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Case No: 202401008 B3
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IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM CANTERBURY CROWN COURT
MR JUSTICE JOHNSON
46ZY1949322

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11 December 2024

Before :

THE LADY CHIEF JUSTICE OF ENGLAND AND WALES
BARONESS CARR OF WALTON-ON-THE-HILL
MR JUSTICE DOVE
and
MR JUSTICE MURRAY

- -

Between :

IBRAHIMA BAH

Applicant

- and -

REX **Respondent**

- -
- -

Richard Thomas KC and Aneurin Brewer (instructed by **Quinn Land Solicitors**) for the **Applicant**
Duncan Atkinson KC (instructed by the **Crown Prosecution Service**) for the **Respondent**

Hearing date: 4 December 2024

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APPROVED JUDGMENT

This judgment was handed down in Court 4 at 10.00am on Wednesday 11 December by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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The Lady Carr of Walton-on-the-Hill, LCJ:

Introduction

1. On 19 February 2024 the applicant was convicted following retrial before Johnson J and a jury sitting at the Crown Court in Canterbury of a single offence of doing an act to facilitate the commission of a breach of UK immigration law by a non-UK national, contrary to s. 25(1) and (6) of the Immigration Act 1971. This was count 1 of the indictment, and the jury verdict was unanimous. He was also convicted of four counts of gross negligence manslaughter, counts 2 to 5 of the indictment, on which the jury verdicts were by majority (10 to 2). On 23 February 2024 the applicant was sentenced to 9 years 6 months' detention in relation to count 2 with concurrent sentences of the same length in respect of the other manslaughter counts. He was sentenced to a further concurrent sentence of 4 years' detention on count 1. In total, therefore, the sentence imposed on the applicant was 9 years 6 months' detention.

2. The applicant applies for leave to appeal against conviction and sentence, and those applications have been referred to the Full Court by the Registrar.

The facts

3. The applicant, who was treated as being 20 years old at the time of conviction, had travelled from Senegal with the intention of claiming asylum in the UK. He came by boat from Libya to Italy and then found his way to the area near Dunkirk known as "The Jungle". He stayed there for around three months awaiting the opportunity to make the crossing of the Channel. He had some experience of handling boats having been involved with fishing boats in his home country, and indeed he had assisted in piloting the boat for part of the crossing from Libya to Italy. There are traffickers operating in the area of "The Jungle" who charge large sums for the chance to travel to the UK across the Channel in small boats for the purpose of making claims for international protection.

4. The applicant did not have the money to pay for a crossing attempt, but he was approached by one of the traffickers who offered free passage for himself and a friend if he would steer the boat. The crossing was to occur that evening. Upon the applicant agreeing, he was taken by car, along with other people who were to be undertaking the crossing, to the point where it was intended that the boat would depart. There were approximately 45 people seeking asylum who were to take part in the crossing. The traffickers provided the inflatable boat which was to be used and some of the passengers became involved in inflating it. The traffickers were armed and were threatening the migrants and assaulting them. Most of the passengers were involved in lifting the boat and taking it to the water.

5. Once the applicant had seen the nature of the boat's construction and the number of intended passengers, he expressed his misgivings about the plan. The traffickers were not interested in this, and the judge accepted that the applicant was "put under verbal and some physical pressure" not to refuse to steer the boat.

6. At about 00.30 on 14 December 2022 the boat set off. Two of the passengers were navigating using their mobile phones and giving instructions to the applicant. Initially the passage proceeded smoothly, and the sea was calm. After about 45 minutes to one

hour water started to enter the boat. The volume of water in the boat increased to the point where the applicant was so concerned that he steered the boat towards a nearby fishing vessel, the Arcturus, which was engaged in dredging for scallops. Panic was setting in amongst the passengers and the applicant urged them to remain calm and stay seated. Unfortunately, as a consequence of passengers standing up, the floor of the boat broke and the boat collapsed in on itself, trapping some of the passengers inside.

7. Ultimately the crew of the Arcturus were roused, and whilst at one point the boat drifted away from the fishing vessel, they were able to bring the Arcturus alongside the boat. During this stage of the rescue the applicant was videoed holding a rope to prevent the boat from drifting away again. He stayed on the boat until most of the passengers had boarded the Arcturus and other rescue vessels had arrived. The applicant was distressed because his friend had become stuck in the collapsed boat and was dying. In the aftermath of the rescue, it became clear that at least four of the passengers on the boat had died. The survivors were taken to Dover where they claimed asylum.

8. At trial the prosecution relied upon expert evidence from Paul Glatzel, who is a powerboat instructor and author of the RYA advanced powerboat handbook. He had undertaken training in marine accident investigation. Mr Glatzel helped the jury with an understanding that the skipper of a vessel is the person in charge with responsibility for the safety of the passengers on board and the course of the journey to be taken. Mr Glatzel was of the opinion that the applicant was the skipper of this boat: he was in charge and had responsibility for the safety of his vessel and its passengers.

9. The boat was not of a satisfactory construction, and craft of this kind are not intended to be used in open seas across large distances. The boat was not provided with the necessary safety and navigation equipment. In short, the boat was not safe at all, let alone for the purpose of carrying around 45 people on the open sea.

