Ng Keng Yong v Public Prosecutor and Another Appeal
[2004] SGHC 171

Case Number : MA 58/2004, 59/2004

Decision Date : 13 August 2004

Tribunal/Court : High Court

Coram : Yong Pung How CJ

Counsel Name(s) : Steven Chong SC, Lionel Tan, Ian Teo and Loh Wai Yue (Rajah and Tann) for appellants; Hamidul Haq and Hui Choon Kuen (Deputy Public Prosecutors) for respondent

Parties : Ng Keng Yong — Public Prosecutor

Criminal Law – Offences – Causing death by negligent act – Collision at sea – Vessels on reciprocal courses – Appellants altered to port instead of starboard – Whether vessels approaching each other so as to involve risk of collision – Breach of Rule 14(a) International Regulations for Preventing Collisions at Sea 1972

Criminal Law – Offences – Causing death by negligent act – Standard of care expected of trainee – Whether same standard as qualified person – Section 304A Penal Code (Cap 224, 1985 Rev Ed)

Criminal Law – Offences – Causing death by negligent act – Test for causation – Whether appellants' negligence contributed significantly or substantially to collision – Whether contributory negligence of other vessel broke chain of causation – Section 304A Penal Code (Cap 224, 1985 Rev Ed)

13 August 2004

Yong Pung How CJ:

1 These were two related appeals by the first appellant, Ng Keng Yong, and the second appellant, Chua Chue Teng, against their respective convictions for causing death by a negligent act not amounting to culpable homicide, an offence under s 304A of the Penal Code (Cap 224, 1985 Rev Ed) ("the PC"). I dismissed both appeals and now give my reasons.

Facts

2 Both the appellants are lieutenants in the Republic of Singapore Navy ("RSN"). The charges against them arose out of the tragic collision between the RSN ship *RSS Courageous* ("the *Courageous*") and the merchant vessel *ANL Indonesia* ("the *ANL*") on 3 January 2003, which resulted in the deaths of four RSN servicewomen.

The vessels

3 The *ANL* was a Netherlands-registered container ship with a gross tonnage of 51,938. She was 293.5m in length and had a top speed of 24.8 knots (46km/h). The *Courageous* was a "Fearless Class" anti-submarine patrol vessel which displaced approximately 452 tonnes. At 57.94m, she was less than one-fifth the length of the *ANL*. She was powered by an advanced twin jet propulsion system, and had a top speed exceeding 20 knots (37km/h).

4 Both ships were equipped with a Gyro compass, radar, Automatic Radar Plotting Aid and other navigational equipment and charts. All the equipment was functioning at the material time.

The sequence of events

5 At about 11.20pm on 3 January 2003, the *Courageous* and the *ANL* were both travelling on the eastbound lane of the Traffic Separation Scheme ("TSS") just off the Horsburgh Lighthouse at Pedra Branca. Both vessels were moving in a north-easterly direction in accordance with the general traffic flow. The *ANL* was en route from Port Klang, Malaysia, to Busan, South Korea, while the *Courageous* was some 6 nautical miles ("nm") ahead of the *ANL* conducting her regular patrol of the waters.

6 At the material time, the first appellant was the Officer-of-the-Watch ("OOW") on the *Courageous*. He was responsible for the safe navigation of the ship. The second appellant was only a trainee OOW, but she had the con, or control of the steering, of the vessel. She made navigational decisions and issued the relevant orders to the rest of the bridge team. As the supervising OOW, the first appellant would only intervene if he was of the view that any of her actions or instructions were wrong.

7 At 11.25pm, the *Courageous* reached the end of her patrol area. After checking that both sides were clear, the second appellant ordered the *Courageous* to execute a "U-turn". This changed her course to a south-westerly direction of 235°, leading her to proceed down the eastbound lane of the TSS against the general flow of traffic.

8 Shortly after, the officer on the bridge of the *ANL*, Gerrit Easge Botma ("Botma"), observed the red port sidelight of the *Courageous* on the port side of the *ANL*. This suggested that the vessels would pass port to port. Meanwhile, on board the *Courageous*, the Closest Point of Approach ("CPA") alarm on the radar came on. The CPA alarm was set at three cables (0.3nm), indicating that the closest distance at which the *Courageous* would pass the target vessel (the *ANL*) was about three cables.

9 Second Sergeant Goh Chun Yong, the radar plotter on the *Courageous*, reported the activation of the CPA alarm to the second appellant and informed her that the *ANL* was at "green 10" (10° on the starboard side). The lookout, First Sergeant Tan Soon Teck, and the petty OOW, Marcus Kuah Yeow Hwee, both confirmed his report. At this time, the vessels were closing in on each other at 31 knots or five cables per minute. Based on the report from the bridge team that the *ANL* was on the starboard side of the *Courageous*, the second appellant ordered an alteration to port from 235° to 215° at 11.30pm to increase the CPA. She also ordered a reduction in speed from Step 4 (1,000rpm or 13 knots) to Step 3 (860rpm or 12 knots).

10 Unfortunately, neither the appellants nor the rest of the bridge team realised that the *ANL* was in fact on the port side of the *Courageous*. The latter's alteration to port therefore inadvertently brought the courses of the vessels even closer together. When the CPA did not open up as the second appellant had hoped, she ordered a further alteration to port from 215° to 210° at 11.31pm.

11 A minute later, Botma saw the green starboard light of the *Courageous* and realised that she had altered to port. As her relative bearing was not changing and the CPA was now zero, Botma alerted the Captain of the *ANL*, Petrus Paulaus Maria Koop ("Koop"), to the danger of collision. After a quick discussion, they decided to alter the *ANL*'s course to starboard in accordance with the International Regulations for Preventing Collisions at Sea 1972 ("the Collision Regulations"). The *ANL* made two alterations to starboard by autopilot between 11.32pm and 11.34pm, bringing her course from 51° to 73°. She also sounded a whistle blast to alert the *Courageous*.

