MALTA

QORTI TA' L-APPELL KRIMINALI

ONOR. IMHALLEF
JOSEPH GALEA DEBONO

Seduta tat-18 ta' Ottubru, 2007

Numru 107/2007/1

The Police
(Spt. JJ Fenech)
(Spt. N. Cutajar)

vs.

Peter Karl Bargmann
Herman Dieter Raake

The Court,

Having seen the charge proffered against the defendants Peter Karl Bargmann and Herman Dieter Raake before the Court of Magistrates (Malta) as a Court of Criminal Judicature for having,
1. at the Malta Freeport, Birzebbugia, on the 11th July, 2004, in their capacity as Captain and Chief Engineer respectively, of the sea vessel CMA CGM VERLAIN, through imprudence, carelessness, unskillfulness in their

art or profession, or non-observance of regulations, caused the death of Raymond Van Beek;
2. as per decree of the 23rd of July, 2004, also charged with having on the same day, time and circumstances, in their duty of an employer failed to ensure the health and safety at all times of all persons who may be effected by the work carried out for them as an employer.

Having seen the judgement delivered by the Court of Magistrates (Malta) as a Court of Criminal Judicature on the 8th March, 2007, which, declared both defendants not guilty of the charges brought against them and consequently decided to acquit them from all the said charges.

Having seen the application of appeal filed by appellant Attorney General on the 23rd March, 2007, wherein he requested this Court to reverse and revoke the decision of the Court of Magistrates, find guilt and inflict the punishment in terms of law.

Having seen the records of the case;

Having seen its preliminary judgement of the 12th. July, 2007, where this Court dismissed the plea of nullity of the Attorney General's appeal application raised by both accused and where it ordered that the appeal be proceeded with on the merits of the case.

Having seen that the Attorney General's grounds for appeal are briefly the following :- that the first court did not consider the circumstantial evidence of the case and instead of accepting it as conclusive, as it should have done, opted to ignore it. The incident could only happen because the bow thruster was on. Whether it was fully operational or in standby mode is the key to the issue. All circumstances point out to the fact that through the negligence of both accused Raymond Van Beek died. There is no other logical interpretation of the facts and therefore the Court had to establish the guilt of both accused.

Having seen the reply filed by both accused to the Attorney General's appeal;

Having seen accused persons' updated criminal conduct sheet filed by the Prosecution on this Court's orders.

Having heard submissions by Defence Counsel and Counsel for the Prosecution on the merits of the case in the course of the hearing of the 12th. July, 2007.

Now therefore the Court, having considered that :-

In the course of the oral pleadings before this Court, Counsel for the Prosecution limited himself to the contents of the grounds of appeal of the Attorney General's appeal application reproduced in a previous paragraph and submitted that the facts of the case warranted a conviction under sections 225 , 20, 22 and 533 of the Criminal Code.

On their part Defence Counsel were more forthcoming and made the submissions which are being summarised hereunder. Dr. Filletti, Counsel for accused Bargmann, submitted that in the appellant's grounds of appeal nowhere was any reference made to the charge under the Health and Safety Act and why this charge should be deemed to have been proven by this Court. The role of this appellate court was not to automatically review the facts. It was up to the appellant Attorney General to prove how and why the judgement of the first Court was manifestly unreasonable. In default, the judgement should be confirmed.

There were doubts as to whether the ship's bow thruster was on already when the deceased took to the water or whether it was switched off and then switched on again. It was established that the bow thruster could not operate on one of the ship's generators alone as there would be an overload. This Court could not deem the judgement of the first court unreasonable when the court-appointed experts had stated that this was an accident. It resulted that the Captain had ordered the First Officer, Mr. Flink, who had a Master's licence and was qualified to operate a

vessel of this ship's size, to switch off all the equipment from sea-going mode to harbour mode. As a result of this order, generators 2,3 and 4 were switched off and only generator number 1 was left on. The generators could not switch on automatically when the ship was in harbour mode.

In this case the underwater inspection of the vessel was not commissioned by the Captain or the shipowners but by the classification society German Lloyds who commissioned the deceased diver. It was the diver who gave instructions to the Captain. These were double checked and signed but kept by the diver himself. The diver had instructed the Captain to fix notices on the vessel and this was done. A warning flag was also hoisted on the vessel. The diver was satisfied that his instructions had been adhered to and decided to start his underwater inspection. The Captain and the local German Lloyds representative accompanied the diver on the barge after the Captain informed the First Officer, Mr. Flink that he was leaving the vessel and going on the barge. At this point the responsibility of the Master stopped and it passed on to the Second-in-command. On his part, the Chief Engineer however handed over to an other officer and went to rest.

