COURT OF MAGISTRATES (MALTA)
AS A COURT OF CRIMINAL JUDICATURE

Magistrate Dr. Neville Camilleri B.A., M.A. (Fin. Serv.), LL.D.

The Police
(Inspector Kylie Borg)
(Inspector Christopher Galea Scanura)

vs.

Vasily Ogarkov

Number: 1245/2012

Today the 12th. of May 2016

The Court,

Having seen the charges[1] brought against the accused **Vasily Ogarkov**, fifty-two (52) years old, Russian nationality, son of Petr and Shaveleva Valentina, born in Tambov in Russia, holder of Russian Passport No. 721019923 charged of having, on the 5th of January 2006, off the Coast of France, whilst on the Maltese registered vessel *Sichem Pandora*:

1. through imprudence, carelessness, unskilfulness in one's art or profession, or non-observance of regulations, caused the death

[1] Doc. "X" – *a fol.* 4984.

of five persons, namely Franck Herouville, Ludovic Herouville, Frederic Terpereau, Olivier Brusa and Thierry Gouselain;

2. whilst on the said vessel, on receiving at sea a signal of distress or information from any source that a vessel or aircraft was in distress, failed to give assistance and to undertake all measures as laid down under the Merchant Shipping Act when a signal of distress or information was received that a vessel was in distress;

3. failed to render assistance to persons in danger at sea;

4. failed to report that a Maltese ship has sustained or caused any accident occasioning loss of life or any serious injury to any person.

Having seen all the acts of the proceedings and the documents exhibited, including the voluminious Maritime Inquiry drawn up by Magistrate Dr. Jacqueline Padovani, Assessor Master Mariner Captain Mario Grech, Assessor Master Mariner Captain Joseph Gabriele and Assessor Chief Engineer Joseph Amato (Doc. "MD 1" – *a fol.* 1 *et seq.*).

Having heard all the evidence brought forward by the Prosecution.

Having seen the Articles of Law sent by the Attorney General on the 24th. of March 2014 (*a fol.* 5213):

(a) Article 225 of the Criminal Code, Chapter 9 of the Laws of Malta;
(b) Article 305 of the Merchant Shipping Act, Chapter 234 of the Laws of Malta ;
(c) Article 306 of the Merchant Shipping Act, Chapter 234 of the Laws of Malta;
(d) Article 307 of the Merchant Shipping Act, Chapter 234 of the Laws of Malta;
(e) Articles 17, 31 and 533 of the Criminal Code, Chapter 9 of the Laws of Malta.

Having seen that, during the sitting of the 6th. of October 2014 (*a fol.* 5217), the Articles of Law sent by the Attorney General on the 24th of March 2014 (*a fol.* 5213) were read out, during which sitting the accused declared that he does not object for his case to be tried and decided summarily.

Having heard, during the sitting of the 6th. of October 2014, the Prosecution and the defence declare that all the expert opinions in the Maritime Inquiry shall be admissible as evidence in this case and parties forfeited their right to raise any pleas in this regard (*a fol.* 5217).

Having heard, during the sitting of the 11th. of December 2014, the defence declare that the accused was not going to testify in these proceedings and that he had no evidence to bring forward (*a fol.* 5218).

Having seen the written Note of Submissions filed by the Prosecution on the 17th. of April 2015 (*a fol.* 5221 *et seq.*).

Having seen the written Reply of Submissions filed by the defence on the 1st. of December 2015 (*a fol.* 5243 *et seq.*).

Having considered

That the acts of these proceedings involve the 14.44 metre long, wooden, light green, white and red in colour fishing trawler *Klein Familie* built in the year 1968 and the Maltese flag chemical tanker the *Sichem Pandora*, built in 1994 having a length of over 110 metres, a beam of 19 metres and 14 cargo tanks all inside a double hull.

That on the 28th. of December 2006 the *Sichem Pandora* concluded discharging her cargo of Colza oil in Sfax, Tunisia and left for Flushing in Holland where she had been expecting to load a cargo of paraffin which was to be delivered in Montreal, Canada. On board the *Sichem Pandora* there was a crew of sixteen persons amongst whom there was Chief Officer Vasily Ogarkov and Able Seaman Aleksandrs Belikovs.

That the *Klein Familie* sank at some time during the early morning of the 5th. of January 2006 off the Coast of France causing the drowning of five of the six crew members on board. Only crew member Michel Gueno survived. He was found in a life raft.

That on the 18th. April 2012, Magistrate Dr. Jacqueline Padovani assisted by Assessor Master Mariner Captain Mario Grech, Assessor Master Mariner Captain Joseph Gabriele and Assessor Chief Engineer Joseph Amato handed down the findings of the Formal Investigation held under Part VII of Chapter 234 of the Laws of Malta.

