

HONG KONG / JUDGMENT

HKSAR v. CHOW TIN SHING

COURT

Court of Appeal

DECIDED

22 October 2007

CASE / FILE NUMBER

CACC85/2007

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bjbj hT)Y Applicant

Before : Hon Stock JA, McMahon J and Lunn J Dates of Hearing : 20 September and 22 October 2007 Date of Judgment 22 October 2007

J U D G M E N T

McMahon J (Giving the judgment of the Court) :

Background

AUTONUMOUT On 13 March 2007, the applicant was convicted after trial before Her Honour Judge Chua in the District Court of two offences of endangering the safety of others at sea, contrary to section 72 of the Shipping and Port Control Ordinance, Cap. 313 (the Ordinance), being Charges 1 and 2 respectively. In respect of the offence the subject of Charge 1, the applicant was sentenced to six months imprisonment and in respect of the offence the subject of Charge 2, to two years imprisonment. The sentences were ordered to be served concurrently, resulting in a totality of sentence of two years imprisonment. AUTONUMOUT The applicant has been granted leave to appeal out of time his conviction in respect of the 1st charged offence. He seeks leave also to appeal the sentences imposed for both offences. The charges AUTONUMOUT The charges were particularised as follows 1st Charge Statement of Offence Endangering the safety of others at sea, contrary to section 72 of the Shipping and Port Control Ordinance, Cap. 313. Particulars of Offence CHOW Tin-shing, on the 22nd day of February, 2006, in Hong Kong, without reasonable excuse caused to be endangered the safety of other persons, namely the crew upon a tug-boat numbered G37 in a manner that being the Master of an oil barge named Wui Tung 3 of registration number M21006Y, the said CHOW Tin-shing failed to: keep to the starboard side when it was travelling in the Eastern Fairway; and manoeuvre the said oil barge to a starboard side course when the said oil barge and the said tug-boat were meeting on reciprocal or nearly

reciprocal courses on the said Eastern Fairway so as to avoid risk of collision. 2nd Charge Statement of Offence Endangering the safety of others at sea, contrary to section 72 of the Shipping and Port Control Ordinance, Cap. 313. Particulars of Offence CHOW Tin-shing, on the 22nd day of February, 2006, in Hong Kong, without reasonable excuse caused to be endangered the safety of other persons, namely, the persons upon a fishing vessel with the registration number M73209Y in a manner that being the Master of an oil barge named Wui Tung 3 of registration number M21006Y, the said CHOW Tin-shing: manoeuvred the said oil barge to a port side course when the said oil barge was avoiding a tug-boat with registration number G37 at the Eastern Fairway; failed to maintain a proper lookout by sight or hearing; collided with the said fishing vessel resulting in the death of a YIP Kun-chai; and failed to keep to the starboard side when it was travelling in the Eastern Fairway. The facts AUTONUMOUT The facts of the offences were as follows. On 22 February 2006, at about 8:20 a.m., the applicant was the master and helmsman of a 23 meter long motorised oil barge Wui Tung the oil barge) which was proceeding in a westwards direction along the Eastern Fairway through the Lei Yu Mun Channel at a speed of about 7.5 knots. The applicant had been licenced to act as the master of such vessels only five months earlier. The oil barge was empty and as a result of its bow riding high out of the water, forward visibility from the helm position was restricted to an extent that the applicant was unable to see small craft less than 200 metres from its bow. In those circumstances, a crew member of the oil barge would usually be positioned forward so as to keep a lookout for small craft that may have moved, or be likely to move, into the helmsman blind spot AUTONUMOUT On this particular occasion, however, there was only one crew on board the barge, the ship s engineer (PW3). He was located on the starboard side of the barge s wheelhouse and, accordingly, was in little better position to keep a lookout than the applicant located inside the wheelhouse. AUTONUMOUT As the barge progressed westwards at 7.5 knots, more or less in the centre of the fairway leading from Lei Yu Mun, a tugboat and its lighter (an unmotorised crane barge) approached on a roughly reciprocal course. The applicant s oil barge and the tugboat and its lighter passed relatively close by each other, perhaps at their closest separation being about 30 metres apart, each leaving the other to its starboard side. Rule 14(a) of the International Regulations for Preventing Collisions at Sea as applied in Hong Kong under the Merchant Shipping (Safety) Ordinance, Cap. 369 (the Regulations), requires power driven vessels on reciprocal or nearly reciprocal courses to each alter course to starboard so as to pass each other on their port sides. But it was a finding of the judge, confirmed by Exh. P6, the radar plot of the courses of the two vessels, that the oil barge altered course slightly to port so as to leave the tug and its lighter to starboard and then continued to proceed westwards on the wrong (southern) side of the fairway. Rule 9(a) of the Regulations requires vessels proceeding along a fairway to keep as close to the outer limit of the fairway which lies on the vessel s starboard side as is safe and practical. The applicant s breach of those two Regulations was taken into account by the judge in arriving at her conviction in respect of the 1st charged offence. AUTONUMOUT The applicant s barge proceeded on its still approximately westwards course at about 7.5 knots, continuing on the wrong side of the fairway. Nearly three minutes after the oil barge had passed the tug and its lighter it was proceeding past the entrance to Shauiwan Typhoon Shelter. In the water at that location pointing westwards but stationary, with its engine running but not in gear,