Defence Counsel further submitted that the inspection concerned the whole hull of the vessel and not just that of the bow thruster. The diver was not using aqualungs but was in deep-sea diver's accoutrements. The diver was wearing flippers but had no weights on his boots but only around his waist. According to Defence Counsel the diver was ill equipped. The sea was calm and there was no wind. The launch of the diver had taken place on the seaward side of the vessel and was proceeding from the stern to the bows of the ship. The diver had been in the water for some 20 minutes. No ripples were seen coming from the direction of the bow thruster. No sounds were heard although this engine is audible. The Captain was observing the operation through a monitor. At one point the diver was heard saying *: "I am hearing a noise but I shall continue."* Then all contact with the diver was lost

and bubbles were seen reaching the surface. The Captain then radioed Mr. Flink to ask what had happened.

The person on the barge had the duty to keep the cable which was about 50 to 60 meters long and contained the air line and 3 or 4 data cables taught. Had this cable been kept taught, the accident would not have happened. The bow thruster had a recessed propeller and there was no grid preventing access to it. It had a variable pitch and could be made to push or suck water.

Dr. Frendo, Counsel for defendant Raake, submitted that, while associating himself with Dr. Filletti's submissions, it had to be stressed that there was no proven causal link between the defendant Raake and the facts. Indeed Raake, after the meeting with the diver, went to the engine room after having performed all the necessary safety precautions. He then handed over to the assistant engineer and retired to his cabin for a few minutes. The bow thruster did not fall under the category of engine room operated equipment but it was "bridge operated". Although one generator always had to be on, the engine control room was one deck lower than the main deck but the bridge was on the eighth deck. So his client could not be held responsible for whatever happened.

Having considered that in their written reply both defendants had referred to the above arguments and had submitted further details in support of their contention that the judgement of the first court should be confirmed, namely that:-

1. when the vessel was safely moored it was put on "harbour mode" which includes the switching off of all unnecessary equipment, including the bow thruster. This was documented by the safety cross sheet exhibited by the assistant engineer, Mr. Molenda.
2. The powering up and the operation of the bow thruster required the simultaneous running and input of at least two generators at a time. While one generator was left on, the others were switched off and switched from "automatic" to "manual" mode, meaning that it required a

specific intervention from the engine room to power up any one of the generators. The on-board ship computer could not power up any of these generators. This was stated by Mr. Molenda and was confirmed by the Court appointed experts and further corroborated by two graphs exhibited by Mr. Molenda indicating that generators 2 and 3 were uninterruptedly off.
3. Chief Engineer Raake testified that the ampere metre in the engine room, which marks the power consumption of the vessel, was on zero reading and from this he could ascertain that the bow thruster was switched off. There was no logical explanation for the operation of the bow thruster at the time of the accident for which the accused or either of them could be held responsible.
4. The Captain and Chief Engineer performed all their duties to the satisfaction of the diver who then prepared himself for the dive.
5. It was therefore clear from the above, defendants submitted, that no other reasonable conclusion could be arrived at other than the complete and unconditional acquittal of both defendants. The conclusions reached by the first court were not only reasonable but incumbent upon it, as it was left with no option, in fact and at law, but to acquit as in fact it did.

Having considered that defendants, without prejudice to their pleas on the merits, further submitted that this Court should not therefore come to a different conclusion from that reached by the first court but, if it did, then it should remit the case back to the first court not to deprive them of the benefit of a review of the punishment awarded, which in any case defendants, without prejudice, submitted should be awarded in its minimum.

Having considered:

That appellant’s grounds of appeal are based on the First Court’s wrong evaluation of the evidence. Now it has been firmly established in local and foreign case law that both in cases of appeals from judgements of the Magistrates’ Courts as well as from judgements of the Criminal Court, with or without a jury, that the Court of

Criminal Appeal does not disturb the evaluation of the evidence made by the Court of first instance, if it concludes that that Court could have reached that conclusion reasonably and legally. In other words this Court does not replace the discretion exercised by the Court of first instance in the evaluation of the evidence, but makes a thorough examination of the evidence to determine whether the Court of first instance was reasonable in reaching its conclusions. However, if this Court concludes that the Court of first instance could not have reached the conclusion it reached on the basis of the evidence produced before it, than that would be a valid – if not indeed a cogent reason – for this Court to disturb the discretion and conclusions of the Court of first Instance (confer: "*inter alia"* judgements of the Court of Criminal Appeal in the cases :"**Ir-Republika ta' Malta vs. George Azzopardi"** [14.2.1989]; "**Il-Pulizija vs. Carmel sive Chalmer Pace"** [31.5.1991]; **"Il-Pulizija vs. Anthony Zammit"** [31.5.1991] and others.)