12 At 11.33pm, the second appellant ordered the *Courageous* to make yet another alteration to port to 200°. She also ordered the speed to be increased back to Step 4. At 11.34pm, she ordered a final alteration to port to 190°, followed shortly by an order to put the helm hard to port. The first

appellant also ordered both engines to "full throttle".

13 The combination of the *ANL*'s alterations to starboard and the *Courageous*' alterations to port resulted in the vessels colliding at 11.35pm about 1nm northeast of the Horsburgh Lighthouse. The *ANL* sustained superficial damage to her bow area, and none of her crew of 23 were injured. However, the *Courageous* sustained heavy losses. Part of her aft section was sheared off and sank. Of her 44 crewmembers, eight were injured and four died.

The inquiry and the charges

14 An inquiry was conducted under s 118 of the Merchant Shipping Act (Cap 179, 1996 Rev Ed) by investigators from the Maritime and Port Authority of Singapore ("MPA"). In their findings, the inquiry team noted that both the *ANL* and the *Courageous* "could have exercised better seamanship". Nonetheless, they found that the collision was caused by "errors in judgment in assessing the situation and the wrongful application of the Collision Regulations" by the *Courageous*.

15 As the appellants were jointly responsible for negligently navigating the *Courageous* in an unsafe manner across the path of the *ANL*, they were subsequently charged under s 304A of the PC for causing the deaths of the four RSN servicewomen. The charges against them were heard together.

The Prosecution's case

16 The Prosecution alleged that the appellants were negligent in:

(a) navigating the *Courageous* against the flow of traffic in the TSS;

(b) altering her course in the wrong direction; and

(c) turning to port in a series of small alterations with a decrease in speed.

Navigating against the flow of traffic

17 The 1997 RSN Operations Directive entitled "Guidelines for RSN Craft/Ships Operating in Singapore Territorial Waters" states that RSN vessels such as the *Courageous* should, as far as possible, comply with the Collision Regulations. At the material time, the *Courageous* was travelling against the general flow of traffic on the eastbound lane of the TSS. This was a technical breach of r 10(b)(i) of the Collision Regulations, which provides that:

(b) A vessel using a traffic separation scheme shall —

(i) proceed in the appropriate traffic lane in the general direction of traffic flow for that lane …

Altering course in the wrong direction

18 The Prosecution also contended that when the *Courageous* found herself on a reciprocal or near reciprocal course with the *ANL*, she ought to have altered her course to starboard in accordance with r 14(a) of the Collision Regulations, which reads:

When two power-driven vessels are meeting on reciprocal or nearly reciprocal courses so as to involve risk of collision each shall alter her course to starboard so that each shall pass on the

port side of the other.

19 As the *ANL* was on the port side of the *Courageous*, an alteration to starboard in compliance with R 14(a) would have ensured that the vessels passed each other safely. By doing exactly what she should not have done, the *Courageous* placed herself on a particularly hazardous course.

Turning to port in a series of small alterations with a reduction in speed

20 The *Courageous* made a total of four alterations to port:

(a) 11.30pm: from 235° to 215° (a 20° alteration);

(b) 11.31pm: from 215° to 210° (a 5° alteration);

(c) 11.33pm: from 210° to 200° (a 10° alteration); and

(d) 11.34pm: from 200° to 190° (a 10° alteration).

21 The first alteration was accompanied by a reduction in speed from Step 4 to Step 3. The Prosecution argued that these actions violated r 8(b) of the Collision Regulations, which states that:

> Any alteration of course and/or speed to avoid collision shall, if the circumstances of the case admit, be large enough to be readily apparent to another vessel observing visually or by radar; a succession of small alterations of course and/or speed should be avoided.

The Defence's case

22 The appellants denied any negligence on their part. Instead, they claimed that the collision was caused by Botma and Koop's negligent breach of r 8(b) of the Collision Regulations, set out above. Specifically, they argued that the *ANL* should have made a decisive alteration to starboard by manual steering, instead of two small alterations using her auto-pilot.

Navigating against the flow of traffic

23 The appellants acknowledged that they were technically in breach of r 10(b)(i). However, a minute of 27 January 2003 from the Office of the Chief of Navy to the MPA entitled "Compliance with COLREGS" states clearly that there can be situations where RSN vessels may be compelled to deviate from the Collision Regulations due to the nature and requirements of military missions and operational profiles. In this case, the *Courageous* was entitled to patrol against the flow of traffic as it placed her in a good position to reinforce the waters off Pedra Branca.

Altering course in the wrong direction

24 The appellants also asserted that r 14(a) was not applicable when they made the alterations to port as there was no risk of collision at the time. The CPA of three cables was safe, and the night order book of the Commanding Officer, Major Tang Yong Yang ("CO"), showed that previous CPAs practiced on board the *Courageous* were as low as two to three cables.

Turning to port in a series of small alterations with a reduction in speed

2 5 *A Seaman's Guide to the Rule of the Road* (6th Ed, 1995) stipulates that a bold alteration is generally 30° or more. Although the appellants' alterations fell below this standard, they argued that

their initial alteration of 20° made their intention to cross ahead of the *ANL* readily apparent. The defence expert, Captain John Third ("DE"), also suggested that the two initial alterations should be considered as one, as they occurred within a minute of each other. This meant that the *Courageous*' first alteration was 25°, a mere 5° below the standard.

The decision below

26 It is settled law that the standard of care for criminal negligence is the same as that for civil negligence: *Lim Poh Eng v PP* [1999] 2 SLR 116. The question before the district judge was whether the appellants had acted in a manner which a reasonable person in their positions would have done. After holding that the applicable standard in this case was that of a reasonable naval OOW operating a naval vessel, the district judge turned to evaluate each of the Prosecution's allegations: see *PP v Ng Keng Yong* [2004] SGDC 74.