That the Formal Investigation here above-mentioned reached the following conclusions[2]:

> "It is the considered opinion of this Court and its Assessors therefore that with reference to the **First Question or Task of this Maritime Inquiry** that there is compelling evidence that shows that:
>
> 1. The ***Sichem Pandora*** **was involved** in the sinking of the *Klein Familie* on the 5th. of January 2006 whilst traversing the English Channel;
>
> 2. That the **First Two Decisive Factors** for the collision between the two vessels was the lack of proper look-out of the two vessels, i.e. the *Sichem Pandora* and the *Klein Familie*;
>
> 3. That the **Third Decisive Factor** for the collision was the violation of Rule 20(b) on the part of the *Klein Familie* that is, the obligation, whilst underway to ensure that from sunset to sunrise, no other lights shall be exhibited, except such lights as cannot be mistaken for the lights specified in these Rules or do not impair their visibility or distinctive character, or interfere with the keeping of a proper look-out.

[2] *A fol.* 4955 *et seq.*

4. That the **Contributing Factor** to this collision were:
    a. the poor health of the Master of the *Klein Familie*;
    b. the poor radar signature of the *Klein Familie*.

Therefore and with reference to the Second Question or Task put to this Maritime Inquiry, it is this **Court's considered opinion that the persons responsible for this Maritime Casualty were Chief Officer Vasiliy** [Vasily] **Ogarkov and Able Seaman Alexandrs** [Aleksandrs] **Belikovs**. Therefore the Court orders that Criminal proceedings be instituted against Ogarkovs [Ogarkov] and Belikovs in terms of Article 225 of the Criminal Code, Chapter 9 of the Laws of Malta, for the involuntary homicide of Franck Herouville, Ludovic Herouville, Frederic Terpereau, Olivier Brusa, Thierry Gouselain and for breaches of Articles 305, 306 and 307 of the Merchant Shipping Act Chapter 234 of the Laws of Malta, that is, for the breach of the obligation to assist vessels in distress, for the breach of the duty to render assistance to persons in danger at sea and for the breach of the mandatory duty to report accidents to ships".

That, as a consequence of the above, criminal proceedings were insistuted against Chief Officer Vasily Ogarkov and Able Seaman Aleksandrs Belikovs.

That the Prosecution in this case and in the case **The Police vs. Aleksandrs Belikovs** (Case Number 1313/12) insists that enough evidence was brought forward for this Court to find Chief Officer Vasily Ogarkov and Able Seaman Aleksandrs Belikovs guilty as charged.

That the Defence basically insists that the Prosecution failed to prove their case beyond reasonable doubt since no evidence whatsoever has been produced to prove that the *Sichem Pandora* was the vessel involved in the collision with the *Klein Familie*. The Defence submits that it is apparent from an analysis of the evidence brought forward that the *Sichem Pandora* was not the vessel which

collided into the *Klein Familie* and that said evidence shows that it was another vessel which must have collided into the *Klein Familie*.

Having considered
Legal Considerations Regarding the Maritime Inquiry

That it has already been noted above that during the sitting of the 6th. of October 2014, the Prosecution and the defence declared that all the expert opinions in the Maritime Inquiry shall be admissible as evidence in this case and that the Prosecution and defence forfeited their right to raise any pleas in this regard (*a fol.* 5217).

That the Courts notes that the main purpose of the Inquiry relating to the *in genere* is that of preserving evidence. The evidence is collected in the acts of that Inquiry and those acts are referred to as a *procès-verbal*. The Magistrate conducting the Inquiry relating to the *in genere* has an important role in the search of the truth and it cannot be doubted that he/she does not have the function of establishing whether a person is guilty or not. It is within the functions of the Magistrate conducting the Inquiry relating to the *in genere* to establish that an offence has been committed and that, on the basis of the evidence, somebody may be charged before a Court of Criminal Jurisdiction. It is certainly not the function of the Magistrate in question to state that somebody is certainly or probably responsible for the commission of an offence.

That in the judgment **Ir-Repubblika ta' Malta vs. Jason Calleja** delivered on the 3rd. of July 1997 the Court of Criminal Appeal noted the following:

> *"[I]l-Magistrat Inkwirenti hu fdat lilu l-inkariku li fil-kazijiet previsti mill-istess Titolu, jinvestiga r-reat jew il-fatt rapportat lilu u/jew izomm l-access li l-ligi tipprevedi u fl-ahharnett jirredigi procès verbal li l-ligi stess tirregola u tattribwilu valur probatorju. Dan kollu jifforma parti integrali mill-process generali tar-ricerka tal-verita' u jikkonsisti principalment fil-gbir u preservazzjoni ta' dawk il-provi kollha, diretti u indiretti, li l-Magistrat Inkwirenti jirnexxilu jidentifika bhala pertinenti ghall-grajja jew reat li jkun qed jinvestiga. Bhala tali, u*

kuntrarjament ghal dak li jigri f'certi sistemi kontinentali, il-Magistrat Inkwirenti mhux parti mill-Pulizija u wisq anqas, mill-Prosekuzzjoni; anzi jidher li fis-sistema taghna huwa previst biex f'numru ta' kazijiet serji li l-ligi stess tispecifika, l-investigazzjoni ma ssirx biss, u l-provi ma jingabrux u ma jigux preservati biss mill-Pulizija, izda ukoll, anzi essenzjalment, minn persuni indipendenti mill-poter esklussiv tal-iStat u li jiggarantixxu li r-ricerka tal-verita' ma tkunx inkwinata minn xi interessi hlief dak suprem li kollox isir skond il-haqq u l-gustizzja. […]

