# N6813

PAPUA NEW GUINEA
[IN THE NATIONAL COURT OF JUSTICE]

**CR NOs. 575 – 578 OF 2015**

**THE STATE**

V

**CAPTAIN PETER ROBERT SHARP** and
**CAPTAIN ANTHONY MATASIR TSIAU**
*Accused*

Kokopo: Higgins, J

2016: 11th –14th April, 14th–17th June, 1st-5th August,
6th –9th September, 29th & 30th November
2017: 13th February, 13th–17th March,
23rd & 25th May, 3rd–7th July, 28th July

***CRIMINAL LAW – Manslaughter – capsizing and sinking of passenger ferry – whether negligence of the managing director or the master of the vessel sufficient for conviction – Negligence must be personal not vicarious – Negligence must be gross and deserving of criminal punishment***

***NO CASE TO ANSWER – Requirement that evidence insufficient for prima facie case***

***EVIDENCE - Insufficient Evidence – Prasad Direction – evidence leaving reasonable doubt even in absence of any defence case – Verdict to be entered without calling on defence***

**Cases Cited:**
**Papua New Guinea Cases**

*Java Johnson Beraro v The State* [1988-9] PNGLR 562
*R v Begari – Dubere* (1962) N227
*R v Johnson* [1951] PGSC 1
*R v Gamumu* [1963] PNGLR 1
*Regina v Gamumu* [1960] PG Law Rep 1; [1963] PNGLR 1
*State v Waluka* [2011] PGNC 155; N4414
*State v Subang* [1976] PGNC 3

*State v Paul Kundi Rape* [1976] PNGLR 96
*The State v John Koe* [1976] PNGLR 562

**Overseas Cases**

*Andrews v DPP* [1937] 2 All ER 552
*Campbell v The Queen* [1981] WAR 286, 290
*Mamote Kulang of Tansagot v The Queen* (1964) 111 CLR 62
*March v Stramare (F&MH) Pty Ltd* [1991] HCA 12; (1991) 171 CLR 506
*R v Huggins* 92 ER 518
*R v Prasad* (1979) 2A Crim R 45, 47
*R v Royall* [1991] HCA 27
*Vane v Fiannopoullos* [1964] 2QB 739

**Counsel:**

*P. Bannister & S. Dusava,* for the State
*D. R. Cooper, QC,* for Capt. Peter Robert Sharp, (instructed by Warner Shand)
*P. Kaluwin,* for Capt Anthony Matasir Tsiau

**RULING**

**28th July, 2017**

1. **HIGGINS, J:** The State charges each accused, Captain Peter Robert Sharp and Captain Anthony Matasir Tsiau with manslaughter of a number of named persons being now 140 on 27 February 2012 when the MV Rabaul Queen, under the command of Captain Tsiau capsized and sank about 6am that day.

2. The State bears the onus of proving each and every element of that offence or offences beyond a reasonable doubt. The accused bear no onus of disproof nor is any adverse inference to be drawn against them for any perceived failure to answer questions or offer an explanation.

3. The charge being of manslaughter and that species of manslaughter being negligence not any intent to kill or endanger life, it is appropriate to set out the relevant law.

**Manslaughter**

4. **S.302 Criminal Code Act**.

> *'A person who unlawfully kills another under such circumstances as not to constitute wilful murder, murder or infanticide is guilty of manslaughter.*
>
> *Penalty: Subject to Section 19 [lesser penalty may be imposed], imprisonment for life'.*

5. That is subject to s.24, that is, criminal liability will not attach where, in association with some act or omission of the accused there has occurred some accidental event which has substantially brought about the final result. (see *Mamote Kulang of Tansagot v The Queen* (1964) 111 CLR 62).

6. Nevertheless, s.287 is relevant. It provides:

> *(1) It is the duty of every person who has in his charge or under his control anything whether living or inanimate, and whether moving or stationary, of such a nature, that in the absence of care or precaution in its use or management the life, safety or health of any person may be endangered to use reasonable care and take reasonable precautions to avoid that danger.*
>
> *(2) A person upon whom a duty is imposed by subsection(1) shall be deemed to have caused any consequences that result to the life or health of any person by reason of any omission to perform that duty.*

7. For the crime of manslaughter alleged to have resulted from any negligent act or omission the degree of negligence required is above that sufficient for s.327 (negligent act or omission causing bodily harm).