10. The Channel was described by Mr Glatzel as being one of the busiest shipping lanes in the world and subject to careful traffic regulation; attempting to cross without any lights on the boat was perilous because the boat would not be visible to the larger vessels in this area. The weather at the time of the incident was cold and the sea temperature was only 11.2 degrees, with the air temperature 3 degrees. There was a clear risk of cold-water shock for anyone who fell into the water. Taking all of these matters into account, the conclusion of Mr Glatzel was that there was a significant risk of death to those who were on board the boat. Those risks would have been very obvious to most people.

11. The judge formed the view that the passengers in the boat were well aware of the risks and that they "freely and voluntarily embarked on the journey knowing of the risks". They had, in helping to inflate the boat and directing its navigation, participated in the undertaking of the crossing.

12. The applicant contended that he had only taken part in the incident as a result of duress at the hands of the traffickers. The jury were provided with directions in relation to this issue, which are not criticised, and rejected duress as a defence. They found the defendant guilty (by a majority of 10 to 2). They were specifically asked whether they found the applicant guilty of unlawful act or gross negligence manslaughter and their verdict was confirmed as being gross negligence manslaughter.

Appeal against conviction: the grounds

13. The application for leave to appeal against conviction is advanced on three grounds. Ground 1 is that there was a jury irregularity which prevented the applicant from having a fair trial. Grounds 2 and 3 are related. Under Ground 2 it is argued that the judge was wrong to reject the submission of no case to answer which was made in relation to the counts of manslaughter. Ground 3 is that, reliant on the same contentions as were made at the close of the prosecution case, it was an error of law for the judge to fail to direct the jury that the deceased's voluntary choice to risk death by joining the crossing was relevant to the issue of whether the applicant's acts were a significant, or more than minimal, cause of their deaths. This argument is made in the alternative, on the basis that the court accepts that there was material which justified the leaving of the case to the jury but concludes that the jury should have had the opportunity to consider the question of whether the conduct of the applicant caused the deceased's deaths. We propose to address these grounds in the order in which they arose in the trial.

Ground 2: the submission of no case to answer

Submissions below

14. The application below proceeded on the basis of the factual framework which has been set out above, and in particular on the basis that it was accepted that the passengers had entered the boat voluntarily. The submission of no case to answer was made on the basis that causation could not be proved, since the chain of causation was broken by the voluntary actions of the deceased in exercising their free will and choosing to board the boat and embark on the crossing. The key authorities relied upon by the applicant were *R v Kennedy (No 2)* [2007] UKHL 38; [2008] 1 AC 269 (*Kennedy*) and *R v Rebelo (No 1)* [2019] EWCA Crim 633 (*Rebelo 1)* followed by *R v Rebelo (No 2)* [2021] EWCA Crim 306; [2021] 4 WLR 52 (together *Rebelo*).

15. In *Kennedy* the appellant prepared a syringe of heroin which he handed to the deceased, another resident of the hostel in which the appellant lived. The deceased injected himself with the heroin and gave the syringe back to the appellant, who left the room. After he had taken the heroin, the deceased stopped breathing. His cause of death was inhalation of gastric contents whilst acutely intoxicated by opiates and alcohol. The appellant was charged and convicted of unlawful act manslaughter. It was agreed that the mere supply of the heroin was not an act which was capable of providing the underlying unlawful act necessary to found a conviction for unlawful act manslaughter. The prosecution accepted that the only potentially unlawful act upon which they could rely was a breach of s. 23 of the Offences Against the Person Act 1861, that is to say unlawfully and maliciously administering, or causing to be administered or taken by another person, a poison or noxious substance so as to endanger the life of the other person or so as to inflict grievous bodily harm. The appellant was convicted.

16. Lord Bingham, giving the opinion of the Committee, made the following observation in relation to the issue of causation in criminal cases:

> "14. The criminal law generally assumes the existence of free will. The law recognises certain exceptions, in the case of the young, those who for any reason are not fully responsible for their actions, and the vulnerable, and it acknowledges situations of duress and necessity, as also of deception and mistake. But, generally speaking, informed adults of sound mind are treated as

autonomous being able to make their own decisions how they will act, and none of the exceptions is relied on as possibly applicable in this case. Thus D is not to be treated as causing V to act in that way rather than another. There are many classic statements to this effect. In his article 'Finis for Novus Actus?' [1989] CLJ 391, 392, Professor Glanville Williams wrote:

> 'I may suggest reason to you for doing something; I may urge you to do it, tell you it will pay you to do it, tell you it is your duty to do it. But they do not cause you to do it, in the sense in which one causes a kettle of water to boil by putting it on the stove. Your volitional act is regarded (within the doctrine of responsibility) as setting a new "chain of causation" going, irrespective of what has happened before.'

In chapter XII of *Causation in the Law*, 2nd ed (1985), p326, Hart & Honoré wrote:

> 'The free, deliberate, and informed intervention of a second person, who intends to exploit the situation created by the first, but is not acting in concert with him, is normally held to relieve the first actor of criminal responsibility.'

This statement was cited by the House with approval in *R v Latif* [1996] 1 WLR 104, 115. The principle is fundamental and not controversial."