S'intendi, certi decizjonijiet il-Magistrat Inkwirenti bil-fors johodhom, anzi, jista' jigi affermat li minghajr l-ezercizzju ta' din il-funzjoni, l-ufficju tieghu, f'diversi kazijiet jisfa' bla sens. Hekk, per ezempju, f'kazijiet ta' mewt rapportati lilu, huwa ghandu jindaga c-cirkostanzi li wasslu ghal dik il-mewt u jistabbilixxi hiex aktarx jew certament wahda accidentali u indipendenti minn kull htija doluza jew kolpuza ta' terzi jew inkella hiex proprju r-rizultat ta' tali komportament ta' terzi. L-istess jinghad ghal kazijiet fejn jigu rapportati lilu eventi li prima facie ikunu jipprezentaw sembjanzi ta' reat. Hi certament l-funzjoni tal-Magistrat Inkwirenti li jinvestiga, okkorrendo permezz ta' esperti, c-cirkostanzi kollha tal-kaz u jipprova jasal ghal konkluzjoni dwar jekk verament sarx reat u jekk hemmx provi tali li jippuntaw lejn xi hadd partikolari li jista' jigi investigat ulterjorment jew addirittura akkuzat. Certament m'hix il-funzjoni tal-Magistrat Inkwirenti li jiddeciedi li ghar-reat investigat minnu huwa certament jew probabbilment responsabbli xi hadd partikolari, ghax kif inghad huwa ma jagixxi qua Qorti, la ta' Istruttorja u inqas ta' Gudikatura. Izda hija certament il-funzjoni tieghu li jiddeciedi l-ewwel hemmx provi sufficjenti li verament sar reat u t-tieni jekk a bazi tal-provi – indipendentement mill-apprezzament taghhom – hemmx bizzejjed biex jinghad li xi hadd partikolari jista' possibilment ikun passibbli ghal proceduri kriminali. Dan mhux biss jikkostitwixxi funzjoni tal-Magistrat Inkwirenti, izda, fil-fehma ta' din il-Qorti huwa addirittura dover tieghu. Jigi ripetut li l-istitut tal-Magistrat Inkwirenti evidentement inholoq biex kemm hu possibbli certi indagnijiet li jistghu iwasslu jew ghal kxif ta'

reati u/jew ta' persuni responsabbli ghalihom, jew li jistghu ikunu necessarji f'certi eventi serji, dawn isiru bl-ikbar serjeta' u l-fuq mis-suspetti jew l-influwenza diretta jew indiretta tal-poter esekuttiv tal-iStat".

That the Court notes that the above principles apply to the formal investigation under the Merchant Shipping Act. Hence it is **ONLY this** Court that has to decide whether the accused is guilty or not of the charges brought against him.

Having considered
Legal Considerations Regarding the Level of Proof Required

That the Prosecution is bound to bring forward evidence so that the Court can find the accused guilty as charged. **Manzini**[3] notes the following:

"Il così detto onero della prova, cioé il carico di fornire, spetta a chi accusa – onus probandi incumbit qui osservit".

In the Criminal field the burden of the Prosecution is to prove the charges beyond reasonable doubt. With regards to the defence, enhanced by the presumption of innocence, the defence can base or prove its case even on a balance of probabilities meaning that one has to take into consideration the probability of that version accounted by the accused as corroborated by any circumstances. This means that the Prosecution has the duty to prove the tort attributable to the accused beyond every reasonable doubt and in the case that the Prosecution being considered as not proving the element of tort the Court has a duty to acquit the accused.

That the following principles, as clearly outlined by the Constitutional Court in its judgement of the 1st. of April 2005 in the case **The Republic of Malta vs. Gregory Robert Eyre et**, must be applied:

[3] **Diritto Penale** (Vol. III, Chapter IV, page 234, Edition 1890).

> "(i) it is for the Prosecution to prove the guilt of the accused beyond reasonable doubt; (ii) if the accused is called upon, either by law or by the need to rebut the evidence adduced against him by the Prosecution, to prove or disprove certain facts, he need only prove or disprove that fact or those facts on a balance of probabilities; (iii) if the accused proves on a balance of probabilities a fact that he has been called upon to prove, and if that fact is decisive as to the question of guilt, then he is entitled to be acquitted; (iv) to determine whether the Prosecution has proved a fact beyond reasonable doubt or whether the accused has proved a fact on a balance of probabilities, account must be taken of all the evidence and of all the circumstances of the case; (v) before the accused can be found guilty, whoever has to judge must be satisfied beyond reasonable doubt, after weighing all the evidence, of the existence of both the material and the formal element of the offence."

