*Privy Council Appeal No. 65 of 1984*

**Kong Cheuk Kwan** *Appellant*

*v.*

**The Queen** *Respondent*

FROM

# THE COURT OF APPEAL OF HONG KONG

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## REASONS FOR REPORT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL OF THE 18TH JUNE 1985, DELIVERED THE 10TH JULY 1985

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*Present at the Hearing:*

LORD FRASER OF TULLYBELTON
LORD ROSKILL
LORD BRIDGE OF HARWICH
LORD BRANDON OF OAKBROOK
SIR OWEN WOODHOUSE

*[Delivered by **Lord Roskill**]*

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On 25th March 1983 the appellant Kong Cheuk Kwan ("Kong") was convicted of manslaughter after a three weeks' trial before Penlington J. and a jury in the High Court of Justice of Hong Kong. On 9th March 1984 the Court of Appeal of Hong Kong (McMullin V-P., and Li and Silke JJ.A.) dismissed Kong's appeal. Subsequently on 25th June 1984 Kong was granted special leave to appeal to Her Majesty in Council. At the conclusion of the hearing of the appeal on 18th June 1985 their Lordships thought it right to state, since Kong had been on continuous bail following his conviction and had been sentenced by the learned judge to 18 months' imprisonment, that they would humbly advise Her Majesty that his appeal should be allowed and his conviction quashed. Their Lordships also then stated that they would give their reasons for so humbly advising at a later date. This they now do.

The prosecution of Kong and his eventual conviction arose out of a disastrous and seemingly inexcusable collision between two hydrofoil ferries operating between Hong Kong and Macau at about 9.25 hours on

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11th July 1982. The collision took place at full speed in clear fine sunny weather with visibility wholly unrestricted. Both hydrofoils were carrying passengers. The Flying Flamingo was carrying passengers from Hong Kong to Macau. The Flying Goldfinch was carrying passengers from Macau to Hong Kong. Kong was in command of the Flying Goldfinch and was at her helm. His first mate Ng Yui-kin ("Ng") was on look-out duty beside Kong. Captain John Coull ("Coull") was in command of the Flying Flamingo. The deck officer of the Flying Flamingo was Ho Yim Pun ("Ho"). He was at her helm. Coull was on look-out duty beside Ho.

Two passengers travelling on the Flying Flamingo were killed as a result of the collision and others were injured. The Crown indicted all four of the men just mentioned for manslaughter of one of those passengers who were so tragically killed. Kong and Ng were indicted on one count in the indictment, Coull and Ho on another. Seventeen witnesses of fact were called at the trial by the Crown including seven passengers from the Flying Flamingo, four seamen and two radio officers, but the indictment of all four men in this manner made it impossible for any of those responsible for the navigation of the two hydrofoils before and at the time of the collision to be called as witnesses for the Crown. There was thus much anecdotal evidence but little direct oral evidence of the respective relative positions of the two hydrofoils and of what precisely was seen and done as a result of observations made in the minutes and seconds before the collision. Each of the hydrofoils was said to have been travelling at a speed equivalent to 32 m.p.h. If that were correct the collision took place in perfect weather conditions at a combined speed of some 64 m.p.h. Hydrofoils are no ordinary vessels. Their speed is much greater. They can be brought to a standstill almost instantly by stopping the engines.

If a charge of manslaughter, in their Lordships' experience most unusual if not unique following loss of life in a collision at sea, is to succeed, it is essential that the Crown should be able to prove clearly and for certain every act whether of commission or omission by those against whom that charge is brought and which is said not only to have caused death but to have been of so grave a character that a conviction for manslaughter should follow. In the case of a collision at sea it is unlikely, though it is of course possible, that a single person will have been responsible for the navigation of each of the vessels involved. On the contrary, it is far more likely that there will be at least a helmsman and a look-out and often others as well on the bridge of each vessel. If for example a charge of manslaughter is to be brought against the helmsman or

