To this extent the statement may be said to be evidence of the facts stated therein. If the jury find that it is an admission they may rely upon it as proof of the facts admitted. If the defendant elects not to give evidence then in so far as the statement contains explanations or qualifications favourable to the defendant the jury, in deciding what, if any, weight to give to that part of the statement, should take into account that it was not made on oath and has not been tested by cross-examination.

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When the Crown adduce evidence in the form of a statement by the defendant which is not relied on as an admission of the offence charged such a statement is evidence in the trial in that it is evidence that the defendant made the statement and of his reaction which is part of the general picture which the jury have to consider but it is not evidence of the facts stated."

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25. It is submitted that if the approach of the Learned Judge was in any way wrong as a result of complying with the decision in Cheng Chiu v. The Queen the consequence could only have been favourable to the Appellant. It is submitted that the statements made by the Appellant were evidence of the truth of the facts alleged in so far as the jury thought that they were admissions. They were otherwise evidence of the Appellant's reaction to the collision and part of the general picture which the jury had to consider. If the jury thought that any of the statements were wholly exculpatory but treated them as evidence of the facts contained in them that could not be prejudicial to the Appellant. It is perfectly proper for the jury to consider any inconsistencies between the statements: see e.g. R. v. Pearce (1979) 69 Cr. App. R. 365 at p.370; Archbold 41st edition paragraph 15-57.

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26. It is submitted that the Appellant's objection to the use of his statements in paragraph 13 of the Petition for Special Leave are unfounded. It is correct that the prosecution did not accept the Appellant's account of the events leading to the collision as wholly true. They could hardly have done so having regard to the fact that the statement in the deck log to the effect that the vessel steered uncontrollably to starboard was demonstrably untrue. It was however for the jury to decide whether the

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Appellant's statements were true or untrue. Counsel for the prosecution submitted that the statements left the collision unexplained except in terms of gross negligence.

10 27. It is submitted that that submission was correct. It is not sufficient to say (as is said on behalf of the Appellant in paragraph 13 of the Petition) that the statement explains the collision in terms of the gross negligence of the other vessel. If the statement also discloses gross negligence on the part of the Appellant that is a matter which the jury is bound to consider. Apart from the statements made at the meeting at the Hong Kong Hotel the Appellant made two statements, one in the deck log and the other to the police.

28. The entry in the deck log book was as follows:-

20 "0926 V/L sheered to starboard at rate of 5 degrees/sec approx. D.o advised master of the incident and at the same time master tried to put the vessel on course again but no response. With port flag pushing forward and starboard flag aft and rudder on port helm. Stop engine. Vessel collided with "FLYING FLAMINGO". App.Pt. II pp.13 and 14

30 In so far as it asserts a rapid alteration to starboard that statement is consistent with what the Appellant said at the meeting at the Hong Kong Hotel (see evidence of Mr Lo). It is however untrue in so far as it suggests that the sheer to starboard was uncontrollable. App. Pt.I Vol. I pp. 154 to 158, 163 to 169, 176 to 179, 181 to 184 & 187 to 193

40 29. The second statement was a detailed statement. In effect the Appellant said that the vessels were approaching in a straight line, or end-on. When the vessels were 2 miles apart he altered course to starboard until the "FLYING FLAMINGO" was bearing about 10 degrees to 15 degrees on the port bow. There was however no significant change in the bearing thereafter. If that were so it would follow that the "FLYING FLAMINGO" had altered course to port. The statement continues:- App. Pt.II pp.18 to 27

"At that time (we) were about half a mile away. So I altered the course 7 degrees to the starboard side and then maintained my App. Pt. II p.20

speed and turning of the helm until the relative position of the opposite ship was about 0.2 - 0.3 mile to about 30 degrees to the port side of my boat. I then checked the rudder indicator, revolution indicator and the flap indicator on the switch board in front of me. When I saw the opposite vessel again, she was about 200-300 feet away, about 3 to 4 points on my port side. Under this circumstances she was trying to pass me from my bow. I at once ordered to shut the engines and saw both hands of the first engineer were on the control handles. I tried to give out warning to the other boat, but both of my hands were controlling the rudder and flap. And my boat kept on swinging to the starboard side. Several seconds later (my boat) collided with the opposite one violently."

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30. That account contains no reference to an uncontrolled sheer to starboard. However that may be, it is submitted that, whatever rules applied to the earlier approach of the vessels, the statement discloses a flagrant breach of rules 2 and 6 of the Collision Regulations. As Captain Pyrke said (and as the Learned Judge repeated in his summing up), on the Appellant's own account, when the other vessel was between 2 and 3 cables away the only proper course was to stop the engines and come down off the foils. That would have brought the vessel to a stop within about 250 feet in about 7 to 8 seconds. In these circumstances it is submitted that it follows from the Appellant's statement to the police (which is the account most favourable to him) that he was guilty of gross negligence in persisting at full speed of over 30 knots. It is submitted that the Court of Appeal's summary of this part of the case is correct.