This Court also refers to what was held by LORD CHIEF JUSTICE WIDGERY in "**R. v. Cooper"** ([1969] 1 QB 276) (in connection with section 2 (1) (a) of the Criminal Appeal Act, 1968) :-

"assuming that there was no specific error in the conduct of the trial, an appeal court will be very reluctant to interfere with the jury's verdict (in this case with the conclusions of the learned Magistrate), because the jury will have had the advantage of seeing and hearing the witnesses, whereas the appeal court normally determines the appeal on the basis of papers alone. However, should the overall feel of the case – including the apparent weakness of the prosecution's evidence as revealed from the transcript of the proceedings – leave the court with a lurking doubt as to whether an injustice may have been done, then, very exceptionally, a conviction will be quashed." (Confer also : BLACKSTONE'S CRIMINAL PRACTICE (1991) , p. 1392)

In Criminal Appeal : "**Ir-Republika ta' Malta vs. Ivan Gatt",** decided on the l st. December, 1994, it was held

that the exercise to be carried out by this Court in cases where the appeal is based on the evaluation of the evidence, is to examine the evidence, to see, even if there are contradictory versions – as in most cases there would be – whether any one of these versions could be freely and objectively believed without going against the principle that any doubt should always go in the accused 's favour and, if said version could have been believed and was evidently believed by the jury, the function, in fact the duty of this court is to respect that discretion and that evaluation of the evidence.

These principles apply equally to cases where appeals from judgements of the Court of Magistrates are lodged by the Attorney General on behalf of the prosecution.

This Court has accordingly evaluated the evidence anew with a view to establishing whether the Court of first instance could have legally and reasonably acquitted both defendants of the charge of involuntary homicide and breaching health and safety rules originally proffered against them.

That from a detailed examination of the evidence tendered before the Court of first instance the following facts emerge.

On the day of the incident in question, i.e. the 11th. July, 2004, shortly after the container vessel CMA CGM Verlaine had berthed at the Free Port at Marsaxlokk, the diver Raymond Van Beek had boarded the vessel to conduct an underwater inspection of the hull as commissioned by the surveyor of the classification society. A meeting was held on board between the diver, the two defendants, the surveyor and other members of the crew wherein agreement was reached on the safety procedures to be followed and after certain precautions, like the hoisting of a flag to warn of a diver's presence in the vicinity of the ship, and other measures were taken, the diver accompanied by the master, defendant Bargmann, boarded a barge from which Van Beek was to dive and which contained the life-line apparatus as well as

monitoring equipment to view and record the findings resulting from the dive. It was the deceased diver Raymond Van Beek who had requested the services of the company which provided the support barge from which he took off to conduct the underwater inspection of the vessel and not the Master of the vessel (vide testimony of **Mario Monaco** [p.139], **Christopher Zerafa** [p. 58] and that of **Michael Galea**. [P. 60]) The inspection started from the vessel's stern on the seaward side and was proceeding along the hull towards to bows of the vessel and all was going normally. There was no sign of activity of the bow thruster on the surface of the water and no sound of its operation or tell tale ripples could be observed in its vicinty.

At one point after the diver had been in the water for some time, he was heard to say that he was hearing a noise but that he was going to continue and shortly after that the air-line and other cables leading from the barge to the diver seemed to be tugged away suddenly and the crew on board the barge tried to hold them back but they were cut and there was a big suction and body parts from the diver could be seen on the surface. (vide evidence of **Anthony Farrugia,** who was acting as second diver on the diver's barge and who was meant to inspect the grids around the bow thruster, which in this case did not exist. [pp.215-216 and 255-260].) The defendant Bargmann who was on the diver's barge, promptly informed the duty officer of what had happened

Eventually the badly mutilated body was retrieved and it became evident that he had been sucked into the bow thruster with fatal consequences (vide photos exhibited by **PC 186 K. Mintoff** - [p. 267]). On inspection, it resulted that the bow thruster did not have any safety grating or guard. (vide evidence of **Mario Monaco** [pp. 142 and 145].