against the look-out or against both as a result of what each is alleged to have done or to have omitted to do, it is essential that the case against each should be specifically and separately proved with the required degree of certainty. But the Crown, having charged all four men in this way and thus made it impossible for any of them to be called by the prosecution to give their own accounts of what had happened, found itself constrained to seek to prove its case by other means. In part the Crown relied on statements made by certain of the accused after the collision. Such statements were in any event only evidence against their makers. Using those statements, the Crown then sought to prove what had happened with the aid of expert evidence some of which was at best of doubtful admissibility. The evidential position was complicated by the fact that one of Kong's statements, as a result of which the log was subsequently written up, was manifestly untrue. The other, in an imperfect translation, was but little more than an attempted reconstruction of what it was suggested had happened. But proof of the untruths, if such they were, in these statements was not proof of what in truth happened.

Their Lordships feel bound to observe that they find it strange that the decision to prosecute all four men should have been taken. A more obvious course, if it were thought proper to launch a prosecution for manslaughter at all in these circumstances, would have been to decide, after full investigation and taking of statements, against which, if any, of those on board which hydrofoil such a prosecution would be most likely to succeed and then launch that prosecution only against that person or those persons, thus enabling the Crown to call as witnesses those against whom it had been decided not to proceed.

None of the accused gave evidence, understandably in these circumstances. Submissions were made at the close of the Crown case that neither the appellant nor the other three accused had a case to answer. The learned judge withdrew the case against Ng but overruled the submissions made on behalf of the other three men. In the result Kong alone was convicted by the jury. Ho was acquitted. So was Coull albeit only by a majority.

The evidentiary difficulty which thus faced the Crown was only one of the difficulties to which the case gave rise at the trial. The very existence of the evidentiary difficulty made it even more important than usual that the trial judge should give to the jury a complete, clear and accurate direction as to the law which they were to apply to the facts as they found them to be. Their Lordships feel bound respectfully to say that, whilst feeling much

sympathy for the learned judge, the direction which he gave as to the relevant law failed to satisfy those requirements in more ways than one. Their Lordships' sympathy for the learned judge arises because he was encouraged by counsel to adopt and did adopt as the basis for his direction a long passage which first made its appearance in paragraph 20.49 of the Second Supplement to *Archbold's Criminal Pleading* (1982) 41st Ed. and which purports to reflect the decisions of the House of Lords in *R. v. Caldwell* [1982] A.C. 341 and *R. v. Lawrence* [1982] A.C. 510. The learned judge does not appear to have been invited to consider those two authorities in detail nor whether the law, as there clearly declared by the House of Lords, was correctly summarised in that paragraph. If that step had been taken, their Lordships do not doubt that the learned judge would have appreciated the errors in the offending passage which they regret to observe still appear in the Eighth Supplement to the 41st edition and which they hope will be revised in the near future. Their Lordships were told by counsel that it was to the Second Supplement that the attention of the learned judge was drawn at the trial.

The crucial passage in the learned judge's direction which, as its text shows, was written out and given to the jury to take with them when they retired, appears at pages 773/4 of the record. A comparison between its text and that of paragraph 20.49 in the Second Supplement of the 41st edition of *Archbold* clearly shows that that latter paragraph, numbered (7) in the supplement, was its source. The learned judge understandably added a few words by way of oral interposition to the text of that paragraph so as to adapt it to the facts of the instant case.

Their Lordships find it necessary to set out the text of the direction in full. The relevant part appears as one very long single sentence in the transcript but that very long single sentence requires to be broken down for the purpose of analysis:-

> "The direction I give you, which I have had typed because I think this is not a trial involving test of memories so I am going to give you a copy of this before you retire, but I will read (it) out, this is the direction on the question of manslaughter by negligence. That is that the defendant and, of course, each of them considered separately, is guilty of manslaughter if the Crown have proved beyond reasonable doubt, firstly, that at the time he caused the deceased's death and, of course, you must be satisfied that each of the accused did cause the deceased's death, there was something in the circumstances which would have drawn the

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

It will be seen that this direction falls into two parts and the second part contains alternatives, the acceptance of either of which when added to the first part would it was said justify convictions for manslaughter.