Navigating against the flow of traffic

27 The district judge recognised that the *Courageous* had technically contravened r 10(b)(i) of the Collision Regulations by proceeding against the flow of traffic in the TSS. However, he accepted that this manoeuvre was safe and operationally necessary. The appellants were therefore not negligent in this respect.

Altering course in the wrong direction

28 Although the appellants were not negligent in navigating against the flow of traffic, the onus was on them to take extra precautions to avoid a close-quarters situation with other vessels proceeding in the right direction. The district judge accepted the evidence of the prosecution expert, Captain Hilbert Fernandez ("PE"), that the CPA of three cables was, in the circumstances, unsafe. Given that this was a head-on situation at night with a large vessel, the appellants should have kept a greater buffer to take into account contingencies such as radar time lag, margins of error and the *ANL*'s size and lack of manoeuvrability. Bearing in mind the conservative approach advocated by the Collision Regulations, the district judge found that there was a risk of collision and r 14(a) therefore applied.

29 The district judge noted that r 14(a) applied to all head-on situations where there was a risk of collision, whether the vessels were passing port to port or starboard to starboard. He found support for this proposition in Nicholas J Healey and Joseph C Sweeney, *The Law of Marine Collision* (1998) at 184:

> [I]n the head-on situation, if any change of course is required to effect a safe passing it must be to starboard so that the vessels will pass port to port. Even if the courses are somewhat starboard of each other, but a safe starboard to starboard passing cannot be made without an alteration of course by either vessel, each must turn to starboard. This is so, even though it may mean that one vessel must cross the other's bow in order to pass port to port.

30 Therefore, although he accepted that the appellants had perceived the *ANL* to be on their starboard side, he found that they were nonetheless obliged to alter to starboard. By altering to port instead, they had negligently breached r 14(a) of the Collision Regulations.

31 Turning to the question of causation, the district judge observed that both causation in fact and in law had to be established. "But for" the *Courageous* turning to port in breach of r 14(a), the collision would have been avoided – causation in fact was proven. The reasonable foreseeability test

for causation in law was also satisfied. The district judge therefore held that the collision was caused by the appellants' negligent breach of r 14(a).

Turning to port in a series of small alterations with a reduction in speed

32 The district judge accepted DE's opinion that the first two alterations of the *Courageous* should be considered as one, as they occurred within a minute. However, the two further 10° alterations were a clear violation of r 8(b) of the Collision Regulations. Although this breach did increase the risk of collision, he found insufficient evidence to establish causation on this aspect of the appellants' negligence.

Further negligence by the appellants

33 The district judge also held that the appellants' failure to make light and sound signals when making the last two 10° alterations was a negligent breach of rr 34(a) and (b) of the Collision Regulations, which state as follows:

> (a) When vessels are in sight of one another, a power-driven vessel underway, when manoeuvring as authorised or required by these Rules, shall indicate that manoeuvre by the following signals on her whistle:
>
> one short blast to mean "I am altering my course to starboard";
>
> two short blasts to mean "I am altering my course to port" …
>
> (b) Any vessel may supplement the whistle signals prescribed in paragraph (a) by light signals, repeated as appropriate, whilst the manoeuvre is being carried out —
>
> (i) these light signals shall have the following significance:
>
> one flash to mean "I am altering my course to starboard";
>
> two flashes to mean "I am altering my course to port" …

34 However, the Prosecution did not allege that any of this was causative of the collision. The district judge was also not prepared to hold that the appellants were negligent in:

> (a) failing to take compass bearings to assess the risk of collision;
>
> (b) failing to infer from the decreasing CPA that the *ANL* must be altering course to starboard; and
>
> (c) failing to switch the radar to a six-minute vector, 3nm range scale or a relative motion setting to assess the risk of collision more accurately.

The ANL's contributory negligence

35 In response to the *Courageous*' actions, the *ANL* had altered her course to starboard which was the correct direction as prescribed under the Collision Regulations. However, instead of making a bold alteration by manual steering, the *ANL* made two smaller alterations by autopilot. As a result, the district judge found that her eventual 22° alteration in course was not large enough to be readily apparent under r 8(b) of the Collision Regulations.

36 If the *ANL* had made a decisive alteration to starboard, the collision could have been avoided. Both elements of causation in fact and in law were satisfied. Nonetheless, drawing from the doctrine of *novus actus interveniens*, the district judge took the view that the *ANL*'s actions were not so unreasonable as to eclipse the appellant's initial negligence in breaching r 14(a), which indisputably caused the collision and resulted in the deaths of the four RSN servicewomen. The appellants were accordingly convicted under s 304A of the PC.

The appeals

37 The appellants raised three principal issues in their appeals:

(a) whether the alteration to port by the *Courageous* was a negligent act in breach of r 14(a) of the Collision Regulations;

(b) whether the alteration to port was the proximate and efficient cause of the collision under s 304A of the PC; and

(c) whether the second appellant, as a trainee OOW, should be held to the same standard of care as a qualified OOW.

Whether the alteration to port was a breach of r 14(a)

38 Rule 14(a) of the Collision Regulations would have applied only if the two vessels were meeting on reciprocal or nearly reciprocal courses (*ie*, approaching within 6° of each other), and they were approaching "so as to involve a risk of collision" at the material time. The appellants did not dispute that before the *Courageous* made her first alteration to port, she was meeting the *ANL* on a reciprocal course. Instead, they contended that there was no risk of collision, and the district judge's finding to the contrary was against the weight of the evidence.

