



**QORTI TAL-MAGISTRATI (MALTA)
BHALA QORTI TA' GUDIKATURA KRIMINALI**

**MAGISTRAT DR.
AUDREY DEMICOLI**

Seduta tat-8 ta' Marzu, 2007

Numru. 565/2004

**The Police
Inspector J. J. Fenech
Inspector Noel Cutajar
vs
Peter Karl Bargmann
Herman Dieter Raake**

The Court,

Having seen the charges brought against the defendants Peter Karl Bargmann, 63 years, of German nationality, son of Peter and Cacilie nee' unknown, born Hamburg 10.08.1940 and residing at 46, Norderkirchenweg, Hamburg, ID No. 1331144023 and Herman Dieter Raake 57 years, of German nationality, son of Kurt and Magdalena nee' unknown, born in Lacoma/Cottbus on the 21.03.1947, and residing at 14 Hunenweg, Bad Doberan, ID No. 0302077744 by virtue of which they were charged with the following:

a. Charged with having at the Malta Freeport, B' Bugia 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 Beck.

b. As per decree of the 23rd of July 2004, also charged on the same day, time and circumstances, as your duty of an employer failed to ensure the health and safety at all times of all persons who may be effected by the work being carried out for you as an employer.

Having seen all documents and records of the procedures including the note filed by the Attorney General (folio 309) dated 19th April 2005 whereby he transmitted acts and records of the preliminary investigation to be heard and decided as by this Court as a Court of Criminal Judicature.

Having seen that on the 13th May 2005 (folio 311) both the accused answered that they had no objection that their case is heard by summary proceedings and decided by this Court as a Court of Criminal Judicature.

Having seen the written submissions filed by Prosecution and Defence Counsel.

Having taken into consideration the following:

That the accused Peter Karl Bargmann and Herman Dieter Raake stand charged in front of this Court with having on the 11th July 2004 at the Malta Freeport in Birzebbuga in their capacity as captain and chief engineer respectively of the sea vessel CMA CGM VERLAINE, through imprudence, carelessness, unskillfulness in their art and profession, or non observance of regulations, caused the death of Raymond Van Beck.

According to the evidence tendered before this Court it results that the ship in question, i.e. the MV VERLAINE, captained by the accused Peter Karl Bargmann was scheduled to make land and enter the Malta Freeport on the 11th July 2004 in order to carry out the operation of container loading and unloading and also to undergo a survey ordered by the classification society, the German branch of Lloyds. On the said date the vessel was moored safely at the Freeport at around 05.30 a.m. local time. The accused Captain Bargmann who gave evidence on the 17th October 2005 said that he oversaw the safe mooring of the vessel where he was on the bridge effecting the necessary manoeuvres. When the ship was safely moored the Captain gave instructions to the Chief Engineer, the other accused Herman Dieter Raake who was in the engine control room, that the ship was to be switched onto harbour mode. This implied that automatic control was shifted to manual control from the bridge panel in the engine control room. Before the ship was moored the ship engine was being automatically operated from the main bridge. Whilst the ship was being moored, according to Captain Bargmann's evidence at around 04.30 a.m., the bow thruster was switched on to increase manoeuvrability of the vessel. The accused Captain Bargmann explained that from the bridge wing where he was one could only manoeuvre the movement of the ship for the purpose of tying up. The main controls of the ship are on the bridge panel where the chief officer was in control. All the computers and alarms are on the bridge panel. When the vessel was switched from the main engine to harbour mode Mr. Fink, who was the chief officer took care of the switching off procedure of the command elements including the bow thruster.

Captain Bargmann also testified that a lot of inspections were programmed to be carried out that day by the surveyor from the classification society, i.e. the German branch of Lloyds, and therefore a number of engines had to be shut down and the vessel had to be kept running on only one generator out of three. Amongst the said inspections to be carried out by the classification society, an underwater hull inspection was to be carried out and

this was the first hull inspection to be carried out on the VERLAINE. The victim, i.e. Raymond Van Beck, was the diver contracted by the classification society to carry out the underwater hull inspection. From the evidence brought forward it results that Van Beck boarded the ship and had a meeting at around 07.40 a.m. with the Captain whereby the safety procedures to be adopted during the underwater hull inspection were discussed. The second captain Mr. Fink, the chief engineer, i.e. the accused Peter Raake and the Lloyds surveyor were also present at this meeting. Van Beck requested the hoisting of the Alpha flag which flag is the international sign for signalling that divers are working in the vicinity of the ship carrying the flag. He also gave two warning notices to the captain and instructed that the said notices were to be posted on the ship's bridge and in the engine control room. The Alpha flag was duly hoisted and the two signs warning the crew that a diver was at work were displayed in the ship's office in front of the control panel and in the engine room. It also results that Raymond Van Beck went through a safety checklist during this meeting and this checklist was signed by him and by Mr. Funk and the accused after the diver was satisfied that all safety criteria had been adhered to.