The first part includes the phrase "there was something in the circumstances which would have drawn the attention of an ordinary prudent individual ... to the possibility that his conduct was capable of causing some injury, albeit not necessarily serious to the deceased ... and that the risk was not so slight that an ordinary prudent individual would feel justified in treating it as negligible ..." (all emphasis added).

The former alternative in the second part speaks of "there being any such risk" and then speaks of "such a risk" while the latter alternative in the second part speaks of "the means that he adopted to avoid the risk". (Again all emphasis added). "The risk" in this last part clearly means in the context the risk already referred to.

Thus three times in this long sentence the learned judge is telling the jury that the relevant risk for them to consider is the risk "of causing some injury albeit not necessarily serious but not so slight a risk that an ordinary prudent individual would feel justified in treating it as negligible".

With profound respect this direction cannot be supported. There is (as in the paragraph in the Supplements to *Archbold*) confusion between (1) causing death by an illegal act of violence, (2) what

was said in *R. v. Caldwell*, (3) what was said in *R. v. Lawrence* and (4) what had half a century previously been said by the Court of Criminal Appeal in *R. v. Bateman* (1925) 19 C.A.R. 8.

The Court of Appeal was obviously critical of this passage but in a careful judgment felt in the light of all the authorities able to conclude that other later passages in the summing up, including repeated references to "gross negligence" put the matter sufficiently right. It is to be observed that from beginning to end of the summing up neither the word "reckless" nor the word "recklessness" ever appears.

Their Lordships have been gravely concerned that the source of this erroneous direction should have appeared in the Second Supplement of the 41st edition, especially as the paragraph numbered (7) purported to reflect the decisions of the House of Lords in *R. v. Caldwell* and *R. v. Lawrence*.

In the 41st edition itself, "involuntary manslaughter" so far as presently relevant is dealt with in paragraph 20.48 under paragraphs 1(a) and (b). Sub-paragraph (a) refers to death resulting from gross negligence. Sub-paragraph (b) refers, *inter alia*, to death resulting from an unlawful act "such as an assault which all sober and reasonable people would inevitably realise must subject the victim to the risk of some harm resulting therefrom, albeit not serious harm whether the accused realised this or not".

The present case is of course one which falls within sub-paragraph (a) and not within sub-paragraph (b). Their Lordships are not concerned with the latter though they see no reason to doubt the correctness of the general proposition just stated. But cases falling within sub-paragraph (a) are further dealt with in paragraph 20.49 of the 41st edition in six numbered sub-paragraphs which previously appeared in the 40th edition (1979) in paragraph 2533. Though *R. v. Caldwell* and *R. v. Lawrence* are referred to in the preface to the 41st edition as "extraordinary decisions" (a view which the editor is of course at liberty to express in his preface if he so wishes) they are understandably not referred to in the original text of paragraph 20.49 though there is a passing reference to them in the final sentence of paragraph 20.49. No doubt it was this omission which necessitated the addition of paragraph (7) in the Second Supplement. But the view, whether correct or not, that the two decisions are "extraordinary" cannot justify complete misrepresentation as to their effect in a text book of great authority widely used in England and Wales and elsewhere as in Hong Kong where the relevant criminal law is the same.

It thus becomes necessary for their Lordships to restate the current position though in so doing they are largely repeating what was said in those two decisions which have themselves since been applied in two further decisions in the House of Lords, *Government of the United States v. Jennings* [1983] 1 A.C. 624 and *R. v. Seymour* [1983] 2 A.C. 493. In *R. v. Caldwell* the House was concerned with and only with the meaning of the word "reckless" in the statutory context of section 1 of the Criminal Damage Act 1971. Any relationship between "recklessness" in arson cases and "recklessness" in cases of causing death by reckless driving or of motor manslaughter was not there under consideration. The crucial passage is in the speech of Lord Diplock with which the other members of the majority of the House agreed and appears at page 354 of the report. Their Lordships think it right to quote this passage in full:-