39 It is trite law that an appellate court will only disturb the trial judge's findings of fact when they are plainly wrong or against the weight of the evidence: *Lim Ah Poh v PP* [1992] 1 SLR 713; *PP v Azman bin Abdullah* [1998] 2 SLR 704. However, when a finding is based not so much upon the demeanour of witnesses but upon inferences made from objective evidence, an appellate court is then in as good a position as the trial court to assess the material: *PP v Choo Thiam Hock* [1994] 3 SLR 248.

"So as to involve risk of collision"

40 A preliminary point must first be made. Both in the trial court and before me, the parties appeared to take the position that the phrase "so as to involve a risk of collision" in r 14(a) was equivalent to the *existence* of a risk of collision. Their arguments therefore centred on whether a risk of collision existed at the material time. This approach was, strictly speaking, inaccurate as a matter of law. The Collision Regulations draw a clear distinction between situations where a risk of collision *exists* (for example, rr 18 and 19), and where the vessels are approaching each other "*so as to involve* risk of collision" (for example, rr 14 and 15): see Healey and Sweeney, *The Law of Marine Collision* ([29] *supra*) at 126–127. Support for this proposition can also be found in John Wheeler Griffin, *The American Law of Collision* (1949) which states at 23:

> It will be noted that the phrase is not "so that there *is* risk of collision," but "so as to *involve* risk of collision." *The words evidently refer to a time when there is not yet actual danger, but when*

the relation between the vessels is such that danger may shortly arise, if the rules are not obeyed. Thus Brett, MR, in the *Beryl*, 9 Prob Div 137, 5 Asp 321 [1884], said that the rules are intended "not merely for the purpose of preventing a collision, but for the purpose of preventing even a risk of collision." And Atkin, LJ, in the *Gulf of Suez*, [1921] Prob Div 318, 332, said that *the phrase "to involve risk of collision … indicates a period before the risk has, so to speak, actually matured; it means a period at which there is a probability that there will be a risk of collision if precautions are not taken*." [emphasis added]

41 The real question before me was not whether a risk of collision *existed* at the material time, but whether the situation simply *involved* a risk of collision. However, this subtle recharacterisation of the issue did not undermine the district judge's decision, since his finding that a risk of collision *existed* at the time necessarily implied that a risk of collision was *involved* to begin with. The distinction was nonetheless crucial to these appeals, since the Prosecution did not have to prove that a risk of collision existed for r 14(a) to apply. All they had to show was that the situation was such that a risk of collision could possibly arise if the vessels did not act in accordance with the regulations. I evaluated the appellants' contentions with this in mind.

Objective test for risk of collision

42 The appellants' main argument was the fact that none of the navigators on the *ANL* or the *Courageous* perceived that a risk of collision existed at 11.30pm, just before the *Courageous*' initial alteration to port. In this regard, I agreed with the Prosecution that when considering if a risk of collision was involved, the subjective opinions of the navigators could not be decisive. The test of whether a risk of collision is involved must be an objective one. Any other approach would completely subvert the Collision Regulations' objective of promoting certainty and safety.

43 The Collision Regulations have force of law in Singapore by virtue of the fact that they are encapsulated in the Merchant Shipping (Prevention of Collisions at Sea) Regulations (Cap 179, Rg 10) of the Merchant Shipping Act. They are universally accepted principles of safe navigation that are designed to ensure that, whenever possible, ships will not reach a close-quarters situation in which a risk of collision will arise: *The "Maloja II"* [1993] 1 Lloyd's Rep 48 at 50–51. As G P Selvam J stated emphatically in *The Teng He* [2000] 3 SLR 114 at [39]:

> Certainty of the situation must be the primary objective. Optimistic assumptions must be avoided: pessimistic assumptions should be preferred. These are the requirements of the Collision Regulations. These are also common sense rules of caution for the avoidance of collisions at sea. Strict adherence to these rules cannot be overemphasized because of the huge losses non-adherence to them can cause to property and human lives.

44 The conservative approach of the Collision Regulations is also borne out by the contents of the rules themselves. For example, r 7(a) provides that if there is any doubt as to whether a risk of collision exists, such risk shall be deemed to exist. Given that the Collision Regulations are meant to regulate and "de-conflict" the actions of vessels approaching one another, an objective approach must be taken when deciding if a risk of collision is involved at the material time. I could not see how the regulations could effectively serve their function if, in the same situation, they would apply to one vessel but not the other, merely because their respective navigators held different opinions as to the risk of collision. I did take into consideration the opinions of the trained navigators on board the *ANL* and the *Courageous*. However, the determination of whether a risk of collision was involved is essentially an objective exercise, and their subjective opinions had to be weighed against the rest of the evidence.

45 Dealing first with the opinions of Botma and Koop on the *ANL*, I noted that they had made their assessment based solely on the fact that the *Courageous* was showing her port sidelights, indicating that the vessels would pass port to port. There was no evidence to suggest that Botma and Koop took any further measures, such as radar plotting, to ascertain if a risk of collision was imminent. This appeared to be an overly simplistic approach, bearing in mind r 7 of the Collision Regulations:

> (a) Every vessel shall use all available means appropriate to the prevailing circumstances and conditions to determine if risk of collision exists. If there is any doubt such risk shall be deemed to exist.
>
> (b) Proper use shall be made of radar equipment if fitted and operational, including long-range scanning to obtain early warning of risk of collision and radar plotting or equivalent systematic observation of detected objects.
>
> (c) Assumptions shall not be made on the basis of scanty information …

46 Although r 7 only applies to the determination of whether a risk of collision exists, it underscores the conservative approach that should be taken by navigators whenever a close-quarters situation appears to be developing. Botma and Koop's opinion that there was no risk of collision was therefore undermined to a certain extent by their rather crude method of assessing the risk involved.