In his report, submitted to the Magistrate conducting the Inquiry, Court appointed expert **Captain Reuben Lanfranco** concluded that shortly after the diver had remarked that he was hearing noises, part of the umbilical

cord (i.e. the air-line and cables extending from the diver's barge to the diver) got entangled with the bow thruster's propeller with the result that the diver was dragged backwards towards the propeller making contact with the propeller with the rear part of his body as indicated by the photos RVB 8 and 9. His head and legs were severed from the rest of his body and other lacerations were caused to other pats of his body by the propeller. He further concluded that while the incident was not premeditated (Sic!) but was an involuntary one caused by lack of communication between members of the crew of the vessel Verlaine. (vide pages 188-211).

In his report (pages 173-176) Court Expert **Martin Bajada** said that he had converted a VHS recording handed over to him into digital format from which he had extracted various still images (Dok. MB2) These came from that portion of the video stream when the diver is allegedly sucked into the ship's bow thruster. He attached a transcript of the audio stream to his report. The recording length is of five minutes and eighteen seconds. After two minutes and fifty six seconds, a humming sound can be heard in the background. Twenty six seconds from the background humming noise, this humming sound is noted by Raymond Van Beek who reports : *"03.22 I hear a lot of noise here above us."* Irrespective of the noise the diver swims on for another 73 seconds before he turns back and recording the following : *"Eehhh let me check."* and "*04.21 Because there suppose to be the….."* at which time a strong crackling sound can be heard. The subsequent video sequences are characterised by a. the stretching of the umbilical cord, b. Van Beek's right hand attempting to pull on the umbilical cord, c. a gust of splattering (Sic!) blood and d. body parts floating outwards, mainly what appears to be a finger, and an arm or foot. There is a twenty six seconds lapse of time from the strong crackling sound to the loss of video.

In his report, Court appointed expert, **Engineer Michael Cassar** (pages 222 - 232) concluded *inter alia* that the container vessel Verlain is equipped with a system called Unmanned Machinery Space , where all he machinery is

operated from the Engine Control Room which is a room to be found in the Engine Room space. This Engine Control Room is in turn equipped with a computer system which logs all alarms which are raised in the engine room. This computer shows this event log either on a screen as well as on automatic print-outs . It indicates the time and type of alarm and the machinery it is related to. The expert noted that the time shown on the screen was some 50 minutes fast. The vessel was equipped with a propeller at the stern and a smaller propeller at the bows , known as a bow thruster, enabling it to better manouver when approaching quays in harbour. It is equipped with three generators of electricity also known as auxiliary engines which are not required to be all in operation at any one time, as the vessel has a certain amount of spare capacity. These generators can either function automatically or manually, when these are started by some person in the engine control room, who operates a common control panel for the three generators.

The bow thruster can be made to operate by a member of the crew in the engine control room in charge of switching on the switchboard of the bow thruster, thus enabling the Master or whoever is steering the ship on the bridge to operate this bow thruster. For the bow thruster to be able to function it is necessary that at least two generators are on to supply the required amount of electricity. This was verified by the expert himself, as on the two occasions he had tried to switch on the bow thruster with just one generator on, it failed to start up. Each time the bow thruster failed to start, an alarm was registered on the event log . On the other hand when both generators were in operation, the bow thruster worked normally and no alarm was registered on the event log in the engine control room.

The expert further noted that when he had asked the Chief Engineer Raake to show him the event log for the period close to when the accident is believed to have occurred , the defendant showed all the alarms which had been logged at around 9.30am . As the time shown on the log was some 50 minutes fast, and he reckoned that

therefore the accident would have happened at around 10.15am according to that advanced time, he noted that there was an interval of about one hour and fifty-two minutes during which no alarm had been recorded, before and after 10.15am. However prior to and after that period alarms had been logged at frequent intervals sometimes with minutes or only seconds in between each other.

The expert then concluded that the bow thruster could not have self started automatically and that there had to be a human intervention to start it up. For this to happen somebody had to start another generator in addition to the one which was on at the time of the accident. Then one had to switch on the bow thruster's switchboard inside the engine control room and then the bow thruster could be operated by a special lever to be found on the bridge. Therefore although the Chief Engineer Raake stated on oath that no crew member had started the bow thruster, it must have been started by somebdy. He excluded the possibility that it had started because of some technical damage to the ship's switchgear, as during the expert's inspection all swichgear functioned well and obeyed all commands of the duty officer on board. Moreover, for that to happen it would have to be a fault affecting three different and separate parts of machinery , i.e. the generator, the bow thrusters switchboard and the bridge lever and therefore it is a very remote possibility that the bow thruster started on its own without human intervention or because of a technical fault.