> "Nevertheless, to decide whether someone has been "reckless" as to whether harmful consequences of a particular kind will result from this act, as distinguished from his actually intending such harmful consequences to follow, does call for some consideration of how the mind of the ordinary prudent individual would have reacted to a similar situation. If there were nothing in the circumstances that ought to have drawn the attention of an ordinary prudent individual to the possibility of that kind of harmful consequence, the accused would not be described as "reckless" in the natural meaning of that word for failing to address his mind to the possibility; nor, if the risk of the harmful consequences was so slight that the ordinary prudent individual upon due consideration of the risk would not be deterred from treating it as negligible, could the accused be described as "reckless" in its ordinary sense if, having considered the risk, he decided to ignore it. (In this connection the gravity of the possible harmful consequences would be an important factor. To endanger life must be one of the most grave.) ... In my opinion a person charged with an offence under section 1(1) of the Criminal Damage Act 1971 is "reckless as to whether any such property would be destroyed or damaged" if (1) he does an act which in fact creates an obvious risk that property would be destroyed or damaged and (2) when he does the act he either has not given any thought to the possibility of there being any such risk or has recognised that there was some risk involved and has nonetheless gone on to do it. That would be a proper direction to the jury: cases in the Court of Appeal which held otherwise should be regarded as overruled."

Lord Diplock was in that passage thus stating (in part) a negative proposition. He was dealing with the factual situation where there was nothing to alert the ordinary prudent individual to the possibility of harmful consequences or where that possibility was so slight that the individual could properly treat the risk as negligible. Such conduct was not "reckless" within the ordinary meaning of that ordinary English word.

Their Lordships now move to *R. v. Lawrence*. There the House was dealing with death caused by reckless driving. The House unanimously accepted the view of the majority in *R. v. Caldwell* as to the meaning of "reckless" and of "recklessness". It applied that ruling to the statutory offence of causing death by reckless driving and suggested a model direction in such cases.

Lord Diplock, on this occasion speaking for all the noble and learned Lords then present, said, after quoting from his speech in *R. v. Caldwell*, (page 526):-

> "In my view, an appropriate instruction to the jury on what is meant by driving recklessly would be that they must be satisfied of two things: first, that the defendant was in fact driving the vehicle in such a manner as to create an obvious and serious risk of causing physical injury to some other person who might happen to be using the road or of doing substantial damage to property; and second, that in driving in that manner the defendant did so without having given any thought to the possibility of there being any such risk or, having recognised that there was some risk involved, had nonetheless gone on to take it. It is for the jury to decide whether the risk created by the manner in which the vehicle was being driven was both obvious and serious and, in deciding this, they may apply the standard of the ordinary prudent motorist as represented by themselves."

Their Lordships emphasise that in this passage Lord Diplock was speaking of an obvious and serious risk of causing physical injury created by the defendant. He was not there concerned to deal with cases where the conduct complained of was of a defendant's reaction or lack of reaction to such a risk created by another person.

The next decision of the House of Lords, to which their Lordships only refer for the sake of completeness, is *Government of the United States of America v. Jennings*, *supra*. The House was there concerned in the context of an extradition treaty with the United States of America whether the common

law offence of motor manslaughter had been impliedly repealed by the creation of the corresponding statutory offence of causing death by reckless driving, since both offences arose in similar factual circumstances. The House held that it had not.

Finally in *R. v. Seymour* the House of Lords held that the appropriate direction in motor manslaughter cases was the same as had been suggested in *R. v. Lawrence* in cases where only the statutory offence had been charged. Their Lordships think it right to add that the word added at the end of the answer to the certified question regarding the very high degree of the risk of death were added not to alter the pre-existing law as to manslaughter by recklessness but only to point to those cases in which it still might be thought appropriate to charge the common law rather than the statutory offence.

It is plain that, as often happens in English criminal and civil law, the law applicable to involuntary manslaughter has developed on a case by a case basis and indeed has developed rapidly in recent years since the offence of causing death by reckless driving appeared in section 50 of the Criminal Law Act 1977.