8. Reference is made to *The State v John Koe* [1976] PNGLR 562 per Prentice DCJ @ 265-6. His Honour's findings may be summarised as being that for dangerous driving causing death, the degree of negligence to be proved must exceed that for civil liability yet that degree of negligence may be insufficient for manslaughter which requires a higher degree of negligence but short of that which might be described as reckless indifference to risk of death or serious bodily harm which might be enough for murder – citing Lord Atkin in *Andrews v DPP* [1937] 2 All ER 552 at 557. In *Koe* the accused, being severely intoxicated drove a defective motor vehicle at high speed through the Gordon Market. His driving was, undoubtedly "grossly negligent" even "reckless" and demonstrated "complete disregard for the lives and safety of others" (569).

9. The fact that many lives are lost in this instance is not of itself determinant of whether the accused has been guilty of criminal negligence – see *Java Johnson Beraro v The State* [1988-9] PNGLR 562. See also *R v Begari – Dubere* (1962) N227 per Smithers J.

10. The test for guilt or otherwise of manslaughter by criminal negligence is not in doubt however difficult may be the application of the relevant principles to the facts of any individual case.

11. The facts supporting such a finding must be established beyond reasonable doubt. There is no onus upon the accused to disprove any fact nor can any adverse inference be drawn from the failure of the accused to offer evidence or to provide any evidence to refute the prosecution case.

12. Importantly, to establish criminal negligence the concept of vicarious liability does not apply save insofar as a statutory provision so requires (see *Vane v Fiannopoullos* [1964] 2QB 739).

13. The concept, supported by s.7 of the *Code*, of a common purpose may suffice if the common purpose is to perform an act or acts that risk death or serious injury to a person or persons and are unlawful. (See *R v Johnson* [1951] PGSC 1). The more obvious and, hence, foolhardy that risk-taking conduct is, the more likely it is to cross the threshold between mere negligence and criminal negligence.

14. An example of a risk which, though when taken resulted in death not amounting to manslaughter, is *R v Gamumu* [1963] PNGLR 1. The accused had twice struck the deceased with a digging stick intending to silence her interruption of his grieving for a deceased sister. Mann CJ found that the accused could not be found guilty in circumstances where, though the blows actually causing death were intentional, they could not have been foreseen by a person such as the accused as likely to endanger the deceased's life or cause her any serious harm, even though his acts were wrongful. His Honour said (at 7).

> *"I think therefore that the event not being foreseeable in the circumstances, was due to accident and that the killing is one excused by law unless it comes within the terms of Section 289. That Section would impose upon the Accused a duty to take care in using the stick for the purpose. Although this Section strongly suggests that the ordinary degree of negligence obtaining in civil cases is to be applied, it appears that the duty involved is a duty to take precautions to avoid danger to life, safety or health and that this has to be construed as setting up a standard of negligence corresponding with the common law concept of criminal negligence involving reckless disregard for the life and safety of others. In the particular circumstances of this case the question as to negligence becomes "Ought to have exercised greater care either to guard against risks, known or unknown, or to avoid any possible consequences". In the circumstances, the failure to guard against the consequences which occurred, does not in my opinion fall below the standard required by Section 289". The Accused was acquitted accordingly."*

15. More analogous to the present case save for the scope of the disastrous consequences is *Koe v The State* [1976] PNGLR 562.

16. The accused drove a dangerously defective vehicle whilst he was significantly intoxicated into a section of a busy market "fish tailing" at least twice from side to side, taking up most of the road space narrowly missing an oncoming vehicle jumping a concrete kerb and colliding with 11 people, killing two of them before crossing a road and colliding with a fence.

17. Though noting that "one must take care lest the seriousness of the outcome overshadow one's consideration of the actual negligence at the time; Prentice DCJ found the manner of driving, 'grossly negligent', hence warranting conviction for manslaughter.

18. That test had been adopted in *Prosecutor's Request No.2 of 1974*, [1974] PNGLR 317.

19. More analogous to the present case is *State v Waluka* [2011] PGNC 155; N4414. The accused was skipper of a dinghy carrying both building materials and people which capsized and sank in rough seas. In addition to loading the dinghy with 36x16 foot galvanised roofing iron and 7x7 ft fibre sheets, the accused allowed 18 passengers on board on top of those materials. In addition, just before embarking, the accused drank 4 bottles of SP beer. It was dark and raining with gale force winds and fast tide and current. Waves swelled up from 1.2 to 1.5 meters in height. The accused carried no form of lighting.

20. In those circumstances, Kawi J had no difficulty concluding that s.287 of the *Criminal Code* imposed a duty upon the accused to take reasonable care to avoid the danger that this hazardous situation created. A passenger drowned as a result of the capsize of the vessel.

21. The duty imposed by s.287 does no more than restate the duty imposed by the common law upon persons, such as the skipper of a vessel "to take reasonable precautions to avoid that danger" to "the life, safety or health" of any person who may be endangered.