17. Turning to the facts of the case, Lord Bingham noted that, firstly, the deceased had committed no offence when he had injected himself with the fatal dose of heroin. Secondly, there was no meaningful sense in which it could be said legally that the appellant was a principal acting jointly with the deceased, or that they had been acting in concert. It could not be said that the appellant caused the heroin to be administered to the deceased or to be taken by him. Lord Bingham dealt with the final argument raised by the prosecution as follows:

> "19. The sole argument open to the Crown was, therefore, that the appellant administered the injection to the deceased. It was argued that the term 'administer' should not be narrowly interpreted. Reliance was placed on the steps taken by the appellant to facilitate the injection and on the trial judge's direction to the jury that they had to be satisfied that the appellant handed the syringe to the deceased 'for immediate injection'. But section 23 draws a very clear contrast between a noxious thing administered to another person and a noxious thing taken by another person. It cannot ordinarily be both. In this case the heroin is described as 'freely and voluntarily self-administered' by the deceased. This, on the facts, is an inevitable finding. The appellant supplied the heroin and prepared the syringe. But the deceased had a choice whether to inject

> himself or not. He chose to do so, knowing what he was doing. It was his act."

18. The appeal was allowed, with Lord Bingham noting that much of the difficulty which had dogged the procedure in the case had flowed from the failure at the outset to be clear in identifying the unlawful act upon which the manslaughter charge was based.

19. In *Rebelo* the appellant marketed capsules of a chemical, Dinitrophenol or DNP, as a food supplement which it was claimed promoted weight loss. The deceased was a student who purchased some of the DNP capsules and after taking eight of the capsules she died. The appellant was charged with manslaughter on the basis that the supply of the capsules of DNP was an unlawful act which was dangerous and had caused the death of the deceased; alternatively, it was said that in supplying the drugs the appellant was in gross breach of his duty of care to the deceased, crossing the criminal threshold and in circumstances which created an obvious and serious risk of death.

20. In *Rebelo (No 1)*, this court concluded that the appellant's conviction for unlawful act manslaughter could not be allowed to stand. It went on to consider the question of gross negligence manslaughter and in particular the appellant's submission that there was a break in the chain of causation caused by the voluntary act of the deceased in taking the capsules as a free, informed and deliberate act. The taking of grossly excessive quantities of the DNP was an intervening act which broke the chain of causation between the appellant's breach of duty and her death.

21. Sir Brian Leveson P, giving the judgment of the court, concluded that the judge's directions on causation had not been adequate. He considered how the jury should have been directed:

> "76. Thus, the jury had to be directed, first, that the defendant must owe the victim an existing duty of care which, secondly, has negligently been breached in circumstances, thirdly, that were truly exceptionally bad and so reprehensible as to justify the conclusion that it amounted to gross negligence and required criminal sanction. Fourth, the breach of that duty must be a substantial and operative cause of death, although not necessarily the sole cause of death. This last ingredient required further analysis which, without seeking to provide a definitive definition, could have been put to the jury in this way:
>
> > In relation to the question of causation, the prosecution must make you sure that the victim did not make a fully free, voluntary and informed decision to risk death by taking the quantity of drug that she ingested. If she did make such a decision, or may have done so, her death flows from her decision and [the] defendant only set the scene for her to make that decision. In those circumstances, he is not guilty of gross negligence manslaughter. What does a fully informed and voluntary decision mean? Whether a decision is informed and voluntary will often be a question of degree. There are a range of factors to be taken into account. The starting point will be the capacity of the victim to assess the risk and understand the

> consequences. Does he or she suffer from a mental illness such as to affect their capacity? In that regard, you will consider the evidence of Dr Rogers, remembering always that it is for you the jury to attach such weight as you feel appropriate to that expert evidence. Against the background of what you have concluded about her capacity, you will consider her ability to assess the risk and understand the consequences relating to the toxicity of the substance and her appreciated of the risk to her health or even her life by taking as much as she did and whether it eclipsed the defendant's grossly negligent breach of duty of care."

22. The appellant was retried, and again convicted. He appealed, in *Rebelo (No 2)*, on the basis that the judge's directions were not faithful to the suggested jury instructions on causation set out in *Rebelo (No 1)*. It was submitted that the judge had failed to direct the jury that, even if they concluded that the deceased's decision was not fully free and voluntary, they still had to assess whether the decision to take the amount of DNP which she did was such that it could be said to "eclipse" the appellant's gross negligence. This submission was rejected by the Court of Appeal. Dame Victoria Sharp P made clear that what had been suggested by the court in the earlier appeal was not to be taken as prescriptive and, further, there was no additional hurdle or step of the kind suggested by the appellant required. It was emphasised that the key direction in relation to causation was the following passage from the earlier decision of the Court of Appeal:

> "In relation to the question of causation, the prosecution must make you sure that the victim did not make a fully free, voluntary and informed decision to risk death by taking the quantity of drug that she ingested. If she did make such a decision, or may have done so, her death flows from her decision and [the] defendant only set the scene for her to make that decision. In those circumstances, he is not guilty of gross negligence manslaughter."

23. The court made clear that what had followed in the earlier decision, and indeed the other material in the directions provided by the judge in her directions on the retrial, were simply placing this essential kernel of the legal directions into the context of the specific evidence that the jury had heard. There had been no misdirection of the jury in the retrial and the appeal on this ground, and indeed all others raised, was dismissed.