The expert also noted that although he could not exclude that such a thing could have happened, it was very strange that no alarm was logged during the period of one hour and fifty-two minutes, particularly when, during the expert's inspection, alarms were being logged at more frequent intervals, even though it appeared that no operation was taking place in the engine room except for that of the generators . He could not tell if the crew had access to alter data which would have been logged in the event log. The fact that this event log showed a time which was some fifty fast, did not necessarily imply negligence on the part of the crew as the vessel might be

sailing in different time zones but would have to adhere to one particular time.

The Court appointed forensic expert, **Dr. M. Scerri** in his report (pages 292-304) concluded *inter alia* that there were various lacerations on the mutilated body of deceased which were compatible with propeller injuries. It appeared that deceased was sucked towards the direction of the thruster whilst the lower limbs, head, and the right upper limb and left shoulder were introduced in the thruster opening and subsequently amputated by propeller action.

The Court appointed pathologists **Prof. M.T. Camilleri** and **Dr. A. Safraz** , who conducted the autopsy on deceased's body, concluded that the cause of death was multiple injuries suffered described in their report. (pages 250-251)

Defendant Bargmann testified in the course of the Magisterial Inquiry before the Court appointed experts, Dr. S. Micallef Stafrace and Captain Reuben Lanfranco, (pages 89 to 110) as well as before the Court of first instance (pages 313 to 331). Before the Inquiry he testified *inter alia* that when he was still on the vessel the bow thruster had been switched off though he could not say who had actually done so. It could not start automatically even if a second generator was switched on. One has to press a button to restart the bow thruster. He was not aware that the grid or guard were missing before the accident happened. No one was on the bridge hen the accident happened. The Chief Officer had the five master keys. He had no technical explanation how the bow thruster started, and when he was on the diver's barge everything was quiet and there was no noise coming from the bow thruster. At that that time there was only one auxiliary engine operating to operate the water pumps for normal cooling. At that time both the Chief Engineer and the Second Engineer were in the engine room and if the Chief Engineer at some point went to his cabin to rest, that was normal. He had no technical explanation how the bow thruster started. He said that it

was a mystery to him how this could have happened. (vide in particular pages 90, 94, 97, 100,102,104, 105, 109, 214 and 215)

When he testified before the Court of first instance, **Defendant Bargmann** (pages 313 - 331) reaffirmed most of his earlier evidence and added *inter alia* that after the vessel was moored on that day, he had informed by telephone the defendant Raake a Chief Engineer, who at that time was in the engine control room that the ship was safely alongside and that they could switch over to harbour mode. He had switched from automatic to manual. He then went with the pilot to the chart room to fill in certain paperwork while the Chief Mate was busy switching off the procedure for the command elements and communication and the nautical aids like echo sounder, radars, bow thruster and all that pertains to the switching off procedures. So all the machines and equipment were switched down by the second captain except the main engine, which was already off.

The diver was chosen by Lloyds of Germany and the owner of the vessel and not by him. After a meeting with the diver, the Lloyds Inspector, Mr. Flink the first officer and the defendant Raake, in which the procedures for the inspection were agreed to, a flag was raised and the diver gave him two notices, one of which one was hung up in the ship's office in front of the control panel so that everybody could see it and one in the engine room by the Chief Engineer, Raake. One of the questions asked by the diver from his check list was whether the bow thruster was switched off and he was reassured that that was the case after due checking. When the diver was satisfied that all was in order he went down to his boat and he and the German Lloyds Inspector, Mr. Monaco followed him onto the same boat. The bow thruster was off and there was no sign of danger when the diver got into the water. Then he described what happened after about fifteen minutes when the video connection stopped after a crackling noise was heard. The bow thruster could not have been switched on accidentally as this involved four steps and the computer on the bridge could not switch on a second

generator which was required for the bow thruster to operate.

When he discovered what had happened he called Mr. Flink , the Chief Mate by walkie talkie and told him to go on the bridge to see what happened. Mr. Flink saw that the bow thruster was running on neutral position and immediately switched it off. When he asked Flink who had switched it on, he told him : "*I don't know."* He then went on board the Verlain again and summoned a meeting on the bridge attended also by defendant Raake and when he asked what was going on, nobody had an answer.

He was not aware that the grid on the port side of the bow thruster was not in place. The one on the starboard side was. When he had left the bridge after the berthing operation he had made sure that al the control lights on the bridge panel were off and that bow thrusters were off.