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App.Pt. I
Vol. II
p.792
lines 39
to 42

App. Pt. I
Vol. II pp.
835 to 837

31. Thus if the jury thought that the statement to the police was true it discloses a case of gross negligence. If on the other hand the jury thought the statement wholly or partly untrue on the ground that it was inconsistent with other evidence that the "FLYING FLAMINGO" had not turned significantly to port the case against the Appellant is very much stronger. [See paragraphs 39 to 41 below.]

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32. The Appellant further contends that the Learned Judge treated the Appellant's statement inconsistently in that he treated it as true for the purpose of acquitting Mr Ng but then pointed out that it was inconsistent with other evidence which suggested

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that it was unlikely to be true. It is submitted that there is no force in this objection. There is no reason why part of the Appellant's statement should not be true and part untrue. Having regard to the Appellant's statement that he had seen the other vessel it would plainly not have been right to allow the case against Mr. Ng to continue. There was no reason to believe that the Appellant had not seen the "FLYING FLAMINGO". It does not however follow that the whole of the remainder of the statement was true. But, as already submitted, even if it was there was sufficient evidence of gross negligence to leave to the jury.

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C. Case to Answer

33. The Appellant says that the Learned Judge ought to have held that he had no case to answer on the ground that there was insufficient evidence of manslaughter to leave to the jury. It is submitted that for the reasons given above the Appellant's own statement to the police discloses a case for him to answer. It follows that the Learned Judge was right to reject the submission of no case to answer.

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34. It is further submitted that the Appellant had a case to answer on two distinct bases even if his statements are disregarded. The first basis considers the speed of the "FLYING GOLDFINCH" alone. The second basis takes account of the evidence of alterations of course.

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Basis A.

35. There was evidence to support the following facts:-

- (a) The vessels were navigating in daylight in calm weather with clear visibility.
- (b) There were no vessels in the vicinity other than those in collision.
- (c) The "FLYING GOLDFINCH" (like the "FLYING FLAMINGO") was foil-borne and was proceeding at or close to full speed at collision.
- (d) The "FLYING GOLDFINCH" could have come to a complete stop from full speed ahead about 7 to 8 seconds and in a distance of about 250 feet but did not.

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(e) There was nothing wrong with the "FLYING GOLDFINCH" which would have prevented her from reducing speed or which caused her to alter course.

36. It is submitted that on those facts there was evidence of gross negligence on substantially the same basis as discussed in paragraphs 29 to 31 above. The Respondent accepts that on the basis of those facts it would not be possible for the jury (or indeed any court) to make detailed findings of primary fact as to what happened throughout the approach of the two vessels. It follows that it would not be possible to reach a clear conclusion as to whether the vessels were meeting head-on within Rule 14 of the Regulations, whether they were crossing vessels within Rule 15 or whether they were initially shaping to pass starboard to starboard (or indeed port to port) and in that event whether the passing distance was safe. It does not however follow that there was insufficient evidence of gross negligence or recklessness. On the contrary it is submitted that there was ample such evidence. 10 20

37. For this purpose it may be appropriate to make assumptions of fact which are most favourable to the Appellant. These are either that the vessels were initially approaching end on and that the "FLYING FLAMINGO" altered course to port contrary to Rule 14 or that the vessels were crossing such that the "FLYING FLAMINGO" was the give-way ship under Rule 16. On both those hypotheses the initial risk of collision was created by the "FLYING FLAMINGO". Nevertheless it is submitted that the action of the Appellant in persisting in proceeding at full speed until collision when he could have stopped his vessel in 7 to 8 seconds within about 250 feet was inexcusable. 30

38. It was a flagrant breach of rule 6. It was also a manifest disregard or neglect of an obvious precaution required by the ordinary practice of seaman or by the special circumstances of the case within the meaning of Rule 2 of the Regulations. The special circumstances were that the Appellant was navigating a hydrofoil with a large number of people on board at high speed in close proximity to another vessel. Even if the "FLYING GOLDFINCH" was the stand-on vessel under Rule 17 there could be no justification for continuing at over 30 knots for as long as the Appellant did. In these circumstances there was ample evidence of gross negligence to leave to the jury. 40 50

Basis B

39. There was evidence of the following further facts in addition to those set out in paragraph 35 above:-

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- (a) The "FLYING GOLDFINCH" made a substantial alteration of course to starboard immediately before the collision.
 - (b) The "FLYING GOLDFINCH" gave no signal to indicate her alteration or alterations of course.
 - (c) The "FLYING FLAMINGO" made no significant alteration of course before the collision, except for a slight alteration of course to port.
 - (d) The angle of blow was between about 50 degrees and 80 degrees leading aft on the "FLYING FLAMINGO".