was the small fishing sampan registered number M73209Y (the fishing boat) particularised in the 2nd Charge. On board were its master Yip Chai and his son (PW2) who was at the helm. Neither the applicant nor PW3 saw the fishing boat and the oil barge collided with it, sinking it, killing Yip Chai and injuring PW2. AUTONUMOUT PW2 had not been looking behind the fishing boat and saw the oil barge approaching from astern only at the last moment. He attempted to engage gear and motor clear but was unable to do so before the collision occurred. Appeal against conviction AUTONUMOUT Ross for the applicant advanced a single ground of appeal in respect of the applicant s conviction of the 1st charged offence which was to the effect that on the totality of the evidence before the court there was no sufficient grounding for a finding that the applicant had endangered the safety of those on the tug. AUTONUMOUT It is worth noting that the particulars of offence specified in respect of the 1st charge rely on the accepted breaches of Rule 14(a) and Rule 9(a) of the Regulations as the source of danger to the crew of the tug. Unlike the particularisation of the 2nd charge, there is no allegation of a failure to keep a proper lookout. But how those breaches caused danger to the tug crew was not immediately apparent from either the particularisation of the 1st charge or the judge s reasons for verdict. AUTONUMOUT However in the prosecution s written opening this statement appears [a] While steering VI [the oil barge] through the Eastern Fairway [the applicant] failed, contrary to Rule 9 of the International Regulations For Preventing Collisions At Sea; the Regulations, to keep to Starboard. [b] When manouvering to avoid the tugboat, the [applicant] turned to port instead of to starboard contrary to Rule 14 of the Regulations. By turning to port he also endangered the tugboat because, had the tugboat followed the regulations by turning to starboard, the vessels would have been placed on a collision course. AUTONUMOUT Accordingly the foundation of the 1st charged offence was said to be the applicant s breach of Rules 9(a) and 14(a) of the Regulations by manoeuvring his oil barge to port and passing the tug on the oil barges starboard side instead of altering course to starboard and leaving the tug to the port side of the oil barge. AUTONUMOUT But the breach of a Regulation does not automatically result in the safety of any person being endangered. There must be created, by the act particularised in the charge, a situation which is dangerous. What is required by section 72 is that the act of a defendant, either itself or by the circumstances it then creates, endangers or causes to be endangered the safety of others. That is purely a question of fact. AUTONUMOUT Whether or not a Regulation is breached by that same act may be neither here nor there. The safety of another may be endangered where no Regulation is breached and conversely a Regulation may be breached without causing any such danger though in very many cases the breach of a Regulation will create a source of danger to others. AUTONUMOUT The question therefore that arose on the 1st charge was whether, by passing the tug on the incorrect side, the applicant s oil barge endangered the safety of the crew of the tug. Any such endangerment could only have arisen where there was a risk of collision. AUTONUMOUT The tug and the oil barge passed by each other relatively closely, they being about 30 metres apart. But being in relatively close proximity to another vessel, albeit on the wrong side of that vessel, does not necessarily of itself result in the crew of that other vessel being endangered. Something more is required. AUTONUMOUT What was relied upon by the prosecution in its opening statement was that if the tug had altered course to starboard so as to leave the oil barge to port, then there was a risk of collision. AUTONUMOUT But we have

difficulty with that somewhat hypothetical proposition. There was good visibility. Both vessels were maintaining, from Exh. P6 the radar plot, reasonably consistent courses as they approached each other. Those courses were not perfectly reciprocal and from the same exhibit the oil barge was at all times passing down the starboard side of the tug. Both vessels could see each other. Unless PW4, the master of the tug, decided at the last minute to alter course into the path of the oil barge, which he could plainly see, the vessels were at no particular risk of collision. AUTONUMOUT The judge found that the tug had in fact maintained a steady course . From the radar plot evidence accepted by the judge, as reduced to graphic form in Exh. P6, it is true also in our view so far as can be gathered from that evidence that the oil barge maintained a reasonably steady course prior to and while passing the tug and its tow. The earlier anomaly in its course where the plot suggests the oil barge altered course to port by some 20 which was presumably the same alteration of course to port relied upon by the prosecution in its case against the applicant, occurred when the oil barge and the approaching tug and tow were still separated by a substantial distance. That alteration of course in any event took the oil barge further from a reciprocal course with the approaching tug. AUTONUMOUT The particulars of the 1st charge effectively allege that by manoeuvring the oil barge in breach of each of Rule 9(a) and Rule 14(a) of the Regulations the applicant had endangered the safety of those on the tug, and the judge s conclusion was that