On that day he was under no obligation and had no written order to switch off the circuit breaker which connected to the bow thruster and he did not even think that he should have put it off but failed to do so. Mr. Flink had expressly told him that the bow thruster was off and when he accompanied the diver on the diver's barge, they heard nothing. Had it been on in neutral position, it would have made no ripples on the surface, only noise and he would have heard the noise but he had not heard it. Had it been fully engaged there would certainly have been not only ripples but a full stream of water coming out from the direction of the bow thruster.

Defendant also stated that he was under no duty to inform all the members of the crew that the dive was going on. He had informed the officers in charge. Although it was possible to have called all 23 members of the crew in a room and tell them what was happening, there are shifts and some members were asleep at the time. He could have woken them up but he did not feel the need at the time. All officers on deck knew that they had an underwater inspection and so did the crew on deck like the watchman, gate watchman. They were instructed in

the ship's office. He did not tell everybody on board and did not give instructions to tell everybody on board either.

On his part, when **defendant Raake** testified in the course of the Magisterial Inquiry before Dr. S. Micallef Stafrace and Captain Reuben Lanfranco, Pages 112 to 137), he stated *inter alia* that he had switched off the second generator when the vessel had arrived in harbour. Even if someone had left the bow thruster on and the second generator was switched on, it was still not possible for it to start automatically. In the forty-five minutes after the diver had signed the declaration that he was satisfied with the precautionary measures taken, it was impossible for anybody to switch on another auxiliary engine. He was in the engine room and he had put up a sign in the engine room signifying that a diver was present. While Number 1 generator was in the automatic position, the other two were in manual. Nobody had switched on the other generator. Switching on the emergency generators would not give enough power for the bow thruster to start up automatically, even if the bow thruster was left on in the bridge and a second generator was switched on. One would still have to push a button on the bridge. At no time did he hear the sound of the bow thruster in operation but he could not hear these from the engine room or from his own cabin. He did not know how the bow thruster started working and he had no idea what had happened (vide in particular : pages 117, 119,122,129,130, 132,134, 135 and 215)

When he testified in his defence before the Court of first instance, he stated what he had testified in the inquiry and *inter alia* added that after the vessel had entered harbour at 5.30 am the Captain called him that the ship was secured. The main engine was no longer required and from that time onward the main engine was changed from manouver to harbour mode, which means that all other things like the air compressors and other equipment were switched off. The switched off the second generator and were only functioning on one generator. It was he himself who switched on the second generator between 5.30 and 6.00am. The engine room was dead apart from this

generator and some pumps for the cooling system of this generator.

He then had a meeting at 8 am with the Captain, the diver, and Mr. Monaco, the German Lloyds surveyor in the course of which security procedures for the diving operations were discussed. The diver had a check list which he signed himself and he appeared satisfied with the procedure to be followed. Then the diver gave him a paper with a sign stating something like **"Don't switch . Diver at work."** or **" Danger. Diver at work."** He had then put up this sign in the central control room of the vessel and told his staff about it. They all understood English. He could not be sure that all seven members of the engine room crew were present when he told them about the diver. Neither the Captain nor himself had however used the Public address system on the vessel to warn the crew that there was going to be the underwater inspection by the diver and he did not hear the captain using it either. Between 8.30 and 8.45am, he was in his room. Between 9 am and 10am he remained either in the engine room or in his office which is in the engine room doing some paper work. At 10am he was summoned to the bridge by the Captain and discovered that something had happened to the diver who was probably dead.

He again emphasised that he himself had switched off the second generator at about 5.30 or 5.40 am. on that day and that it was impossible for the bow thruster on the vessel to be put on without a minimum of two generators working. These other two generators were never switched on and, as they are big motors, he would have heard the noise and felt the vibrations if they had. The bow thruster could only be operated from the bridge and neither he as Chief Engineer nor his officers or engineers in the engine room had the authority to switch on a bow thruster

Jan Molenda, the second engineer, testified (page 348 et seq.) that at 5.30am on the 11th. July, 2004, when the vessel was moored, the engine was switched off. He had switched off the main engine and together with the Chief Engineer, they switched off the unnecessary units, such

as the auxiliary engine, the second generator and the bow thruster as well as the air compressors. He had ticked the check list to record all these facts. All generators were switched on to manual mode and therefore to restart them one would have to push its start button from the engine control room. This cannot be done from the bridge. He checked that the bow thruster was off by looking at the control panel where all control lamps were off and the ampere meter for the bow thruster was on zero. To switch it on one needs at least another generator as one generator would not be enough. And even if the Captain on the bridge were to switch on the bow thruster, if the generators were on manual, they would not start or switch on automatically.