47 Further, Botma and Koop had estimated that the CPA at the time was four to five cables. As the *ANL*'s CPA alarm was not switched on, this approximation could not be verified with certainty. In contrast, the CPA alarm on the *Courageous* was activated and clearly indicated that the CPA was three cables. As Botma's and Koop's evaluation of the situation was made in the context of an overestimation of the CPA, I found that the district judge was correct to have placed little weight on their opinions.

48 As for the appellants' claim that there was no risk of collision, this had to be placed in the context of my earlier finding that a risk of collision did not have to *exist* at the material time for r 14(a) to apply. The threshold for the operation of r 14(a) was lower – all that was necessary was for the situation to *involve* a risk of collision.

PE's evidence

49 Also, the appellants' views that there was no risk of collision had to be balanced against PE's considered opinion that there was such a risk. The appellants alleged that PE was tailoring his evidence to suit the Prosecution's case, as he only suggested that there was a risk of collision in his Supplementary Expert Report after the appellants had adduced evidence to show that there was no such risk.

50 I found this attack on PE's credibility to be disingenuous and completely unwarranted. The only evidence that the appellants produced to suggest that PE did not initially believe that there was a risk of collision was the following quote from his first Report:

> From 2325 to 2329 hours, RC [the *Courageous*] was fine on the port bow of AI. At this stage, they were not on a collision course and would have passed each other port to port…

51 Saying that the vessels were not on a collision course is very different from taking the view

that there was no risk of collision. The *Courageous* and the *ANL* were obviously not on a collision course at the material time because the CPA was not zero cables. The real question was whether the CPA of three cables was safe, or whether the situation was such that a risk of collision would arise if proper precautions were not taken. Although PE did not use the exact phrase "risk of collision" in his first Report, a brief perusal of the contents demonstrated that he had consistently maintained that a CPA of less than five cables was risky in the circumstances. At para 29 of the Report, he opined that the CPA of three cables was "unsafe and unjustifiable … as it would not allow the OOWs on both vessels to take corrective action(s) in time …" He reiterated this at para 34:

> [A] small CPA of less than 5 cables at night (especially when going against the flow of traffic in the TSS) is risky and is certainly poor seamanship… [S]uch small passing distances is [*sic*] unacceptable.

52 The appellants sought to dispute PE's findings by referring to the American case of *Acacia Vera Navigation Co Ltd v Kezia Ltd* 1996 AMC [*American Maritime Cases*] 2592. In this case, the vessels *Omina* and *Blue Cloud* were passing starboard to starboard at a distance equivalent to three cables when the *Blue Cloud* took a sharp starboard turn, causing her to collide twice with the *Omina*. In giving judgment for the owners of the *Omina*, the district court found that there would have been a distance of at least three cables between the two vessels, "a clear and sufficient distance in all respects": see *Acacia Vera* at 2601. The decision was upheld on appeal, and the appellants argued that the case supported their contention that the CPA of three cables was safe.

53 I could not agree. The court in *Acacia Vera* had merely held that a CPA of three cables was sufficient in the circumstances of the case. As PE highlighted in his Report, the calculation of a safe CPA is necessarily dependent on the particular circumstances of the encounter. Factors such as traffic density, state of visibility, sea condition, manoeuvring characteristics of the vessel, speed and draft have to be taken into consideration. It follows from this that the court's finding in *Acacia Vera* could not be transplanted *in toto* to the facts of the present case.

54 In any event, the Prosecution also cited a number of cases which found a risk of collision even though the CPA was more than three cables. This further substantiated my opinion that the appellants' reliance on *Acacia Vera* was misplaced, as a safe CPA has to be determined according to the circumstances of every encounter.

Whether a CPA of three cables was safe in the circumstances

55 Therefore, the facts of the present case had to be scrutinised to determine if the *ANL* and the *Courageous* were approaching each other so as to involve a risk of collision. After evaluating the evidence, I found myself in firm agreement with the district judge that the CPA of three cables was unsafe in the circumstances. In coming to this conclusion, I took the following factors into account:

(a) the *Courageous* was travelling against the flow of traffic;

(b) a sufficient buffer had to be given to accommodate contingencies such as engine and steering failure and unexpected last minute manoeuvres;

(c) the vessels were closing in on each other rapidly;

(d) there were margins of error on the radars of both vessels that could assume significant portions at close range;

(e) visibility was obviously poorer at night; and

(f) the *Courageous* had failed to use any light or sound signals at any time.

56 Although the appellants were not negligent in navigating the *Courageous* against the flow of traffic, it was incumbent on them to take all the necessary safety measures including the maintenance of a sufficient CPA. Considering the circumstances highlighted above, and the relative approaches of the *ANL* and the *Courageous*, I had no doubt that the situation clearly involved a risk of collision. Therefore, I agreed with the trial judge that r 14(a) applied.

57 It has been established since my decision in *Lim Poh Eng* ([26] *supra*) that the civil standard of care applies to criminal cases as well. Since the appellants did not dispute that an unjustified breach of the Collision Regulations would constitute negligence, and they had plainly failed to alter to starboard as required by r 14(a), I found that the Prosecution had proven its case beyond a reasonable doubt.

58 In coming to this conclusion, I did take into account the fact that entries from the CO's night order book indicated that the *Courageous* had kept a CPA of as low as two to three cables on a number of nights. Given that the applicable standard of care in this case was that of a reasonable naval OOW, the appellants argued that the entries in the night order book demonstrated that they did not fall below the standard required of them, even though the CPA on the night of the accident was only three cables.

59 This contention completely misses the point I had made earlier, which is that the minimum safe CPA to be kept at any given time must be determined on a case by case basis. Without any further evidence to suggest that the circumstances involved on the dates of these entries were similar or analogous to those on the night of 3 January 2003, I failed to see how this evidence advanced the appellants' case. Even if I accepted that the practice on these specific occasions could be applied to the night of the accident, the success of the appellant's argument rested on the assumption that the CO's orders on the entries were not negligent to begin with. Not having adduced any evidence to support the soundness of such an assumption, the appellants could not hope to succeed on this point.