After this meeting was held Captain Bargmann together with the surveyor from Lloyds and the diver left the ship and boarded the diver's boat. At this point command of the Verlainne was according to international practice passed on to the chief officer Mr. Fink even though there was still a communication link between the captain and the chief officer by means of walkie talkie.

The dive in question commenced at around 09.00 a.m. local time. There were three people on this boat apart from Captain Bargmann and the Lloyds surveyor. The diver had cables, audio link and oxygen and the cables were stuck at the back of the diver's helmet and he had to dive at a depth of around 13.5 metres and go 40m across under the vessel. During the inspection Captain Bargmann and the Lloyds inspector were in the cabin watching the monitor whilst the diver's staff, included the

assistant diver, were on deck and one of the said staff was holding the lines to keep the boat in position. The assistant diver was not wearing a diving suit and he had no audio or video link with Van Beck. After about 15 minutes after the dive has commenced the monitor screen began the crackle and subsequently the lines of the audio and video link were interrupted. The captain and the surveyor informed the assistant diver and the latter replied that this was always happening and he attempted to reconnect and thus resume the link but to no avail. Captain Bargmann says that he then stood up and saw bubbles and some black pieces coming out of the water and he immediately realised that there was something wrong. He tried pulling the chord up and saw that this was all torn and had flesh stuck to it. The captain communicated with the chief officer of the Verlaine and asked him to call the Valletta Port and ask for emergency support. He also instructed Mr. Fink to go on the bridge and see what happened. Fink saw that the bow thruster was running on neutral mode and he immediately switched it off.

From the records of the Magisterial Inquiry (fol. 80 et sequitur of the acts) it results that Raymond Van Beck lost his life because he got sucked in by the bow thruster and parts of his body were torn off or dismembered by the said bow thruster. It also resulted that there was no grid covering the said bow thrusters and that no one knew who had switched on the bow thruster.

Since it is the said bow thruster which brought about the tragic death of Raymond Van Beck, an understanding of the operation of the said bow thruster is of the utmost importance. Captain Bargmann gave evidence to the effect that the bow thruster of the Verlaine cannot be switched on accidentally from the ship since one has to carry out four steps to start the said bow thrusters, the first step is to put on the main switch which is on the operation panel on the bridge and if there is enough power available a control light is switched on to indicate that enough power is available and subsequently the hydraulics of the bow thruster are switched on. Another control light comes on

to signal that hydraulic power is on and the hydraulic system ensures that the bow thruster is on zero position. *“If during the switching on procedure the blades are engaged there would be a black out. If then you start the bow thruster motor, the electric motor, if the electric motor is actually turning it will put a light on and you will confirm that you want it on when it's on its neutral and then you have the lever to give it power. You need two generators to put the bow thruster”* says Captain Bargmann. If not enough power is available the alarm system will go off states the accused who also explained that for a second generator to be switched on this would have to be done from the bridge since the generators were on manual mode and running on light diesel. *“The computer on the bridge could no switch on the second generator. It had to be switched on manually from the engine room. So for this procedure you have to have somebody on the bridge and somebody else in the engine room”* states the accused.

The technical experts appointed by the Inquiring Magistrate i.e. Captain Reuben Lanfranco and Engineer Michael Cassar after carrying out several tests in fact confirmed that the bow thruster could not be switched on with only one generator operating.

The Prosecution in its final submissions states that in its opinion no one actually switched on the bow thruster at the material time of the accident since it has been demonstrated that this could not have occurred because there was not enough electrical power available. The Prosecution therefore maintains that the bow thruster was never switched off after the ship had docked.

In this regard the Court would like to emphasise that a Court of Criminal Judicature has to decide on the basis of facts and not on the basis of mere conjectures. In criminal proceedings the Prosecution is bound to prove beyond reasonable doubt that the accused is or are guilty as charged. In the case in question it therefore had to prove that there was negligence, carelessness, unskilfulness and non-observance of regulations by the accused which brought about the death of Raymond Van Beck. The

Prosecution cannot base its case purely on mere arguments, opinions and assumptions as it has attempted to do in relation to its hypothesis or opinion regarding the operation of the bow thruster.

From the evidence brought forward by both the Prosecution and the Defence it resulted beyond reasonable doubt that the bow thruster in question could not be switched on with only one generator operating. Captain Bargmann and Engineer Raake confirmed that upon mooring they both followed the standard procedure to ensure that the vessel was set from sea mode to harbour mode and that therefore all unnecessary equipment, including the bow thruster, were switched off and this is a documented task and was duly documented in the case in question as evidenced by the safety cross sheet exhibited by Jan Molenda (Dok JM1 at folio 359). The safety cross sheet is a document which needs to be filled in every time the vessel sets into port in order to ensure that the vessel is safely placed in harbour mode. This document clearly indicates that the bow thruster was switched off when the vessel was moored.