That **Lord Denning** in the case **Miller vs. Minister of Pension**[4] explained what constitutes "proof beyond a reasonable doubt". He stated:

> "Proof beyond a reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour, which can be dismissed with the sentence 'of course it is possible but not in the least probable' the case is proved beyond reasonable doubt, but nothing shall of that will suffice".

Having considered
Legal Considerations Regarding Circumstantial Evidence

[4] 1974 - 2 ALL ER 372.

That the present case is based on circumstantial evidence. At law the position in Malta relative to circumstantial evidence that can lead to a conviction was analysed in various judgments, including **Il-Pulizija vs. Abdellah Berrad et** decided by the Court of Magistrates (Malta) on the 19th. of May 2014 where the main principles were outlined as follows:

> *"Huwa minnu wkoll kif rapportat aktar 'l fuq li fl-Artikolu 638(2) tal-Kapitolu 9 ix-xiehda ta' xhud wiehed biss, jekk emnut minn min ghandu jiggudika fuq il-fatt hija bizzejjed biex taghmel prova shiha u kompluta minn kollox, daqs kemm kieku l-fatt gie ppruvat minn zewg xhieda jew aktar. Ghalhekk jispetta lill-Qorti tara liema hija l-aktar xhieda kredibbli u vero simili fic-cirkostanzi u dan a bazi tal-possibilita'. Huwa veru wkoll li l-Qorti ghandha tqis provi cirkostanzjali jew indizzjarji sabiex tara jekk hemmx irbit bejn l-imputat u l-allegat reat. Dan qed jinghad ghaliex ghalkemm huwa veru li fil-kamp penali l-provi ndizzjarji hafna drabi huma aktar importanti mill-provi diretti, pero' hu veru wkoll li provi ndizzjarji jridu jigu ezaminati b'aktar attenzjoni sabiex il-Gudikant jaccerta ruhu li huma univoci.*
>
> *Fil-fatt il-Qorti hawnhekk taghmel riferenza ghall-sentenza moghtija mill-Qorti tal-Appell Kriminali fil-hmistax (15) ta' Gunju, 1998 fil-kawza fl-ismijiet* ***Il-Pulizija vs. Joseph Lee Borg****, fejn kien gie ritenut li provi jew indizzji cirkostanzjali ghandhom ikunu univoci, cioé mhux ambigwi. Ghandhom ikunu ndizzji evidenti li jorbtu lill-akkuzat mar-reat u hadd iktar, anzi l-akkuzat biss, li hu l-hati u l-provi li jigu mressqa, ikunu kompatibbli mal-presunzjoni tal-innocenza tieghu. Illi ghalhekk huwa mportanti fl-isfond ta' dan il-kaz li jigi ppruvat li kien l-imputat biss li ghamel dak li gie akkuzat bih u ghalhekk il-Qorti sejra tikkonsidra kwalunkwe prova possibilment cirkostanzjali li tista' torbot lill-imputat b'mod univoku bir-reati addebitati lilu. Fil-fatt kif gie ritenut fis-sentenza moghtija mill-Qorti tal-Appell Kriminali fis-sitta (6) ta' Mejju, 1961 fil-kawza fl-ismijiet* ***Il-Pulizija vs Carmelo Busuttil****: "Il-prova ndizzjarja ta' spiss hija l-ahjar prova tal-volta hija tali li tipprova fatt bi precizjoni matematika".*

Illi huwa veru li fil-kamp penali, il-provi ndizzjarji hafna drabi huma aktar importanti mill-provi diretti. Hu veru wkoll li l-provi ndizzjarji jridu jigu ezaminati b'aktar attenzjoni sabiex wiehed jaccerta ruhu li huma univoci.

***Archbold** fil-ktieb tieghu **Criminal Practice** (1997 Edition Para 10-3) b'riferenza ghal dak li qal **Lord Normand** fil-kaz **Teper vs. R** (1952) jghid:*

"Circumstantial evidence is receivable in Criminal as well as in Civil cases; and indeed, the necessity of admitting such evidence is more obvious in the former than in the latter; for in criminal cases, the possibility of proving the matter charged by the direct and positive testimony of eye witnesses or by conclusive documents much more than in civil cases; and where such testimony is not available. The Jury is permitted to infer the facts proved other facts necessary to complete the elements of guilt or establish innocence. It must always be narrowly examined, if only because evidence of this kind may be fabricated to cast suspicion on another [...]. It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there is no other co-existing circumstance which would weaken or destroy the inference".

*Illi din hija ezattament il-posizzjoni hawn Malta, kif fil-fatt giet konfermata b'sentenza moghtija mill-Qorti tal-Appell Kriminali nhar d-disgha ta' Jannar, 1998 fil-kawza fl-ismijiet **Il-Pulizija vs Emanuel Seisun**.*

Din il-Qorti thoss u tghid li provi cirkostanzjali huma bhal katina li tintrabat minn tarf ghal tarf, b'sensiela ta' ghoqiedi li jaqblu ma' xulxin u li flimkien iwasslu fl-istess direzzjoni.