24. Based upon these authorities the applicant submitted to the judge, and submits before us, that a properly directed jury could not conclude other than that the decision of the deceased to take part in the perilous journey was entirely voluntary and therefore that causation could not be established.

25. The prosecution resisted the application on the basis that this case was clearly to be distinguished from the case of *Kennedy*, firstly, on the basis that that case was expressly said to be relevant only to unlawful act manslaughter and not gross negligence manslaughter. Secondly, it was clear that the prosecution in *Kennedy* failed because, on the facts, it could not be established that there was an unlawful act upon which the allegation of manslaughter could be founded: the appellant had not administered the drug and had not caused the drug to be administered to or taken by the deceased. The

prosecution submitted that both *Kennedy* and *Rebelo* were very different cases from the present case. In the present case it was the applicant's actions in driving the boat across the Channel that caused the deaths of the deceased, and those deaths occurred during that ongoing act. There was no separate act undertaken by the deceased that broke the chain of causation. This was not a case where the applicant's acts were merely setting the scene or creating the background to the separate acts of the deceased which caused their death.

26. The applicant responded to these submissions relying upon the centrality of voluntariness to the reasoning in both *Kennedy* and particularly *Rebelo* and pointing out that the applicant's act of steering the boat still left room for the deceased to have made a separate and autonomous decision to come aboard the boat for the attempted Channel crossing.

The judge's ruling

27. The judge dismissed the application. He proceeded on the basis that each of the deceased had made a free, voluntary and informed decision to travel on the boat driven by the applicant. His reasons for rejecting the application were as follows:

> "It is clear from the authorities that there are some circumstances in which the free and voluntary act of the victim will negative legal causation connection, and some circumstances where it does not. The distinction is explained by Hart and Honoré (see para 5.5 above). It is between those cases where the victim and defendant act in concert, and those cases where the victim does not act in concert with the defendant but exploits the situation which he has created.
>
> *Kennedy* is an example of the latter situation. The deceased and the defendant were not acting in concert. The deceased had not committed any criminal offence. The defendant had merely prepared the syringe. The deceased had made the fully informed decision to exploit the situation that the defendant had created by injecting himself with the syringe.
>
> *Rebelo* is also, in principle (and subject to the question as to whether the deceased did make a voluntary decision), an example of the latter situation. The defendant had merely supplied the pills. The deceased had made the decision to take the pills. If that decision had been truly free and voluntary, then that would have negatived any causal connection, in law, between the defendant's acts and the deceased's death.
>
> By contrast, where the deceased is acting in concert with the defendant, and thereby freely and voluntarily accepts the risk of death, that does not negative a legal causal link…
>
> In the present case, the deceased were all seeking to travel, together, to the UK in breach of UK immigration law. The defendant was (on the prosecution case which, it is accepted,

should in this respect go to the jury) committing an offence contrary to section 25 of the Immigration Act 1971. The deceased were not committing that offence, but they were committing offences contrary to section 24 of the 1971 Act, and it was that offending that the defendant was (on the prosecution case) facilitating. They were, together, pursuing a common criminal enterprise to reach the UK (or, at least, UK territorial waters) without detection. Thus, they travelled at night. They were quiet. They avoided illuminating the boat. Together, they inflated and carried the boat from the shore to the sea. There is evidence they kept their heads down to enable the defendant to see and to steer the boat.

I do not accept Mr Thomas' submission that they were not acting in concert. Mr Thomas is right that the offences committed by the defendant, on the one hand, and the passengers, on the other, are distinct. They were not joint offenders. He did not, however, identify anything in the authorities to suggest that legal causation is negatived if the parties are not joint offenders. The statement of principle given by Hart and Honore, and endorsed by the House of Lords, requires merely that they "act in concert". Lord Bingham's analysis at [18] shows that "acting in concert" is a broader concept than joint enterprise offending. Nor did Mr Thomas give any principled or policy reason why causation should be negatived if the parties are not joint offenders. On the contrary, that would reduce the test of causation to an artificial exercise of identifying the contours of different criminal offences. This is sufficient to distinguish *Kennedy*: in that case, the defendant and the deceased were not acting in concert. In this case, they were (or, at least, there is a sufficient case that they were).

…

Accordingly, applying the principle identified by Hart and Honoré and approved by the House of Lords, the deceased were acting in concert with the defendant (or, at the very least, there is a case fit to go to the jury on that issue) such that their free and voluntary decision to travel on the boat does not negative legal causation. If the defendant had purchased the boat, and left it on the beach, and the deceased had then decided to take the boat and travel across the Channel then the position would be different. In such a case, they would not have been acting in concert with the defendant and they would, instead, have sought to exploit a situation that he had created. That would be sufficient to negative legal causation. Here, by contrast, the defendant and the deceased were acting in concert, and that means that the chain of causation is not broken."

Analysis

28. Causation is a central issue in result crimes, because causation is used to link the defendant with the criminal consequences of their action. Any assessment of legal causation should maintain focus on whether the accused should be held legally responsible for the consequences of his action (see *R v Wallace (Berlinah)* [2018] EWCA Crim 690; [2018] 2 Cr App R 22 (*Wallace*) at [46] and [63]).