Their Lordships are of the view that the present state of the relevant law in England and Wales and thus in Hong Kong is clear. The model direction suggested in *R. v. Lawrence* and held in *R. v. Seymour* equally applicable to cases of motor manslaughter requires first, proof that the vehicle was in fact being driven in such a manner as to create an obvious and serious risk of causing physical injury to another and second, that the defendant so drove either without having given any thought to the possibility of there being such a risk or having recognised that there was such a risk nevertheless took it. Once that direction is given, it is for the jury to decide whether or not on their view of the evidence the relevant charge has been proved.

In principle their Lordships see no reason why a comparable direction should not have been given in the present case as regards that part of the case which concerned the alleged navigation of the Flying Goldfinch by Kong and indeed as regards the alleged navigation of the Flying Flamingo by the other two defendants. Did their respective acts of navigation create an obvious and serious risk of causing physical damage to some other ship and thus to other persons who might have been travelling in the area of the collision at the material time? If so did any of the defendants by their respective acts of navigation so navigate either without having given any thought to the possibility of that risk or, while recognising that the risk existed, take that risk?

Unfortunately this direction was not given. The direction given and its source in the Second Supplement, in the passage which reads "his conduct was capable of causing some injury albeit not necessarily serious to the deceased ... and that the risk was not so slight that an ordinary prudent individual would feel justified in treating it as negligible" has been taken from Lord Diplock's negative proposition. This has then been turned round and the proposition treated as an affirmative statement of the relevant risk. With all respect, that cannot be justified and in their Lordships' view vitiates the direction. The first part of the second limb purports to repeat in part the model direction in *Lawrence* but unhappily that direction is vitiated by the reference back to the statement of the nature of this risk to which their Lordships have already referred. The second part of the second limb appears to be a throwback to *R. v. Bateman* [1925] 19 C.A.R. 8. Though Lord Atkin in his speech in *R. v. Andrews* [1937] A.C. 576 did not disapprove of what was there said, he clearly thought, (page 583), that it was better to use the word "reckless" rather than to add to the word "negligence" various possible vituperative epithets. Their Lordships respectfully agree. Indeed they further respectfully agree with the comment made by Watkins LJ. in delivering the judgment of the Court of Appeal (Criminal Division) in *R. v. Seymour* [1983] 76 Cr. App. R. 211 at 216:-

> "We have to say that the law as it stands compels us to reject Mr. Connell's persuasive submissions and to hold that the judge's directions were correct, although we are of the view that it is no longer necessary or helpful to make reference to compensation and negligence. The *Lawrence* direction on recklessness is comprehensive and of general application to all offences, including manslaughter involving the driving of motor vehicles recklessly and should be given to juries without in any way being diluted. Whether a driver at the material time was conscious of the risk he was running or gave no thought to its existence, is a matter which affects punishment for which purposes the judge will have to decide, if he can, giving the benefit of doubt to the convicted person, in which state of mind that person had driven at the material time."

Learned counsel for the Crown pressed their Lordships to apply the proviso even though their Lordships felt obliged to hold that there had been the misdirection already mentioned. Their Lordships find themselves unable to take this course. They regard the misdirection as so fundamental (especially as it was in writing and given to the jury on retirement) that it is impossible to assert that a properly directed jury must inevitably have reached a

verdict of guilty against Kong. There was in connection with this part of the submission on behalf of the Crown much discussion regarding the facts, with a view to showing that on a proper direction a conviction was inevitable. Their Lordships did not find it necessary to hear counsel for Kong on this issue and it would not be right for them to offer any detailed comments upon the facts beyond observing that the summing-up does not seem to have distinguished between an obvious risk created by those navigating each hydrofoil by their own navigation and the response by those on board one hydrofoil to any obvious risk created by the navigation of the other.

Their Lordships thus do not find it necessary to discuss the evidence afforded by the written statements of those involved or their evidential status. This last matter is now concluded by the decision of the Board in *Leung Kam-Kwok v. The Queen* (No. 36 of 1983), judgment in which was given after the hearing in the Court of Appeal in the present case.

It was for these reasons that their Lordships, in respectful disagreement with the Court of Appeal regarding the misdirection by the learned judge, felt constrained humbly to advise Her Majesty that this appeal must be allowed and Kong's conviction quashed. The Crown must pay Kong's costs at the trial, in the Court of Appeal and before the Board.