Il-Qorti hija rinfaccjata b'zewg verzjonijiet ta' kif sehhet il-grajja [...]

Ghalhekk m'hemmx dubju li l-Qorti hija rinfaccjata b'zewg verzjonijiet dijametrikament opposti ghal xulxin ghalkemm inghad sa minn dan l-istadju bikri tas-sentenza jidher li l-

imputati li gew investigati a tempo vegine tal-investigazzjoni baqghu konsistenti fil-verzjoni tal-fatti taghhom sa meta xehdu l-Qorti viva voce minn jeddhom hames snin wara l-incident.

Illi ghalhekk m'hemmx dubju li kollox jiddependi fuq il-kredibilita` tax-xhieda u dan billi bhala gudikant il-Qorti ghandha tqies l-imgieba, il-kondotta u l-karattru tax-xhieda, tal-fatt jekk ix-xhieda ghandhiex mis-sewwa jew hiex kostanti u ta' fatturi ohra tax-xhieda tieghu u jekk ix-xhieda hiex imsahha minn xhieda ohra u tac-cirkostanzi kollha tal-kaz u dan ai termini tal-Artikolu 637 tal-Kapitolu 9 tal-Ligijiet ta' Malta. […]

Huwa minnu, kif gie allegat mid-difiza, li jekk il-Qorti hija rinfaccjata b'zewg verzjonijiet konflingenti ghandha tillibera, stante li tali konflitt ghandu jmur a beneficcju tal-imputat, pero' huwa veru wkoll kif gie deciz mill-Qorti tal-Appell Kriminali fid-dsatax ta' Mejju, 1997 fil-kawza fl-ismijiet ***Il-Pulizija vs Graham Charles Ducker****:*

"It is true that conflicting evidence per se does not necessarily mean that whoever has to judge may not come to a conclusion of guilt. Whoever has to judge may, after consideration of all circumstances of the case, dismiss one version and accept as true the opposing one."

Thus in order for a Court of Criminal Jurisdiction to be able to secure a conviction on the basis of circumstantial evidence:

(a) it has to assess this evidence with a high degree of circumspection and attention (if only because evidence of this kind may be fabricated to cast suspicion on another);

(b) it has to be sure that a direct link is established between the alleged perpetrator and the offence itself – and no other person apart from the accused;

(c) it has to be univocal and not equivocal or ambiguous (It is also necessary before drawing the inference of the accused's guilt

from circumstantial evidence to be sure that there is no other co-existing circumstance which would weaken or destroy the inference);

(d) it has to ensure the continuity of the chain of evidence;

(e) it has to be such that it leads the Court to conclude, solely on its basis that the accused committed the crime beyond a reasonable doubt.

Having considered

Before proceeding any further, the Court notes that the defence argues that the second, third and fourth charges brought against the accused are time-barred. The Court notes that the incident in question occurred on the 5th. of January 2006 and that the accused was originally notified with the charges against him in November 2012, which charges had been corrected to which new charges the accused, during the sitting of the 10th. of January 2013, declared that he was being notified[5].

That the second charge refers to Article 305(1) of Chapter 234 of the Laws of Malta which states that:

> "The master of a Maltese ship, on receiving at sea a signal of distress or information from any source that a vessel or aircraft is in distress, shall proceed with all speed to the assistance of the persons in distress (informing them if possible that he is doing so), unless he is unable, or in the special circumstances of the case considers it unreasonable or unnecessary, to do so, or unless he is released under the provisions of subarticle (3) or (4)".

According to Article 305(5) of Chapter 234 of the Laws of Malta:

> "If a master fails to comply with the preceding provisions of this article, he shall for each offence be liable to imprisonment for a period not exceeding two years or to a

[5] *A fol.* 4981.

fine (*multa*) not exceeding one thousand units or to both such imprisonment and fine".

According to Section 688(d) of Chapter 9 of the Laws of Malta:

> "Save as otherwise provided by law, criminal action is barred […] (d) by the lapse of five years in respect of crimes liable to imprisonment for a term of less than four years but not less than one year".

That the third charge emanates from Article 306(1) of Chapter 234 of the Laws of Malta which states that:

> "The master or person in charge of a Maltese vessel shall, so far as he can do so without serious danger to his own vessel, her crew and passengers (if any), render assistance to every person who is found at sea in danger of being lost, even if such person be a citizen of a State at war with Malta; and if he fails to do so he shall for each offence be liable to imprisonment not exceeding two years or to a fine (*multa*) not exceeding one thousand units or to both such imprisonment and fine".

Reference has already been made above to Section 688(d) of Chapter 9 of the Laws of Malta.

That the fourth charge refers to Article 307(1) of Chapter 234 of the Laws of Malta which states that:

> "When a Maltese ship has sustained or caused any accident occasioning loss of life or any serious injury to any person, or has received any material damage affecting her seaworthiness or her efficiency either in her hull or in any part of her machinery, the owner or master shall, within twenty-four hours after the happening of the accident or damage, or as soon thereafter as possible, transmit to the Minister, by letter signed by the owner or master, a report of the accident or damage and of the probable occasion

thereof, stating the name of the ship and the place where she is".