22. His Honour adopted the view, with which I respectfully concur, that the negligence required to justify conviction for manslaughter goes beyond simple lack of care sufficient for civil liability.

23. Whether negligence found to be a relevant cause of the relevant fatalities is sufficient to be described as criminal or gross to warrant conviction is a question of fact for the tribunal of fact having regard to the circumstances in the particular case.

24. His Honour was satisfied that the boat when it set out was 'grossly overloaded' and obviously facing adverse weather conditions. The relevance of the overloading was to lower the free board clearance of the boat to precarious levels.

> *"54 ... the accused took the risk and compromising the lives and safety of the passengers and the boat, the accused skippered ahead only to have the boat capsize and sunk in the waves.*
>
> *55. In my view, the accused showed such a complete and reckless disregard for the lives and safety of the passengers as well as the boat by taking the boat out to sea in such terrible weather conditions."*

25. Hence the accused was guilty of manslaughter.

26. The case of *State v Subang* [1976] PGNC 3, emphasises the point that even driving in a manner dangerous, speeding and overtaking unsafely will not per se be sufficient for manslaughter. The degree of carelessness must be such as to amount to a "complete and reckless disregard for the lives and safety of the passengers".

27. I have also had regard to the case of *R v Johnson* (1951] PGSC1, which contains, to my mind an excellent exposition of the law for PNG regarding manslaughter by negligent acts or omissions.

28. At the conclusion of the State's case, the accused each submitted that there was no case to answer. That submission involves two enquiries. First, is the evidence legally sufficient for conviction and, even if so, is the evidence such that a tribunal of fact would not convict. The tribunal of fact may if it considers it appropriate, decide that it would not convict the accused on the evidence adduced by the prosecution even absent any evidence adduced by or on behalf of the accused.

29. That latter proposition is supported by the case of *R v Prasad* (1979) 2A Crim R 45, 47 per King CJ:

> *"It is, of course, open to the jury at any time after the close of the case for the prosecution to inform the judge that the evidence which they have heard is insufficient to justify a conviction and to bring in a verdict of not guilty without hearing more. It is within the discretion of the judge to inform the jury of this right, and if he decides to do so he usually tells them at the close of the case for the prosecution that they may do so then or at any later stage of the proceedings: Archbold, Criminal Pleading and Practice 39th ed. (1976) p.332. He may undoubtedly, if he sets fit, advise them to stop the case and bring in a*

*verdict of not guilty. But a verdict by direction is quite another matter. Where there is evidence which, if accepted, is capable in law of proving the charge, a direction to bring in a verdict of not guilty, would be, in my view, a usurpation of the rights and the function of the jury. I think that there is a clear distinction for this purpose between a trial before a magistrate or other court which is the judge of both law and facts and a trial by judge and jury*."

30. It is usually referred to as a Prasad Direction.

31. I propose to consider the facts proved by the State and then to consider in each case whether a case has been made out to require the accused to answer.

**THE FACTS**

32. The fundamental facts are not in dispute, though in some respects the State calls for adverse inferences to be drawn whereas the defence would assert that no such inferences can be drawn to the requisite level of certainty i.e. beyond reasonable doubt.

33. For the purposes of a submission that the evidence cannot sustain the State case, whether the evidence is capable of doing so is ascertained by taking the State's case as its' highest. Whether it should be so taken is a question of fact for the tribunal of fact. However, if, though uncontradicted, the State evidence leaves a reasonable doubt as to the guilt of the accused, the tribunal of fact may, and, indeed, should, enter a verdict of not guilty without calling on the defence case.

34. **MV Rabaul Queen** was, it is agreed, built in Japan in 1983. It was brought to PNG in 1998 and regularly plied between Buka, Rabaul, Kimbe and Lae. That continued until the early hours, approximately 6am, of 2 February 2012. At that time the ship was sailing in rough conditions about 9 nautical miles off from Finschaffen, Morobe Province towards Lae, the capital of the Province.

35. The ship had departed Buka, Autonomous Region of Bougainville, on 31 January 2012. It travelled to Rabaul, East New Britain Province, where it took on passengers and cargo including those coming from Buka, to Kimbe, West New Britain Province, intending to dock at Lae, Morobe Province PNG.

36. Rabaul Queen was a passenger ferry of 259 gross tons and 47 metres in length. It was licensed, under its Survey Certificate to carry 295 unberthed passengers plus 11 crew. It was also rated to sail in weather conditions up to but not greater than force 7. That is a reference to the Beaufort Scale. It rates wind strengths 28 – 33 knots maximum as force 6 – 7; 34 – 40 knots, force 8, and 41 to 47 knots as force 9.