Whether the alteration to port was the proximate and efficient cause of the collision

60 The appellants' second ground of appeal related to the issue of causation.

Test for causation

61 The established test for causation under s 304A of the PC is set out in *Lee Kim Leng v R* [1964] MLJ 285 at 286, where F A Chua J adopted the Indian decision of *Emperor v Omkar Ram Pratap* (1902) 4 Bom LR 679:

> In the Indian case of *Emperor v Omkar Ram Pratap* it was held that to impose criminal liability under section 304A of the Indian Penal Code (which is similar to our section 304A of the Penal Code) it is necessary that the *death should have been the direct result of a rash and negligent act of the accused* and *that act must have been the proximate and efficient cause without the intervention of another's negligence*. It must have been the *causa causans*; it is not enough that it may have been the *causa sine qua non*. [emphasis added]

62 Although Chua J's words are recognised to be inaccurate in so far as they suggest that death

should be the direct result of a rash *and* negligent act (it being clear that the provision only requires the offending act to be rash *or* negligent), the rest of the decision is widely acknowledged as the correct approach to causation under s 304A. The Malaysian court in *PP v Joseph Chin Saiko* [1972] 2 MLJ 129 expressed similar views at 133, noting that the rash or negligent act had to be the immediate cause of death and not just a remote cause.

63 Therefore, I agreed with the appellants that the district judge erred in importing principles of causation from civil negligence, such as the "but for" test and the doctrine of *novus actus interveniens*, into the operation of s 304A. Although I held in *Lim Poh Eng* ([26] *supra*) that the standard of negligence in criminal cases should be the civil standard of negligence, this was by no means a licence for the entire law of civil negligence to be transplanted into the criminal sphere. There is no doubt that the distinction between criminal and civil liability must be maintained. In the present context, the distinction between civil and criminal negligence is reflected in both the higher standard of proof for the Prosecution and the stricter test of causation that needs to be established for criminal liability to attach.

Whether ANL's contributory negligence broke the chain of causation

64 Adopting Chua J's test of causation in *Lee Kim Leng*, the question before me was whether the appellants' negligent alteration to port in breach of r 14(a) of the Collision Regulations constituted the proximate and efficient cause of the collision, or whether the *ANL*'s undisputed contributory negligence intervened to break the chain of causation.

65 According to the appellants' interpretation of *Lee Kim Leng*, the chain of causation is necessarily broken whenever another party's negligence *in fact* intervenes, irrespective of the parties' relative blameworthiness. Read literally, Chua J's statement that the accused's act "must have been the proximate and efficient cause without the intervention of another's negligence" might support the appellants' argument. However, I found such an approach to be so repugnant to common sense that it had to be rejected. Taking the appellants' argument to its logical conclusion, criminal liability under s 304A would at all times be imposed on the person who committed the most recent act of negligence, even when the negligence of another was more substantially to blame. I could not accept that the authorities led inexorably to such an arbitrary conclusion.

66 To my mind, the words of Chua J in *Lee Kim Leng* can be interpreted in a much more reasonable and equitable fashion. In the same case, Chua J noted further in his judgment that to impose criminal liability, "it must be found as a fact that the collision was entirely or at least mainly due to the act of the appellant": *Lee Kim Leng*, [61] *supra*, at 286. Proceeding on both principle and logic, it is evident that criminal liability under s 304A should attach to the person(s) whose negligence contributed substantially, and not merely peripherally, to the result. When Chua J observed that the accused's act should be the proximate and efficient cause of the result without the intervention of another's negligence, he was merely emphasising the point that the accused's negligence, and not the negligence of any other person, should have contributed significantly to the result. If he meant to suggest that the chain of causation was necessarily broken by the very fact of a third party's intervening negligence, then, with the greatest respect, I cannot agree. The particulars of the factual matrix, and the extent to which the third party's negligence contributed to the deaths, have to be assessed as well. The court must ultimately direct its mind to whether the negligence of the accused contributed significantly or substantially to the result.

67 On the facts, the appellants were negligent in turning to port in the face of a potential risk of collision when r 14(a) of the Collision Regulations directed them to alter to starboard instead. On her part, the *ANL* had turned starboard in accordance with the Collision Regulations, but was also

negligent in failing to alter her course boldly and quickly. Applying the above principles of causation to the present case, the question was whether the *ANL*'s contributory negligence had such causative potency that the appellant's initial negligence could not be said to have contributed significantly to the collision.

68 The appellants cited a number of authorities to support their case. In *Kurban Hussein Mohamedalli Rangawalla v State of Maharashtra* AIR 1965 SC 1616, seven workers were killed in a fire at a paint factory. The fire was caused by the negligence of one worker, Hatim. While manufacturing paints through a heating process, he had poured turpentine too quickly into a hot rosin mixture, causing it to overflow. The heat that was generated subsequently caused some varnish and turpentine stored nearby to catch fire. The appellant, the managing partner of the factory, was initially convicted under the Indian equivalent of s 304A for causing the workers' deaths, as he had allowed the heating process to take place in the same room where the varnish and turpentine were stored. The Supreme Court of India allowed his appeal, holding that the deaths were not the direct or proximate result of his negligence. Instead, they held that the direct or proximate cause of the fire was Hatim's own negligence.

69 In *Lee Lai Siew v PP* [1978] 1 MLJ 259, the master of the ship *Nanukan Express* was charged and convicted of causing the deaths of 38 passengers following the sinking of the vessel. He had overloaded her with 170 passengers when she was only licensed to carry 84. The High Court of Sabah set aside his conviction, finding that the main cause of the sinking and the passengers' deaths was the bad weather and rough seas. The negligent overloading was, in the court's view at 262, "a very remote fact in causing this tragedy".