The Court deems that it has been established beyond reasonable doubt that the vessel was on harbour mode up to the moment of the accident and that the vessel was therefore only operating on one generator. Moreover it also resulted that generators two and three which were switched off could not be automatically switched on by the onboard computer due to the fact that these generators were switched onto manual mode. As stated above the Court appointed experts during the sea tests carried out in the course of the criminal inquiry confirmed that the bow thruster in question could not have been switched on with only one generator operating since this would have caused a complete black out on the vessel.

The Prosecution managed to prove that the bow thruster in question was switched on neutral mode at the time of the accident but it failed to prove who actually switched on the said bow thruster on when it actually switched on. The Defence on the other hand managed to prove on a

balance of probabilities, as it is bound to do, that the bow thruster was switched off when the vessel was switched onto harbour mode and that the bow thruster could not be switched on automatically whilst the vessel was on harbour mode and with just one generator on. The Prosecution tries to explain what happened by saying that it is of the opinion that the bow thruster was never switched off in the first place. It is not the Prosecution's role to put forward a hypothesis of what might have happened or to give opinions. The Prosecution had to prove beyond reasonable doubt that there was negligence, carelessness, unskilfulness and non-observance of regulations by both the accused or either one of them which brought about the tragic death of Raymond Van Beck and this it certainly cannot be said to have done. The Prosecution failed to prove what happened and or how the action or the inaction of the accused resulted in the tragic death of Van Beck and above all how their action or inaction could have amounted to criminal negligence. The fact that there seems to be no logical explanation for the operation of the bow thruster at the time of the accident does not mean that the Prosecution can solely by process of elimination and not on the basis of facts, come to the conclusion that the bow thruster was never switched off and that this was attributable to the accused.

Furthermore it is relevant to note that from the evidence brought forward it results that when the accident occurred the Captain of the Verlaine, i.e. the accused Bargmann, was on the diver's boat and not on the said vessel. The Captain was therefore not in command of the ship since as a matter of international practice as soon as a captain leaves the vessel command passes on to the second captain or chief officer. In the case in question before leaving the vessel Captain Bargmann passed the command of the said vessel to the chief officer Mr. Fink. What happened on the vessel is unknown to the Captain since he was not present and not in command of the vessel at the time. The Defence proved on a balance of probabilities that when the dive commenced Captain Bargmann and the Chief Engineer Peter Raake had fully

performed their duties. When the Captain descended from the vessel he was no longer in command and he no longer had effective control of the vessel since such command had been passed onto the Chief Officer Mr. Fink and consequently there cannot be said to have been any form of casual link between the Captain and the accident.

It is also relevant to note that the other accused, i.e. Chief Engineer Peter Raake was in the engine room when the accident occurred. After the meeting with the diver he went to the engine room to continue safety and routine checks. He was confident that the bow thruster was switched off because the ampere meter was on zero and the safety check list also confirmed this. It resulted very clearly from the evidence brought forward that the bow thruster is bridge operated machinery and that it can be operated only from the bridge. Since the bridge does not fall within the responsibility of the Chief Engineer the accused Raake certainly cannot be held responsible for matters that fall completely outside his responsibility. The fact that Engineer Raake chose to retire to his room for a few minutes certainly cannot be said to have amounted to negligence once it has been proved that he had performed his duties diligently and was confident as explained above that the bow thruster was switched off.

In its final submissions the Prosecution suggests that criminal responsibility of the accused can be deemed to emanate from Section 13 of the Interpretation Act, i.e. the Prosecution is stating that the vessel can be deemed to be a legal enterprise in terms of Section 13 of the Interpretation Act and that the accused can be held to be guilty on the basis of vicarious responsibility. This argument is totally unfounded for various reasons, the main one being that the accused were charged in their personal capacity under Section 225 of Chapter 9 of the Laws of Malta and not on the basis of vicarious responsibility. Furthermore even if one had to accept the Prosecution's argument that a vessel can be held to be a legal enterprise in terms of Section 13 of the Interpretation Act then it would be the ship owners who would be

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responsible for the legal enterprise and not the Captain and the Chief Engineer.

Finally the Court would like to point out that from the evidence brought forward it clearly transpired that the diver was self employed and that he operated through a company of which he was a sole director and that he was contracted to do the job by the classification society. Raymond Van Beck was therefore solely responsible for all the health and safety issues relating to the diving operation.

As stated above the Prosecution failed to prove their case to the threshold of reasonable doubt required in criminal proceedings since they failed to prove that the accused were careless, unskilful or imprudent in their actions on that they failed to observe some legal norm or rule. Moreover no casual link was established between the accused and the death of Raymond Van Beck and therefore no criminal liability can be found in the accused.

For the above mentioned reasons the Court declares both the accused not guilty of the charges brought against them and consequently decides to acquit them from all the said charges.

< Sentenza Finali >

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