29. The causation requirement in the context of gross negligence manslaughter was made clear in *R v Broughton* [2020] EWCA Crim 1093; [2021] 1 WLR 543 (*Broughton*) at [5]. Having reviewed the authorities, Lord Burnett of Maldon LCJ stated:

> "The result of this consideration is that the six elements have been identified that the prosecution must prove before a defendant can be convicted of gross negligence manslaughter:
>
> (i) The defendant owed an existing duty of care to the victim.
>
> (ii) The defendant negligently breached that duty of care.
>
> (iii) At the time of the breach there was a serious and obvious risk of death. Serious, in this context, qualifies the nature of the risk of death as something much more that minimal or remote. Risk of injury or illness, even serious injury or illness, is not enough. An obvious risk is one that is present, clear, and unambiguous. It is immediately apparent, striking and glaring rather than something that might become apparent on further investigation.
>
> (iv) It was reasonably foreseeable at the time of the breach of the duty that the breach gave rise to a serious and obvious risk of death.
>
> *(v) The breach of the duty caused or made a significant (i.e. more than minimal) contribution to the death of the victim.*
>
> (vi) In the view of the jury, the circumstances of the breach were truly exceptionally bad and so reprehensible as to justify the conclusion that it amounted to gross negligence and required criminal sanction.
>
> The elements found in (iii) and (iv) will not need separate consideration or articulation in many cases." (emphasis added)

30. *Wallace* was a case involving very different facts (acid-throwing leading to voluntary euthanasia), but the court made some general observations on causation in the criminal context (see in particular [46] to [48], [52] and [53]). The meaning of causation is heavily fact-specific: "it is not always safe to suppose that there is a settled or 'stable' concept of causation which can be applied in every case" (see [48]). However, there are two well-recognised considerations: the first is that a chain of causation between

the act of A and a result may be broken by the voluntary, deliberate and informed act of B to bring about that result; secondly, there is a distinction between "cause" in the sense of a sine qua non, without which the consequence would not have occurred, and "cause" in the sense of something which was a legally effective cause of that consequence. Where there are multiple legally effective causes, it suffices if the act or omission under consideration is a significant (or substantial) cause. There is a well-recognised distinction between conduct which (merely) sets the stage for an occurrence and conduct which on a common-sense view is regarded as instrumental in bringing about the occurrence (see [48]).

31. The principle that "the free, deliberate and informed intervention of a second person, who intends to exploit the situation created by the first, but not acting in concert with him, is normally held to relieve the first actor of criminal responsibility" was endorsed expressly (at [47]).

32. With these considerations in mind, we turn to the facts of the present case. Whilst the judge was concerned with both unlawful act and gross negligence manslaughter, in the light of the jury's verdict, we are only concerned with the latter. The application engaged the first limb of the well-known test from *R v Galbraith* [1981] 1 WLR 1039, namely that the evidence could not establish an offence having been committed by the applicant in this case because causation could not be established.

33. Whilst the existence of the duty owed to the deceased in the present case was not in dispute, it is of assistance to examine the foundation of that duty in order to inform an understanding of the chain of causation in this case and whether it can properly be said to have been broken by the passengers' decisions to board the boat.

34. In this regard, the prosecution relies on *R v Wacker* [2002] EWCA Crim 1944; [2003] QB 1207 (*Wacker*). *Wacker* concerned the facilitation of the illegal entry of 60 Chinese nationals to the UK in a modified refrigerated container on a lorry being driven by the appellant. At the rear of the container was a load of tomatoes, but behind the tomatoes was a partition beyond which were the illegal migrants. There was a small air vent which was closed prior to the ferry crossing to prevent discovery of the migrants. All but two of the Chinese nationals died of suffocation.

35. The appellant was charged with gross negligence manslaughter. On a submission of no case to answer it was argued there could be no duty of care arising in circumstances where the appellant and the deceased were both involved in a criminal enterprise. It was accepted by the trial judge that this principle was of application in the criminal law but, having examined the facts of the case, he concluded that there was still a case to go to the jury. On appeal, the suggestion that a duty of care could not arise between one person engaged in a criminal activity with another also engaged in that activity was rejected. Giving the judgment of the court, Kay LJ distinguished the criminal law from the civil law when considering whether a duty of care existed:

> "31. The first question that it is pertinent to ask is why it is that the civil law has introduced the concept of ex turpi causa. The answer is clear from the authorities. Bingham LJ in *Saunders v Edwards* [1987] 1 WLR 1116, 1134 … explains that as a matter of public policy the courts will not 'promote or countenance nefarious object or bargain which it is bound to condemn'.

32. In other situations, it is clear that the criminal law adopts a different approach to the civil law in this regard. A person who sold a harmless substance to another pretending that it was an unlawful dangerous drug could not be the subject of a successful civil claim by the purchasers for the return of the purchase price. However the criminal law would, arising out of the same transaction, hold that he was guilty of the offence of obtaining property by deception. Many other similar examples readily come to mind.

33. Why is there, therefore, this distinction between the approach of the civil and the criminal law? The answer is that the very same policy that causes the civil courts to refuse the claim points in a quite different direction in considering a criminal offence. The criminal law has as its function the protection of citizens and gives effect to the state's duty to try those who have deprived citizens of their rights of life, limb or property. It may very well step in at the precise moment when civil courts withdraw because of this very different function. The withdrawal of a civil remedy has nothing to do with whether as a matter of public policy the criminal law applies. The criminal law should not be disapplied just because the civil law is disapplied. It has its own public policy aim which may require a different approach to the involvement of the law.