40. Those facts are based principally on the evidence of the following witnesses:-

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- (a) Mr Ho Ngau, a sailor on board the "FLYING FLAMINGO", who saw the wake of his vessel in a straight line App.Pt.I
Vol.I p.72
 - (b) Mr Chan Shek, a seaman on board the "FLYING FLAMINGO", who said the wake of the "FLYING GOLDFINCH" indicating a curve to starboard towards his vessel App. Pt.I
Vol.I pp.111
to p.112
 - (c) Mr Lo Kai, a seaman on board the "FLYING GOLDFINCH" who described the wake of his vessel as 'like a sickle' and the turn of his vessel as a 'sharp turn to starboard' App. Pt. I
Vol.I p.323
 - (d) Mr Raymond Tang and Captain Pyrke of the Marine Department, who respectively expressed the view that the angle of blow was between 60 degrees and 80 degrees and between 50 degrees and 70 degrees. App.Pt.I
Vol. I pp.
223 and
360 to 364
- 30

40 In addition it may be observed that the fact of a rapid turn to starboard would be consistent with the statement of the Appellant both at the Hong Kong Hotel and in the deck log that the "FLYING GOLDFINCH" altered her heading to starboard at a rate of 5 degrees a second. The jury was entitled to treat that statement as an admission

and to consider why it was (a) that, the only explanation given for the collision in the Appellant's first account was a sheer to starboard and (b) that he made the untrue statement that it was an uncontrollable sheer.

41. It is submitted that on the further facts set out in paragraph 39 the jury would be entitled to conclude that in addition to the excessive speed of the vessels one of the major causes of the collision was the rapid alteration of course to starboard by the "FLYING GOLDFINCH". That rapid alteration (which was intentional and not uncontrollable) was further evidence of gross negligence which it was proper to leave to the jury. It is submitted that that is so regardless of whether the ships were initially meeting end on or crossing or shaping to pass port to port or starboard to starboard. It may be that it was the jury's view of the alteration to starboard which led them to distinguish between the conduct of the Appellant and of Captain Coull.

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D. Expert Evidence

42. It is said on behalf of the Appellant that the learned Judge did not properly direct the jury in relation to the evidence of Captain Pyrke. The Respondent accepts that the Learned Judge did not summarise that evidence with absolute accuracy. It is however submitted that none of those errors was of any materiality. Detailed submissions will be made on this topic at the hearing of the appeal when it is known precisely how the Appellant's case is put. It is however submitted that none of the errors so far suggested on behalf of the Appellant is relevant to the way the Respondent's case is put in paragraphs 33 to 41 above.

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E. The Proviso

43. It is submitted that in any event this is a case in which it would be proper to uphold the conviction under the Proviso to section 83(1) of the Criminal Procedure Ordinance of Hong Kong on the ground that "no miscarriage of justice has actually occurred". The evidence of gross negligence on the part of the Appellant was overwhelming. In particular his persisting in proceeding at over 30 knots until collision was inexcusable. So was his rapid alteration to starboard. It is submitted that it is no answer to say, as the Appellant does, that there may be other faults of one or both vessels in relation to the earlier navigation under one or more of the Collision

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App. Pt. I
Vol. II
p. 835

Regulations. The Appellant's navigation involved a high or very high risk of death which was both obvious and serious. The Appellant either gave no thought to that risk or if he did he nevertheless went on to take it.

44. It is therefore submitted that this appeal should be dismissed for the following among other

R E A S O N S

- 10 (1) BECAUSE the Learned Judge did not misdirect the jury on the ingredients of the offence of manslaughter.
- (2) BECAUSE the Learned Judge did not improperly direct the jury in relation to the statements of the Appellant in any respect which was prejudicial to him.
- (3) BECAUSE the Appellant had a case to answer.
- (4) BECAUSE the Learned Judge did not misdirect the jury in relation to the expert evidence to any material extent.
- 20 (5) BECAUSE there are no other grounds for interfering with the verdict of the jury.
- (6) BECAUSE the Court of Appeal was right to dismiss the Appellant's appeal.
- (7) BECAUSE it would in any event be proper to uphold the conviction on the ground that "no miscarriage of justice has actually occurred".

ANTHONY CLARKE Q.C.

T. JENKYN-JONES

IN THE PRIVY COUNCIL

O N A P P E A L
FROM THE COURT OF APPEAL OF HONG KONG

B E T W E E N :

KONG CHEUK KWAN Appellant

- and -

THE QUEEN Respondent

CASE FOR THE RESPONDENT

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