70 In my opinion, the facts in both cases were clearly distinguishable from those in the present appeals. In *Lee Lai Siew*, there was evidence to suggest that the overloading had absolutely no impact on the safety of the ship. The court took the view that the weather and the sea were the only causes of the passengers' deaths. In *Kurban Hussein*, while the appellant's negligence in storing the varnish and turpentine in the heating room did facilitate the fire, it was Hatim's own independent act of negligence that ignited the materials in the first place. Hatim's negligence was in no way related to or caused by the appellant's initial negligence.

71 In the present case, I accepted the appellants' point that the vessels would not have collided if the *ANL* had not been negligent. Nevertheless, it must be emphasised that the appellants were the ones who created the situation of danger to begin with. Although I agreed with the district judge that they were not negligent in navigating against the flow of traffic due to operational exigencies, the onus was on them to take the necessary extra precautions to avoid any potential risk of collision with other vessels proceeding in the correct direction on the TSS. Far from keeping a watchful eye on the situation, the appellants made a series of alterations to port in breach of the Collision Regulations. The *ANL* was obliged by the appellants' actions to respond with her own, albeit negligent, manoeuvres. To my mind, the appellants' negligence was clearly a substantial cause of the collision.

72 As Lord Pearce opined in *The "Miraflores" and the "Abadesa"* [1967] 1 Lloyd's Rep 191 at 200 (*sub nom Miraflores (Owners) v George Livanos (Owners)* [1967] 1 AC 826 at 847–848):

> It is axiomatic that *a person who embarks on a deliberate act of negligence should*, *in general*, *bear a greater degree of fault than one who fails to cope adequately with the resulting crisis which is thus thrust upon him* … For all humans can refrain from deliberately breaking well-known safety rules; but 'tis not in mortals to command the perfect reaction to a crisis; and many fall short at times of that degree which reasonable care demands. [emphasis added]

73 This analysis of the situation is also supported by Chua J's decision in *Lee Kim Leng* itself. In this case, a pedestrian was killed by the impact of the appellant's car colliding into the rear of a taxi, which had stopped suddenly at the pedestrian crossing. The appellant was convicted under s 304A of causing the death of the pedestrian, but his conviction was overturned on appeal. Chua J found that the appellant's negligence was not wholly or mainly responsible for the collision, as the taxi driver was initially negligent in failing to see the pedestrian at the crossing until he was almost upon her. As the taxi had stopped suddenly without giving any signals, the appellant simply had no time to react and he could not therefore be held responsible for the subsequent collision.

74 Similarly, in this case, the *ANL* was forced to react in response to a risk of collision created by the appellants' own negligent actions. I could not see how the appellants could seriously argue that their negligence had not contributed significantly to the collision and the consequent deaths of the four servicewomen.

Whether second appellant should be held to same standard as a qualified OOW

75 The final ground of appeal centred on the issue of the standard of care, and related only to the second appellant's conviction. The second appellant argued that as a trainee OOW she should not be held to the same standard as a qualified OOW, and the district judge had erred in applying the case of *Nettleship v Weston* [1971] 2 QB 691.

Whether Nettleship v Weston should apply

76 In *Nettleship v Weston*, the plaintiff was injured as a result of the defendant's negligent driving. Although the defendant was a learner driver, the English Court of Appeal found that she had to be held to the same standard of care as that of a reasonably competent driver. A doctrine of varying standards depending on the defendant's experience was too uncertain to be viable. Megaw LJ (who dissented only on the issue of quantum of damages) explained the rationale for the court's decision at 707:

> The disadvantages of the resulting unpredictability, uncertainty and, indeed, impossibility of arriving at fair and consistent decisions outweigh the advantages. The certainty of a general standard is preferable to the vagaries of a fluctuating standard.

77 I acknowledged the second appellant's point that *Nettleship v Weston* was influenced to some extent by extraneous considerations of insurance and risk allocation, none of which were relevant in the present case. Nonetheless, I found that the approach taken by the court was correct and ought to be adopted here – any other alternative was simply too ambiguous and uncertain.

78 Even if I were minded to accept the second appellant's argument that she should be held to a lower standard because she was still a trainee, that still begged the question of what standard the second appellant should have been held to. The second appellant argued that all she had to do was take her training seriously. Assuming that I was prepared to agree with this, I could not see any logical reason to limit such an indulgence to the facts of this case. The court in *Nettleship v Weston* itself recognised that its decision would inexorably extend to a much wider sphere of negligence responsibility. Megaw LJ's comments at 593 merit reproduction here:

> … [I]f the principle of varying standards is to be accepted, why should it operate, in the field of driving motor vehicles, only up to the stage of the driver qualifying for a full licence? And why should it be limited to the quality of inexperience? If the passenger knows that his driver suffers from some relevant defect, physical or temperamental, which could reasonably be expected to

affect the quality of his driving, why should not the same doctrine of varying standards apply? … Logically there can be no distinction.

79 At the end of the day, the duty of care should be tailored not to the actor, but rather to the act which he or she elects to perform: *per* Mustill LJ in *Wilsher v Essex Area Health Authority* [1987] QB 730 at 750–751. Holding a trainee to the same standard as a qualified professional is also sound as a matter of policy. Here, the second appellant had plainly taken control of a vessel that was plying in open waters with heavy merchant traffic. She herself conceded that once she took the con of the *Courageous*, she was responsible for the lives and safety of the crew on board. I would only pause to add that once she was placed in the position of making navigational decisions for the vessel, she was also responsible for the lives and safety of the crew of other vessels in the vicinity as well. In the circumstances, she had to be held to the same standard as a reasonably competent and qualified OOW. This may seem harsh, but to subject her to a lower standard of care would unfairly place the safety of everyone else around her at risk.