34. Further the criminal law will not hesitate to act to prevent serious injury or death even when the persons subjected to such injury or death may have consented to or willingly accepted the risk of actual injury or death. By way of illustration, the criminal law makes the assisting of another to commit suicide a criminal offence and denies a defence of consent where significant injury is deliberately caused to another in a sexual context: *R v Brown (Anthony)* [1994] 1 AC 212. The state in such circumstances has an overriding duty to act to prevent such consequences.

…

39. One further issue merits consideration, namely is it any answer to a charge of manslaughter for a defendant to say, 'We were jointly engaged in a criminal enterprise and, weighing the risk of injury or death against or joint desire to achieve our unlawful objective, we collectively thought it was a risk worth taking?' In our judgment it is not. The duty to take care cannot, as a matter of public policy, be permitted to be affected by countervailing demands of the criminal enterprise. Thus, in this case, the fact that keeping the vent shut increased the chances of the Chinese succeeding in entering the United Kingdom without detection was not a factor to be taken into account in deciding whether the defendant had acted reasonably or not."

36. Thus, the applicant here is right to accept that he owed a duty of care to the deceased. That duty was grounded in the fact that he had taken charge of steering the boat and assumed the role of skipper. As explained in the expert evidence, firstly, in that role he was responsible for the safety of the boat and its passengers and, secondly, the boat was wholly unsuited and unequipped for the crossing of the Channel which was attempted. As reasoned in *Wacker*, the duty of care was not obviated by the fact that the deceased freely volunteered to be passengers in the boat; or that this was a criminal activity designed to enable their illegal entry into the United Kingdom; or on account of the fact that the deceased may have considered that the risks of the voyage were worth taking in order to obtain the objective of claiming asylum in the United Kingdom. And it is this duty which founds a consideration of the chain of causation.

37. We cannot identify a proper basis upon which it could be said that the chain of causation in this case was broken. Whilst the applicant and deceased were not joint offenders, they were undoubtedly acting in concert in the same, single episode which ended in the deaths. The voluntary boarding of the boat accompanied the applicant's piloting of the boat, giving rise to his duty of care to the passengers. From that point on, there was no separate, voluntary act by any of the deceased that could be said to have broken the chain of causation. There was no interference with or interruption of the link between the applicant's breach of duty and each death.

38. *Kennedy* and *Rebelo* do not assist the applicant, either as a matter of principle or on the facts. Indeed, Lord Bingham in *Kennedy* (at [14]) endorsed the principle that, where both actors are acting in concert, the free deliberate and informed decisions of a second person will not normally relieve the first person of criminal responsibility. He described the principle as "fundamental and not controversial".

39. For the avoidance of doubt, it is not necessary for these purposes for the parties to be engaged in what the criminal law would recognise as a joint enterprise or joint participation in a criminal offence. The principle is clearly far broader.

40. The facts of the cases of *Kennedy* and *Rebelo* were very different from the facts of this case. As set out above, it is clear from the authorities that different factual considerations may arise on causation in gross negligence manslaughter cases, depending on their context (see for example, *Broughton* in the context of medical treatment; and *R v Field* [2021] EWCA Crim 380 in the context of voluntary consumption of alcohol). The assessment will always be fact-specific.

41. Putting to one side that *Kennedy* was a case of unlawful act (and not gross negligence) manslaughter in which the prosecution were unable to establish the underlying offence, it was also a case in which the voluntary act of the deceased was properly regarded as being entirely separate and distinct from the acts of the appellant. The appellant and the deceased were not acting in concert. The appellant at most set the scene for what the deceased then chose to do, namely self-inject heroin. Similarly, *Rebelo* did not involve the appellant and the deceased acting together; rather the decision of the deceased to take the capsules was a separate and distinct (subsequent) action.

42. For these reasons, we are satisfied that the judge was correct to reject the applicant's submission of no case to answer.

<u>Ground 3: the failure to direct the jury in relation to voluntary choice and causation</u>

43. The applicant submits that, notwithstanding the rejection of the submission of no case to answer, the jury should have been directed that the deceased's voluntary choice to risk death by joining the crossing was relevant to the question of causation which they had to decide. In particular, counsel should have been permitted to make submissions in this respect when making their closing speech to the jury. In fact, the judge directed the jury that it "is not a defence that the victims freely and voluntarily made the journey".

44. In the light of our conclusions on Ground 2 we can address Ground 3 succinctly, since the two are interrelated. Indeed, it is accepted for the applicant that the two grounds stand or fall together. Here the judge correctly analysed that the fact that the deceased volunteered to join the boat could not establish a break in the chain of causation; the evidence to that effect was thus irrelevant to causation (as were any related submissions).

45. The judge was therefore right to direct the jury as he did. Indeed, an instruction to the jury inviting them to consider whether the fact that the deceased boarded the boat of their own free will broke the chain of causation would have amounted to a misdirection. Ground 3 cannot succeed.