31. I am satisfied that the prosecution has proved beyond reasonable doubt the defendant s conduct in not keeping a proper lookout and manoeuvring VI (the oil barge) on an incorrect course in the fairway endangered the safety of the persons on G37 (the tug). The defendant is convicted on the 1st charge. AUTONUMOUT We are not sure why the judge referred to the prosecution having proved beyond reasonable doubt the defendant s conduct in not keeping a proper lookout . That was not the prosecution case so far as the 1st charge was concerned and the evidence established that the tug and oil barge had seen each other well before passing each other. PW3, the crew on the oil barge, had pointed out the tug and its tow to the applicant. Further, the oil barge s 200 metres blind spot in front of its bow would not necessarily apply to a tug and its crane barge tow. That blind spot was calculated on the basis of the size of the small fishing vessel the subject of the 2nd charge. AUTONUMOUT The judge did not provide any specific reason for her conclusion that the applicant s manoeuvring of the oil barge in breach of Rule 9(a) and Rule 14(a) endangered the safety of the tug personnel. She made no finding of the nature that the oil barge had passed too closely to the tug and its tow or that it had dangerously crossed in front of it. Indeed on the evidence no such finding was possible. AUTONUMOUT Further, the prosecution s assertion that the persons on the tug would have been endangered if the tug in attempting to comply with Rule 14(a) had altered course to starboard was undermined by the following statement of the judge in her conclusions as to the 1st charge when PW3 alerted the defendant to the tug s presence, there was ample room and time for the defendant to comply with Rule 14 and move starboard to pass G37 on its portside. Instead, without warning, he moved to port. Seeing this, I infer PW4 did not find it necessary to further sound his horn or to alter his course. (emphasis added) AUTONUMOUT That suggests quite strongly that PW4, the master

of the tug, was satisfied with the course separation of his vessel and the oil barge after the oil barge had altered its course. In that regard the oil barge's alteration of its course to port had taken place when there was from the evidence of PW4 some 100 to 120 metres separation between the oil barge and the tug (though, as we have said, from Exh. P6 the separation may have been greater). AUTONUMOUT PW8, an expert called by the prosecution who was the holder of a Class I Master Mariners Certificate and who was the commanding officer of the Marine Police Training School, said in his evidence that in the event the oil barge had altered course to port as it approached the tug, the tug could proceed straight ahead if its master, PW4, did not fear a collision. That is indeed what the judge found had happened. In that regard, PW8's evidence was, in respect of PW4's actions, as follows. It might be [PW4] sees that the oil barge has taken some actions which he can see that he can go straight ahead and that's why he did not alter course to starboard, and he is not in doubt, then he did not sound the signal as described by Rule 34(d). AUTONUMOUT Rule 34(d) states that where a master of a vessel is in doubt as to whether sufficient action is being taken by another vessel to avoid collision, he shall indicate such doubt by five short rapid blasts on the whistle of his vessel. PW4 gave no such signal and maintained his course. There was no evidence to suggest he thought there was any risk of collision such as to cause him to alter course in some way into the path of the oncoming oil barge. AUTONUMOUT In all those circumstances, independently of any breach of the Regulations by the applicant, it is difficult to see how the prosecution on the evidence before the court had proven to the requisite standard that the applicant's actions in failing to alter course so as to leave the tug to port had created a real risk of danger. AUTONUMOUT Accordingly, we grant leave to appeal against conviction so far as the 1st charged offence is concerned, treat the hearing of the application as the hearing of the appeal and allow the appeal. The applicant's conviction of the 1st charged offence is quashed and his sentence in respect of that conviction is set aside. Appeal against sentence AUTONUMOUT We turn now to the application concerning sentence in respect of the 2nd charged offence. AUTONUMOUT The applicant's ground of appeal against the sentence is that it is manifestly excessive. Mr Ross, on behalf of the applicant, complains in particular that The sentence imposed is manifestly excessive, taking into account that the offence had not been planned. The Applicant was not intoxicated at the time. The Applicant was a relatively inexperienced ship's captain. The real criminality of charge 2 was the failure to provide a lookout for smaller craft at the front of the Applicant's vessel. AUTONUMOUT Nearly three minutes after passing the tug and lighter, the applicant's oil barge was at the extreme southern boundary of the Eastern Fairway and was on a course which would take it into the inshore traffic area which was marked by and ran parallel to that boundary of the fairway. The oil barge was still proceeding at 7.5 knots as it passed the entrance to the Shaukiwan Typhoon Shelter. AUTONUMOUT The fishing boat with which the oil barge collided was lying stationary just 200 metres off the entrance to the shelter. When the collision occurred, the oil barge was either just in the fairway or on the boundary of the inshore traffic area. AUTONUMOUT In those circumstances, where a motorised oil barge with significantly limited visibility and not keeping a proper lookout was proceeding at a substantial speed of 7.5 knots in the vicinity of both a small boat channel and the entrance to