Article 307(2) of Chapter 234 of the Laws of Malta states:

> "If the owner or master of a ship fails without reasonable cause to comply with this article, he shall for each offence be liable to a fine (*multa*) not exceeding fifty units".

According to Section 688(e) of Chapter 9 of the Laws of Malta:

> "Save as otherwise provided by law, criminal action is barred […] (e) by the lapse of two years in respect of crimes liable to imprisonment for a term of less than one year, or to a fine (*multa*) or to the punishments established for contraventions".

After considering what has been outlined above, due to the fact that over five years elapsed between the date of the incident and the notification of the charges to the accused, the Court notes that the defence is right in stating that the above-mentioned charges are time-barred. Hence, the Court will declare the proceedings regarding the three mentioned charges as being time-barred and consequently extinguished.

Having considered

That the Court will now proceed to determine whether the first charge brought against the accused has been sufficiently proven or not. The Prosecution is bound to prove that the *Sichem Pandora* was involved in a collision with the *Klein Familie* and that such collision occurred, in whole or in part, because of negligence on the part of the accused. This Court needs to be convinced beyond reasonable doubt that it was indeed the *Sichem Pandora* that collided into the *Klein Familie* in order to find guilt in the accused. Hence, not being able to exclude contact is not sufficient.

The Court notes the following:

- Both Ogarkov[6] and Belikovs[7] released a statement after consulting a lawyer. It results that on the day in question visibility was not obstructed. Ogarkov says that he noticed nothing irregular and when asked what the flashing light he saw was according to him, he replied: *"It could have been a fishing net buoy. I was thinking that it was fishing net buoy"* (*a fol.* 1k). Asked if he logged the change in the navigational direction, he replied: *"No, it was a minor manoeuvre and it was not recorded"* (*a fol.* 1k). Ogarkov denies that the *Sichem Pandora* collided with anything during his shift.

  When Belikovs was asked about the visibility, he replied: *"two miles, maybe more"* (*a fol.* 5072). Asked if he normally navigates the ship automatically, he replied: *"Depends on the situation. If you are in the shallow or narrow waters, or the officer, chief officer or captain demands so, he navigate manually"* (*a fol.* 5072). He says: *"he navigates and I follow orders"* (*a fol.* 5072). Belikovs further says: *"The chief officer switched from automatic to manual himself. [...] He never mentioned that I should switch from automatic to manual"* (*a fol.* 5072). When Belikovs was asked if he noticed something when he was on the bridge, he replied: *"I see a white flashing light. It is nothing unusual for us because we used to see them frequently while at sea"* (*a fol.* 5072). To the question whether the *Sichem Pandora* collided with anything during his shift he replied in the negative.

- All the certificates produced before Magistrate Dr. Padovani show that all the crew on board the *Sichem Pandora* and the vessel itself were properly and fully certified and in full compliance of the international regulations and Malta flag requirements.

- The *Klein Familie* and its crew committed a number of breaches of the International Regulations for Preventing Collisions at Sea (1972). For instance, the *Klein Familie* had no watch keeping, either by sight, by sound or by electronic means. It was

[6] Doc. "CSH" (*a fol.* 1H *et seq.*) – same as Doc. "KB 4" (*a fol.* 5065 *et seq.*).
[7] Doc. "KB 5" (*a fol.* 5070 *et seq.*).

exhibiting flashing white fishing lights and was also operating without a valid navigation certificate which had expired on the 15th. of November 2005. The Maritime Inquiry lists the provisions of which the *Klein Familie* was in breach of.[8]

- When all the crew on board the *Sichem Pandora* were interviewed by Magistrate Dr. Padovani and the Assessors forming part of the Formal Investigation all of them confirmed that none of them felt any form of collision with any object during the early morning of the 5th. of January 2006. They all confirmed that the atmosphere on board the vessel was perfectly normal and calm with no form of agitation or excitement coming from the bridge.

- During the course of the morning of the 5th. of January 2006, several vessels were navigating in the vicinity of the site where the wreck of the *Klein Familie* was found.

- At approximately 08.45 GMT survivor in a life boat, i.e. Gueno, was picked up by a man over board vessel deployed by the *Alblas* and brought to the *Alblas*. He recounted that when the *Klien Familie* went out on the 5th. of January 2006, Thierry Goueslain, the master of the *Klein Familie*, was on his own on the bridge. The bad state of health of Goueslain has been confirmed. Even though his medical certificate had expired on the 4th. of December 2001, it was never reviewed. It results that he had weight problems, had breathing difficulties, sleep apnea and heart problems. It also results that he would often fall asleep before dinner and while in company. For instance, Chantal Colombel confirmed that her husband had sailed with Thierry Goueslain for several years and was aware of his health problems which included a heart condition and pulmonary problems. Her husband had told her that Goueslain would often fall asleep at the helm and that this constituted a very grave risk to everybody on board.