When the Master, defendant Bargmann at about 9.45 - 9.50am. passed through the workshop and asked him who had switched on the bow thruster, he replied that he did not know and on checking the situation of the auxiliary generator, in the control room, he found that only one generator was running and the other two were off and on manual mode. The bow thruster control panel showed zero on the ampere meter as had been earlier on that morning. The print-out from generator number 2 showed that it had been switched of at 5.30am. that morning and was not switched on again before 4pm. while generator number 3 was not switched on at all that day.

In the course of the daily meeting in the engine room at 8am. the defendant Mr. Raake informed all seven members of the engine room crew that they had a diving operations that day. All crew members understood English. The bow thruster cannot be switched on from the engine room but only from the bridge. The engine room crew is only involved in providing enough power when they receive information from the bridge that they need the bow thruster. It is the Captain or the First Mate who usually asks the engine room crew to do this.

He further stated that on that day there was a notice posted in the engine room saying *"Danger. Diver at work"* and this could be seen easily by anybody in the engine

room. If a generator had to go on he would hear it. He was constantly in the engine room between 8am and 10am and could physically see that the generators were off. He was absent from the engine room between 7.30am and 8am when he was having his breakfast. Nobody in the crew can change the clock of the computer which is on GMT.

Peter Muller , who was a quality manager at NSB in Germany and who was also a qualified Master of container ships , testified on behalf of the defence (pages 362 et seq.) that when a master of a ship leaves a vessel , the next officer in charge would be the Chief Officer and he would take over command of the ship. Defendant Raake, as Chief Engineer is responsible for the whole engine department but has nothing at all to do with the bridge. All members of the crew are trained and audited and conversant with the English language which is the working language of the vessel.

Robert Clay also testified on behalf of the defence (pages 371 et seq.) that grids for bow thrusters are not part of the classification of the German Lloyds Company and are not required. The function of the grid is to avoid or prevent damage to the bow thruster caused by drift wood. It is not there for the protection of humans.

The evidence of **Dr. Ramiro Cali' Corleo**, (pages 284 et seq.) which is of a general nature and contains mainly information about diving practices, though interesting, is not admissable in so far as it contains opinions, as he was never appointed as a Court expert and had communicated with defendants about the case (see minutes of the court records at page 376),

Having considered

That it was on the basis of this evidence that the Court of first instance came to the conclusion that both accused had to be acquitted of the charges proffered against them.

Having considered that in the Attorney General's Note of referral dated 19th. April, 2005 (page 309) he only mentioned section 225 as the section of the law under which the defendants could be found guilty, defendants could never be convicted of the second charge proffered against them. Accordingly, even though the first court acquitted them of the charge on its merits (p. 434), the acquittal would have to be upheld in any case as the Attorney General himself had not mentioned the relative article or articles of the law in his Note.

With regards to the first charge, from a detailed examination of the evidence, the salient points of which have been summarised above, whereas all evidence suggests that the bow thruster had been switched off after the vessel had berthed earlier on that morning and that it could not have been switched on automatically unless four manual operations were performed from the bridge and from the engine control room, this machinery was in effect on or switched on when the diver was swimming very close to the bow thruster, with the result that he was either sucked in bodily onto its propeller or was tugged in because his life line and communication cables were caught in its propellers.

If the equipment was switched on just before the accident happened, from the evidence it does not result who actually switched on these various parts of equipment to make the bow thruster start functioning. There were twenty three members of the crew on board and it did not follow necessarily that any act performed on board had to be performed by the two defendants or any one of them. It also results from the evidence of the independent witnesses, who were on the diver's barge, that there were no tell tale signs on the surface of the water prior to and during the diver's immersion until the last moments when the diver himself said that he was hearing a noise just prior to the severing of all lines of communication between him and the boat. It follows therefore that someone on board, for some unknown reason, had operated the various controls on the bridge and in the engine control

room to bring the thruster into operation just when the diver was close to it.

It remains a mystery who did that and why it was done. The fact that the event log in the engine control room shows a long interval between one alarm and another on or around the time when the accident happened makes the incident harder to explain and raises a degree of suspicion that whoever might have been responsible for what had happened might have obliterated the records to conceal who had actually started the equipment. But criminal guilt cannot be founded on mere suspicion alone and direct and/or conclusive circumstantial evidence is necessary to pin each one of the defendants to the facts causing the incident in question.