a typhoon shelter, then in our judgment a situation of material risk existed and the safety of those aboard the fishing vessel and indeed any small vessel in that same vicinity was significantly endangered. AUTONUMOUT Ross has provided us with a number of authorities related to sentences imposed in respect of motor vehicle offences, but we do not think those of direct application to a sentence imposed pursuant to section 72 of the Ordinance. As a matter of general principle, any sentence imposed pursuant to a section 72 offence will primarily depend upon the degree of danger created by the acts of the offender in the circumstances as they existed at the time of the offence. Those circumstances will vary enormously. The weather, degree of visibility, sea state, speed of vessels, manouvres performed and other factors pertaining to those circumstances will often be relevant. AUTONUMOUT In cases involving high speed chases by police launches of sampans carrying illegal immigrants in Hong Kong waters, sentences of 2 years and three years imprisonment after trial have been approved by this court : see A.G. v. Chan Siu Yun (1995) 2 HKCLR 223 and R. v. Sze Yui, unreported, CACC 348 of 1995. In the latter case, a subsequent similar offence by the same applicant led to a starting point at the maximum of four years imprisonment being endorsed : see HKSAR v. Sze Yu, unreported, CACC 143 of

2003. It should be noted in these cases, however, that the acts of endangerment were deliberately reckless and of great risk to the safety of the passengers in the sampans and to a lesser extent to the crew of the pursuing police launches. AUTONUMOUT We do not think the same considerations apply in the circumstances of the present case. The applicant performed no deliberately dangerous manoeuvres. He proceeded at the barge's maximum speed, but at a speed well within the limit for the fairway. It is true he had elected to proceed on the wrong side of the fairway and in the vicinity of possible inshore traffic in circumstances where he knew his forward vision was reduced and that the applicant's act brought about a person's death. But it was not a situation where the applicant in a calculated way risked the lives and safety of others such as was so in the above cited cases. Indeed, immediately after the collision the applicant stopped and contacted the authorities in a successful attempt to bring assistance to the scene. Marine police came and rescued the injured son of the deceased. This is to be distinguished from the callous indifference to life displayed by the defendants in the cited cases. The fact that in those cases there was no loss of life is a matter of pure chance. AUTONUMOUT Given the maximum term for the sentence of four years imprisonment, the contrast between the applicant's conduct and the conduct of those involved in intentionally risking the lives of others, should have been given greater recognition in the sentence imposed in this case. AUTONUMOUT For these reasons, we consider the sentence imposed to have been manifestly excessive. In our view in the circumstances of this offence a sentence of 18 months imprisonment after trial was called for. There was some mitigation available for the applicant given his clear record and his immediate calling of assistance to the scene, and that sentence should be discounted to 17 months imprisonment. We do not regard the applicant's relative inexperience as a master of such vessels to be a mitigating factor in the circumstances of this case. AUTONUMOUT The application for leave to appeal against the sentence imposed in respect

of the 2nd charged offence is granted. The hearing of the application is treated as the hearing of the appeal which is allowed to the extent that the sentence of two years imprisonment is reduced to a sentence of 17 months imprisonment. (F. Stock) Justice of Appeal (M.A. McMahon) Judge of the Court of First Instance (Michael Lunn) Judge of the Court of First Instance Mr Simon Tam, SGC of Department of Justice, for HKSAR Mr Philip Ross, assigned by the Director of Legal Aid, for the Applicant PAGE - PAGE A B C D E F G H I J K L M N O P Q R S T U V 1udk 1udk H I J K L M N O P Q R S T U V t"(&`#\$"@AB i\$&`G 7:PQ w^Ba w^Ba 7:PQ EvP & 6" ABC.dot setup Microsoft Word 9.0 Judiciary Title Microsoft Word Document MSWordDoc Word.Document.8

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