[8] *A fol.* 4955.

- The acts of the proceedings contain three testimonies of Gueno. He recounts that whilst he was sleeping inside the *Klein Familie* he found himself catapulted out into the open sea when he saw the *Klein Familie* sinking before his eyes.

  In his first testimony, on the 5th. of January 2006, Gueno states that as he found himself in the water after the incident he recalled seeing the back part of a big blue vessel with yellow pipes running across it. He says that he tried to use the light available in the life raft to signal the vessel but the vessel did not see him. He then saw three ships coming to his direction. He found two flares in a bag in the life raft and he first ignited one and then the other. Asked whether he could identify the name of the ship which he had mentioned before and which had passed him as soon as he found himself in the water, Gueno said that he could not remember since it was still dark.

  In his second account, when Gueno was interviewed by Mr. Cremona and Capt. Chappelle, Gueno says that when he was asleep he heard a loud noise followed by a cracking noise all around and water started coming in. He says that it was dark. Gueno states also that he could have spent about one hour in the life raft until he spotted the vessels approaching him for the rescue. The Court notes that, during this instance, Gueno makes no mention whatsoever of having seen a vessel when he emerged out of the water.

  In his third account before Magistrate Dr. Padovani, Gueno states that when he was in the water he noticed a big ship with pipes on deck but did not look any further. Gueno states that since the ship was illuminated, he could still see the ship even if it was still dark. He also says that he could hear the engine of the ship and that between himself and the ship there were about 20 metres and between the bridge of the *Klein Familie* and the ship about 10 to 15 metres.

- It results that the *Sichem Pandora* was not blue and did not have any yellow pipes. It results that it had a red hull[9]. It is understandable that Gueno was rather groggy, considering he was fast asleep and found himself plunged in the sea in the middle of the night, yet the defence is right in arguing in its submissions that the paint job of the *Sichem Pandora* does not have any colours which could possibly be mistaken for blue or for a colour as flourescent as yellow.

- Considering that Gueno was fast asleep prior to and when the incident occurred and that he was not wearing a watch, Gueno was not able to pin point the exact time of the incident. He had to rely on his estimate calculations in relation to the time when the incident actually happened. It should also be noted that he gives conflicting versions in relation to the time the incident took place. Taking all his versions into account, according to Gueno the incident occurred between half an hour up to an hour and a half before daybreak.

- It results that a number of paint samples were taken from pieces of wood of the *Klein Familie* by professional French drivers who also took a number of samples of the paint work of the *Sichem Pandora*. The object of this exercise was to attempt to ascertain whether the remnants of paint taken from the hull of the *Sichem Pandora* could be identified as paint lifted from the *Klein Familie*.

  The Maritime Inquiry reached the following conclusion:

  > "Therefore and for all these reasons, the Court and its Assessors may only conclude that they cannot exclude contact between the *Sichem Pandora* and the *Klein Familie*" [10].

  The Court notes at the outset that the Inquiry did not say that the evidence produced proved that the contact must have been

[9] *Vide* photos *a fol.* 5274-5275.
[10] *A fol.* 4949.

between the *Sichem Pandora* and the *Klein Familie* but simply said that contact **could not** be excluded.

The Court notes that three separate analysis were carried out on the paint sample. In fact following the French report on the paint sample, it was deemed necessary to appoint Pharmacist Mario Mifsud and Inspector Ellul to conduct similar analysis of the paint sample taken from the hull of the *Sichem Pandora* and the wreck of the *Klein Familie*. Because of the diametrically opposing results, the Maritime Inquiry deemed it prudent to appoint Mr. Peter Moore to conduct the most discriminative analysis available.

The French Analysis concluded that it can be inferred that it is possible and plausible that there was a cross-transfer of materials between the *Klein Familie* and the *Sichem Pandora*. It does not speak of probability but of possibility. As far as the Maltese Analysis is concerned, this concluded that no elemental similarity (in the chemical-element of the paint) in pattern and concentration was observed between the paint samples taken from the *Sichem Pandora* and the *Klein Familie*. It also concluded that there was an organic spectral similarity between the patterns of some of the green and light green paint samples taken from the *Sichem Pandora* and of some of those taken from the *Klein Familie*, yet it notes that this is totally inconclusive since when green flake of paint was lifted from a door at the Police Headquarters it showed the same extent of similarity. Under these circumstances, Pharmacist Mifsud and Inspector Ellul could not reach a conclusion that there was contact between the *Sichem Pandora* and the *Klein Familie* but they could not exclude it.

As regards the English Analysis, this concluded that some samples of paint of the *Sichem Pandora* are similar to some samples of the *Klein Familie*. The Court took also note of the very detailed cross-examination of analyst Mr. Peter Moore. It results that the paint lifted off the *Sichem Pandora* and the paint lifted from the *Klein Familie* contained different elements.