The criminal context

80 I recognised that *Nettleship v Weston* dealt with civil negligence, and, as I had emphasised earlier when discussing the appropriate test for causation under s 304A, the distinction between civil and criminal liability ought to be maintained. Nonetheless, I took the view that the court's decision in *Nettleship v Weston* ought to be adopted in the present appeal.

81 I laid down the definitive standard of care for criminal negligence in the case of *Lim Poh Eng* ([26] *supra*). In this case, the appellant was a practitioner of traditional Chinese medicine who was charged under s 338 of the PC for causing grievous hurt to a patient who had visited his clinic for colonic washouts. The Prosecution alleged that the appellant had been criminally negligent in prescribing the colonic washouts without proper training in the procedure and use of equipment, and without any understanding of the risks and complications involved. One of the appellant's arguments on appeal was that the standard of negligence in criminal cases should be higher than the civil standard.

82 After considering the case law and various policy concerns, I rejected the appellant's contention and held that the standard of negligence required in criminal cases was the same as that in civil cases. This followed from the local High Court's decisions in *Woo Sing v R* [1954] MLJ 200 and *Mah Kah Yew v PP* [1969–1971] SLR 441. I acknowledged the need to maintain a distinction between civil and criminal liability, but found that it was not strictly necessary to have a higher standard in criminal cases to maintain that distinction. Even without a different standard of negligence, there are still essential differences between a civil tort in negligence and a criminal offence involving negligence. The standards of proof are obviously different in the two scenarios. Also, as I had set out earlier, the causation test is stricter in the case of criminal negligence under s 304A.

83 In *Lim Poh Eng*, the appellant had proposed an intermediate standard of negligence, lower than the standard of gross negligence for the common law offence of manslaughter but higher than the civil standard of negligence. I found such an intermediate standard to be too elusive a concept to be workable, and held that the standard of negligence in criminal cases should be the civil standard of negligence.

84 It is therefore established that the criminal standard of negligence is the same as that in civil negligence. *Nettleship v Weston* was a case that dealt directly with the issue of standard of care. Since I took the view that *Nettleship v Weston* represented the correct approach to a trainee's standard of care in civil negligence, it necessarily applied in the present criminal context. This flows

strictly from my earlier decision in *Lim Poh Eng*.

85 I also noted that Lord Denning MR and Megaw LJ in *Nettleship v Weston* drew much support for their decision from the responsibility of a learner driver in criminal law. Lord Denning MR observed at 698:

> In the criminal law it is no defence for a driver to say: "I was a learner driver under instruction. I was doing my best and could not help it." Such a plea may go to mitigation of sentence, but it does not go in exculpation of guilt. The criminal law insists that every person driving a car must attain an objective standard measured by the standard of a skilled, experienced and careful driver.

86 The second appellant contended that the strict approach in *Nettleship v Weston* was inappropriate for a criminal charge because "the status of a trainee is itself diametrically opposed to the concept of *mens rea* … [as] a trainee is still be trained to know what is right and what is wrong." With respect, I found counsel's argument on this point difficult to follow. Presumably, he was suggesting that for criminal liability to attach in this case, the second appellant had to subjectively *know* that her actions were likely to cause death or injury.

87 In my opinion, this line of reasoning completely misses the point. Section 304A does not require proof of intention or knowledge. The relevant *mens rea* is rashness or negligence, which was defined by Holloway J in *Re Nidamarti Nagabhushanam* (1872) 7 MHC [*Madras High Court*] 119 at 120, and cited with approval by MPH Rubin JC (as he then was) in *PP v Teo Poh Leng* [1992] 1 SLR 15 at 16, [4]:

> Culpable rashness is acting with the consciousness that the mischievous and illegal consequences may follow, but with the hope that they will not, and often with the belief that the actor has taken sufficient precaution to prevent their happening. The imputability arises from acting despite the consciousness (*luxuria*). *Culpable negligence is acting without the consciousness that the illegal and mischievous effect will follow, but in circumstances which show that the actor has not exercised the caution incumbent upon him, and that if he had he would have had the consciousness.* The imputability arises from the neglect of the civic duty of circumspection. [emphasis added]

88 It was therefore legally inaccurate for the second appellant to argue that s 304A requires an accused person to possess knowledge that his act was likely to cause death or injury. The correct approach is to consider whether a reasonable man in the same circumstances would have been aware of the likelihood of damage or injury to others resulting from such conduct: *Adnan bin Khamis v PP* [1972] 1 MLJ 274. The subjective knowledge of the second appellant was irrelevant, so long as a reasonably competent OOW would have known that the act was likely to cause death or injury. I had no doubt that a reasonable OOW in the same circumstances as the second appellant would have had such knowledge. The *mens rea* requirement of s 304A was therefore satisfied, and the second appellant could not succeed on this final ground of appeal.

Further implications

89 Counsel for the appellant sought to impress upon me that this decision would have wider implications on the training regime of the RSN. In particular, future trainee OOWs taking the con of vessels as part of their training programme would be held to the same standard as a qualified OOW. I recognised the potential ramifications of my finding. Yet, to my mind, there was no reason for these trainees to be held to a lower standard of care simply because allowing them to take control of naval

vessels was part and parcel of the RSN's training regime. I had to consider not just the welfare of such RSN trainees, but also the wider interests of other RSN personnel as well as the other vessels and their crews at sea. To demand any less from these trainees would unduly place the lives and property of other innocent parties at risk.

Conclusion

90 For the reasons above, I dismissed both appeals against conviction. As neither party appealed against sentence, and I found the respective sentences imposed on the appellants to be entirely appropriate, I chose not to disturb the district judge's orders on this matter.

Appeals dismissed.

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