Now it results that defendant Bargmann who was the Master of the vessel Verlain, at the time of the accident, had left the vessel and went on board the diver's barge to monitor by means of audio-video equipment on the barge the results of the deceased diver's inspection. Although he was still in communication with the ship's first officer through walkie talkie equipment, he was no longer in charge of the vessel at the time and effective control and command devolved upon the First Mate or First Officer, Mr. Flink. As such unless it is proven, which it is not, that defendant Bargman gave some order over walkie talkie to Flink or any other officer to start up the bow thruster, he cannot be held directly responsible for what happened. All evidence suggests that the bow thruster had been switched off hours earlier that morning after the vessel had secured alongside the quay at the Free Port and that defendant Bargmann had personally made sure that all lights on the bridge control panel had been switched off. He could therefore in no way be held criminally directly responsible for the incident over which it does not result that he had any control or in which he made any direct intervention.

The fact that the Master had not felt the need to summon all crew members to inform them that there was going to be an underwater inspection of the vessel by a diver does

not of itself make him responsible if some crew member acted irresponsibly by starting up the relative equipment. This is equipment which is not there to be started or switched on capriciously or inadvertently by any Tom, Dick and Harry, as in the case of the switching on of a light bulb in a cabin. It requires specific orders from a competent officer and execution by equally competent members of the crew. In short, even if some members of the crew were unaware of the diver's presence near the ship's hull, it was not their business to turn on or start equipment of this nature, unless they received express orders from someone in authority to do so. All four deck officers were aware of the inspection. In any case the hoisting of the appropriate flag warning of a diver's presence on the yardarm and the hanging up of the two notices given out by the diver himself , one in the ship's office and another one in the engine control room, for all to see, should have alerted those members of the crew, who had business in there, of the diver's presence.

Obviously aware of the state of the evidence, the Prosecution had submitted before the first court that defendants could still be found guilty in terms of section 13 of the Interpretation Act. (Chapter 249 of the Laws of Malta). This section of the law makes all persons who at the time of the commission of an offence by a body of persons were either directors, managers, secretaries or similar officials of that body, or who appeared to be acting in such a capacity, guilty of that offence, unless they proved that the offence was committed without their knowledge and that they had exercised all due diligence to avoid the commission of that offence.

Now this Court in this case upholds the view held by the Court of first instance that this provision of law does not apply to the crew of a vessel and surely the Master and Officers of a vessel cannot be, by some analogy, deemed to be directors, managers, secretaries or other officials of a body of persons whether juridical or otherwise. Consequently the Prosecution cannot base its charges on this provision of law in the present case.

Even if such a provision were applicable, however, defendant Bargmann would still have proven to the satisfaction of this Court to the degree of probability required of an accused person in criminal proceedings, that he was not aware of the acts leading to the commission of this offence and that he had exercised due diligence to prevent it when he had made sure that the bow thruster machinery had been switched off hours earlier on that morning.

Having considered that although defendant Raake, the Chief Engineer was on board the vessel at the time of the fatal occurrence, the same rules of evidence apply to him albeit, after taking into account that he was in overall charge of engine room operations. Even in his case Section 13 of the Interpretation Act cannot be successfully invoked by the Prosecution.

One therefore has to examine the evidence to determine if he was either by commission or ommission responsible directly for any of the events which led to the bow thruster starting up when it did. It results that if when this happened he was not in the engine room the Second Engineer was on duty at the time. He categorically denies that he had a hand in starting the bow thruster and emphasises in any case that it could not be started with the operation of any equipment in the engine room alone but that it also needed a direct manual intervention from someone on the bridge.

In the circumstances, once all agree that the equipment could not have kickstarted automatically, there arises a very strong suspicion that either it had not been properly and completely turned off in the first place or else that some member or members of the crew had put the bow thruster into operation by direct interventions both in the engine room and on the bridge. Alternatively there could have occurred some general technical malfunction of the vessel's equipment which caused these various items of machinery to start up without direct human intervention.

But this Court is not to find criminal responsibility on the basis of mere suspicion however strong and nagging that may be and unfortunately the telegraphic if not altogether cryptic style of the Attorney General's application of appeal in no way helps this Court to put its finger on any concrete facts which could convince this court to the degree of moral certainty of the defendants' guilt beyond reasonable doubt.

Accordingly this Court is dismissing the appeal and confirming the findings and conclusion of the Magistrate's Court in the judgement under appeal, and this without in any way prejudicing the rights of deceased's dependants to seek redress in any court or tribunal of civil jurisdiction - where other rules of evidence governing civil liability apply - against any of the members of the crew or possibly the owners of the vessel or both for the damages they have suffered *"si et quatenus*", in view of the very special circumstances that shroud this case in mystery.

< Sentenza Finali >

----------TMIEM----------