The Maritime Inquiry noted the following:

> "It is pertinent to add at this stage that there is **no international database for marine paints** as there is for vehicle paints/sprays. Whatever the differences or similarities adduced, there is therefore no way of determining the **percentage probability of matching** the paints. Furthermore no ratio was given by the analysts for false positives.
>
> The matter is more confounded by the realisation that vessels plough the oceans and seas which contain similar elements to those that form an inherent part of the paint. Therefore the elements of ocean and sea water may contaminate marine paint samples.
>
> The areas chosen for the prelevement of the samples, the size of the paint samples are of vital importance and ideally need to be one centimeter square. The number of tests conducted in different areas of the same sample are equally critical if one desires to achieve a true picture of the whole. The comparison of the testing of a raison, rather than the cake that also contains raisons, is a vivid explanation of the difficulties encountered with paint sample of less than a square centimeter when that paint sample relates to the hull of a vessel.
>
> **Therefore and for all these reasons, the Court and its Assessors may only conclude that they cannot exclude contact between the *Sichem Pandora* and the *Klein Familie***".[11]

After considering what has been outlined above regarding the paint analysis, this Court notes that the chemicals in the paints are different and hence the paint cannot be used as circumstantial evidence to prove that the *Sichem Pandora* had

[11] *A fol.* 4948-4949.

actually collided in the *Klein Familie*, always keeping in mind that this should have been proven beyond reasonable doubt!

- In its Written Note of Submissions[12], the defence argues that a collision with another vessel, namely the *MSC Lea*, was factually and scientifically more than possible and this unlike the conclusion drawn up by the Formal Investigation. The defence argues:

> "It should be noted that despite an inspection being undertaken on the *MSC Lea* on the 8th. January 2006 (as documents in Document WAC4), ***no underwater inspection was actually carried out***. Given the size of the *Klein Familie* and its wooden construction, it is highly unlikely that any signs of collusion would be spotted unless an underwater survey of the hull is carried out".[13]

The defence also complains that not even the *Belarus* and the *Hellas Warrior*, which were close to the wreck site, were subjected to an underwater survey or inspection. No paint samples were taken and analysed from these three vessels: i.e. the *MSC Lea*, the *Belarus*, and the *Hellas Warrior*. The Court notes that the *MSC Lea* and the *Hellas Warrior* had dark hulls which, as the defence argued, could easily match the description of the "blue" hull seen by Gueno. Despite this, the Court notes that it is actually not within its remit to establish whether it could have been the *MSC Lea*, or the *Belarus* or the *Hellas Warrior* which collided with the *Klein Familie* but whether the *Sichem Pandora* collided with the *Klein Familie*. The Court also notes that an underwater inspection should have been undertaken on the *MSC Lea*, the *Belarus* and the *Hellas Warrior* and paint samples should have been taken to exclude any queries whatsoever.

[12] *A fol.* 5265.
[13] *A fol.* 5322.

That in judgment in the names **Il-Pulizija vs. Joseph Formosa et** delivered on the 15th. of January 2016, the Court of Criminal Appeal noted the following:

> *"Din il-Qorti ħasbet fit-tul dwar iċ-ċirkostanzi kollha ta' dan il-kaz kif jemerġu mill-provi inkluzi dawk li fuqhom straħet l-ewwel Qorti u din il-Qorti waslet għall-konkluzjoni li fuq dawk iċ-ċirkostanzi l-ewwel Qorti ma setgħetx raġionevolment tasal għall-konkluzjoni li waslet għaliha u ċioé li l-imputati appellanti huma ħatja mingħajr dubbju dettat mir-raġuni tal-imputazzjonijiet miġjuba kontra tagħhom. L-aktar 'il bogħod li wieħed jista' jasal fuq l-iskorta tal-provi prodotti huwa li dawn jiġġeneraw suspett raġonevoli li l-imputati ikkommettew l-għemil imputat lilhom mill-prosekuzzjoni, izda prova sa dan il-grad ma hix bizzejjed sabiex jintlaħaq il-grad għoli ta' prova meħtieġ għas-sejbien ta' ħtija fil-qasam tad-dritt penali".*

After considering what has been outlined above, the Court notes that there is no concrete evidence to show that the *Sichem Pandora* was involved in a collision with the *Klein Familie*. This has surely not been proven beyond reasonable doubt. There is absolutely nothing in the acts of the case to establish that contact between the *Sichem Pandora* and the *Klein Familie* actually took place. There is even no evidence whatsoever to suggest that the *Sichem Pandora* did not keep a proper watch. Consequently, the first charge brought against the accused has not been sufficiently proven and hence the Court will acquit the accused from the said charge.

Therefore, the Court, whilst declaring the proceedings regarding the second, third, and fourth charges brought against the accused as being time-barred and consequently extinguished, does not find the accused Vasily Ogarkov guilty of the first charge brought against

him due to lack of sufficient evidence at law and hence acquits him from the said charge.

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Dr. Neville Camilleri
Magistrate

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Ms. Christine Farrugia
Deputy Registrar