Ground 1: jury irregularity

46. Following the conviction of the applicant on 19 February 2024 it appears that (on 22 February 2024) the court received a communication in relation to the jury by email. The communication read as follows:

> "[Email sent on 22 February 2024 at 5.40pm, subject "Jury member discussing matters of a ongoing trial"] I am contacting you regarding someone who I work with
>
> Their name is [redacted]. I believe theyre [redacted age] and works for
> [redacted]. I am led to believe that the trial is still ongoing and the final verdict of the case has not been made. However. I, and several of my colleagues have witnessed, overheard or have been spoken to directly about the case in question. (Hour long conversations of sensitive details shared among colleagues)
>
> Names of other people on the jury have been mentioned.
>
> Sensitive information and details regarding the weeks long trial have been
> leaked.
>
> Including the reasons for the trial, opinions of the jurys conversations and
> debates including,
>
> Two verdicts of the jury members.
>
> I am led to believe that doing this an offence.

> And I would appreciate my information staying anonymous
> Thank you
>
> And I'm sorry to share this information with you.
> Kind regards [redacted]" .

47. The Registrar referred this material to the Attorney General's Office pursuant to CrimPD 8.7.43. By letter dated 3 July 2024 the Registrar informed the parties that the potential jury irregularity had been investigated and that no action was to be taken.

48. For the applicant concern is expressed that the reasons why no action was taken in relation to this matter have not been provided to the court. It is suggested that the court ought to seek to obtain disclosure of the evidence obtained during the investigation (under s. 23(1)(b) of the Criminal Appeal Act 1968). It is submitted, that whilst the Attorney General would have applied a criminal standard of proof to the investigation of the jury irregularity, the test for the court to consider is very different and related to whether the offending conduct had an impact on the safety of the conviction. In that connection it would appear that the relevant substance of the complaint was that the juror was talking to work colleagues about the case, notwithstanding the judge's instructions not to discuss the case with anyone outside the jury, and that the juror had been relating to them the contents of the jury's deliberations. Given the politically sensitive and highly emotive content of the evidence at trial the applicant submits that this complaint evidences that the trial was procedurally unfair and the conviction unsafe.

49. This challenge is without merit. We make the following points:

    i) The (unusual and oddly crafted) email was not received until after the jury's verdicts were in;

    ii) It was written by someone who apparently wanted to remain anonymous, and the Attorney General, following investigation, is not taking any further action;

    iii) No concern was raised by any juror during trial as to actual or potential jury misconduct;

    iv) The matters alleged in the email might, at face value, amount to an offence under s. 20D of the Juries Act 1974 (disclosure of jury deliberations). However, and fundamentally, there is no suggestion of any irregularity or impropriety in the approach of any juror to their consideration of the evidence at trial or to their fellow jurors. In other words, there is no evidence that, beyond the alleged external misconduct, there was any irregularity in the jury's conduct at trial such as to render the convictions unsafe.

50. In short, we do not consider it either necessary or expedient in the interests of justice to order disclosure from the Attorney General (a matter in relation to which we note the Attorney General has been given no notice). Nor is there any sufficient basis for a direction to the Criminal Cases Review Commission under s. 23A of the Criminal Appeal Act 1968 to investigate and report (see the cautious approach to be taken, as identified in *R v Baybasin* [2013] EWCA Crim 2357 at [60] to [63]). The necessary strong and compelling evidence is simply lacking.

Appeal against sentence

51. In sentencing the applicant, the judge decided to treat the applicant as being 20 years of age. He concluded that, in relation to the s. 25 offence (which carries a maximum sentence of life imprisonment), this was a case of low culpability, as the applicant had played no part in the organisation of the crossing and had not coerced the passengers to take part. He had not secured any financial gain apart from not having to pay for his own passage. The judge concluded that there was, however, a high degree of harm caused by the offence. The applicant had facilitated the breach of immigration control for a large number of individuals, all of whom were put at very significant risk in a dangerous vessel unsuited and unequipped for the journey they embarked upon. The judge had regard to the recent case of *R v Ahmed* [2023] EWCA Crim 1521; [2024] 1 WLR 1271 (*Ahmed*) in which this court gave guidance in relation to the correct approach to sentencing in these cases.

52. The judge considered that the starting point for this offence would be 5 years. He proceeded to consider the mitigation in the applicant's case, principally that he had been put under some pressure by the traffickers to steer the boat; he was still a young man; he was of good character; he suffered from a depressive disorder with some symptoms of post-traumatic stress disorder; he had encountered hardships both in his upbringing and also on the journey he had taken prior to the attempted crossing. The judge accepted that it would not be easy for the applicant in custody. Ultimately, taking all of these factors into account the judge sentenced the applicant to 4 years' detention on count 1.

53. Turning to counts 2 to 5, the judge had regard to the Sentencing Council Guideline for gross negligence manslaughter (the Guideline). Bearing in mind the number of deaths and the very significant and obvious risks which the applicant had created, he concluded that the case came into the high culpability category, albeit towards the lower end of that bracket and the upper end of the medium culpability bracket. The Guideline provided a starting point of 8 years for high culpability cases, with a range of 6 to 12 years' custody. The judge sentenced on the basis that the deceased freely and voluntarily embarked on the journey aware of the risks that they were taking. The judge took account of the applicant's conduct when the boat was in trouble, and that he had stayed on board and sought to help passengers. The judge concluded that the sentence for a single offence would have been 5 years 9 months' detention. However, there were four offences to take into account, along with the sentence on count 1. Seeking to reflect totality, the judge determined that the overall sentence for the applicant should be 9 years 6 months' detention concurrent on each of counts 2 to 5, together with a concurrent sentence of 4 years' detention on count 1.

54. The applicant seeks leave to appeal against sentence, firstly on the basis that the judge was wrong when sentencing the applicant under count 1 to conclude that this was a case where there was a high degree of harm. This was a case where the harm was, as in *Ahmed*, more than minimal but not high, and the judge's starting point should have been 3, not 5, years' detention.

55. The court in *Ahmed* addressed the question of the categorisation of harm in the following terms.

> "19. The highest category of harm will be reserved for cases where the small boat or boats used involved a high risk of serious

> injury or death and/or where the offender assisted large numbers of individuals to arrive unlawfully in the UK. The former factor will bite where the boat concerned was particularly unsuitable for the purpose to which it is being put. The latter factor will capture those involved in organising small boats crossing the Channel. Harm will also be high if the offender has exploited or coerced others to assist them. Again this is likely to apply to organisers.
>
> 20. Any small boat crossing the Channel will involve some risk of serious injury or death given the potential for bad weather and the number of vessels using the Channel on any given day. Thus, it is unlikely that harm can ever be considered to be minimal. Moreover, inherent in any offence contrary to section 25 will be the harm done to the public interest in maintaining proper border controls."

56. When addressing his assessment of the harm, the judge had regard to the number of individuals whom the applicant had assisted to breach immigration control, the extent to which this offence undermined the public interest in maintaining secure control of the UK's borders, and the number of lives which were put at risk. In particular, he noted that the boat "was not a reasonably safe, seaworthy vessel, it was about as dangerous and inadequate as it is possible to imagine". In making these findings, the judge was clearly engaging in the application of the matters set out in [19] and [20] of *Ahmed*. The findings in relation to the condition of the boat were supported expressly by the detailed expert evidence that the court had heard. The judge's reasons in relation to the question of harm were an accurate application of the principles to be found in the authorities. A 5 year starting point cannot be impugned.

57. The second ground raised by the applicant is that the judge ought to have placed the gross negligence manslaughter charges into the lower culpability category, on the basis that the applicant was playing a lesser or subordinate role in the offending, and that the blame for what happened lay mainly with the traffickers who preyed on those seeking to come to the UK and took large sums of money for organising crossings in dangerous inflatable boats. It is said that, at most, the applicant should have been put in the medium culpability category. Allied to this, it is said that the judge gave inappropriate weight to two factors: firstly, the suggested disregard of the very high risk of death in the incident should have been put in the context of the passengers volunteering to take the risk; secondly, the judge's suggestion that there were some in the boat who wanted to turn back was against the weight of the evidence.

58. We do not consider that there is any substance in these complaints. The judge correctly noted that the Guideline is not to be applied mechanistically and that it had not been specifically devised for this kind of offence. However, on the facts of the case there were clearly features engaging a finding of high culpability. The applicant persisted in the conduct which arose in the context of other serious criminality and demonstrated a clear disregard for the high risk of death arising from the negligent conduct. On the other hand, as the judge noted, the primary responsibility for what happened had to rest with the traffickers who procured the unsafe vessel and to that extent the applicant was in a lesser and subordinate role.

59. As the Guideline indicates, the characteristics are an indication of the level of culpability that can attach to an offender's conduct, but it is necessary to balance them out and arrive at a fair overall assessment in the context of the circumstances of the offending as a whole. That is what the judge clearly did in this case, arriving at an overall sentence that cannot be impugned. He paid express regard to the fact that the passengers freely embarked on the boat and there was clear evidence, reflected in the summing-up, that the applicant persisted in driving the boat over a prolonged period of time during which the passengers were becoming increasingly fearful and distressed.

60. The third point raised, and emphasised before us, is the suggestion that the judge failed to make an adequate reduction for the applicant's age (and the other mitigation available to him). This is a submission which we are unable to accept. The judge observed that he took "particular account" of the feature of youth. When taken together with the other mitigating factors identified by the judge, this is what led to a reduction from 5 years to 4 years' detention in relation to count 1, and 7 years to 5 years 9 months' detention in relation to counts 2 to 5. We consider that this overall reduction, incorporating an adjustment for the applicant's youth, reflected adequately the relevant mitigation.

61. The final suggestion, also emphasised for the applicant, is that the judge failed to have proper regard to the principle of totality. It is argued that the increase from the indicated sentence for a single offence of 5 years 9 months' detention to 9 years 6 months' detention for all the offences was too great, resulting in an overall sentence that was manifestly excessive. We cannot agree. The judge did not simply pay lip-service to the question of totality. The judge's view of the correct sentence for a single offence was unimpeachable; he then carefully adjusted the final overall sentence by means of concurrent sentences reflecting that there were four counts of manslaughter to be brought into account. There is no proper basis for appellate interference with his assessment that the final sentence was proportionate to the applicant's overall offending.

Conclusion

62. For the reasons set out above, on analysis, Grounds 2 and 3 of the application for leave to appeal against conviction are unarguable and cannot succeed. Ground 1 is also not arguable. Leave to appeal against conviction must accordingly be refused.

63. The grounds of the application for leave to appeal against sentence are not properly arguable, again for the reasons given. Leave to appeal against sentence is also refused.