37. High winds were forecast for the Vitiaz Strait area where the Rabaul Queen sank. There was a general warning for the area of gale force winds and also for strong winds up to but below force 7.

38. The Trim and Stability Book for the vessel had distributed passengers 57 to top deck and the remainder to the middle deck. It did not specify the numbers for the lowest deck.

39. That is a little curious as the bottom deck was open to and used by passengers. It also gives a misleading effect to the stability of the vessel. Dr. Renilson's report (ex 72) and his evidence, make it clear that the weight of passengers in the lowest deck contributes positively to the stability of the vessel. Passengers on the middle deck make a neutral contribution whilst passengers on the top deck make a negative contribution to stability. Some diminution in stability is to be expected. A moot point is when that stability is so reduced as to make the vessel unsafe in high seas. That question is further complicated by the fact that there was, for the most part, wind driving rain and sea spray over the exposed deck areas.

40. At each of the stops at Rabaul and Kimbe, passengers disembarked. Some, not all, reboarded but other passengers were also taken on board. It appears that, at least at Buka, some passengers boarded irregularly. Whether they remained on board after Kimbe is not possible to say. Whether they had tickets or not from Buka to Rabaul is equally uncertain.

41. However, it is unlikely that such irregularities would have significantly inflated the number of passengers.

42. There were two records of the numbers on board when the ship left Kimbe. First, the manifest, second, the ticket butts.

43. From that information, the State submits that the numbers shown to be on board at the time of capsize was 386.

44. The evidence disclosed 140 deceased and 246 survivors.

45. The defence did point out that those numbers might not be totally accurate. Some claiming to have been survivors might not have been. On the other hand, it may well be that more perished than disclosed by the evidence. I accept that the enclosed areas were full of passengers and much of the exposed areas as well. On the top deck, though no accurate figure was ascertained, estimates varied from 80 – 100. As this is a criminal trial, the least adverse hypothesis supported by the totality of the evidence must be assumed. Thus I conclude that the upper deck, on the evidence as it stands held approximately 80 persons, including a number of small children.

46. That left about 295 persons to be distributed between the middle and lowest decks.

47. As will be apparent from the exposition of the law, not disputed by any of the parties, the negligence, if any, of the accused and each of them must be identified to determine whether having regard to all aspects of any breach of duty by each accused that accused could at law be guilty of that gross negligence sufficient for manslaughter. Part of that enquiry is to establish the causal link between that negligence and the demise of the deceased persons.

48. The question of causation is sometimes over-complicated. In truth, it is a common sense test, not a philosophical conundrum. (see *R v Royall* [1991] HCA 27 citing with approval @ [15] Burt CJ in *Campbell v The Queen* [1981] WAR 286, 290:

> *"It would seem to me to be enough if juries were told that the question of cause for them to decide is not a philosophical or scientific question, but a question to be determined by them applying their common sense to the facts as they find them they appreciating that the purpose of the enquiry is to attribute legal responsibility in a criminal matter*."

49. That is a reference to the fact that the onus of proof rests on the prosecution to prove that essential element beyond reasonable doubt having given due weight to the presumption of innocence. The text for causation was extensively considered in *March v Stramare (F&MH) Pty Ltd* [1991] HCA 12; (1991) 171 CLR 506. *Regina v Gamumu* [1960] PG Law Rep 1; [1963] PNGLR 1.

50. Thus even if the "but for" test is satisfied it is still a question as to whether the accused can be blamed for the consequence of his or her actions or omissions.

**What caused the deaths of the 140 passengers of the Rabaul Queen?**

51. The short answer is that the proximate and common sense cause of their deaths was being precipitated into the sea or being dragged down into the sea by the capsize and sinking of the Rabaul Queen.

52. It is necessary then to identify the acts or omissions of each accused said to have caused or materially and foreseeably contributed to that tragic result.

53. In coming to a conclusion concerning the culpability of the accused in respect of any act or omission of theirs which is said to have caused or contributed to the capsize of the vessel it is important not to be unduly influenced by the tragic consequences of that capsize, of the grief and suffering inflicted not only upon the families of those who died but also upon the

survivors themselves. The Court is not an instrument to avenge the deaths of those who died or to compensate those who suffered but it must determine calmly and objectively the criminal responsibility, if any, proved by the State to rest upon the accused. That is not to indicate any lack of sympathy to those who suffered loss and grief as a result of the sinking.

54. The accused each submit that the evidence adduced by the State even if accepted at face value does not warrant in either case a finding that the accused had caused or contributed to the deaths that occurred as a result of the capsize of the vessel by criminal negligence.

55. In this context, it is the law, and the State accepts it, that neither accused is to be adjudged to be negligent by reason of any vicarious liability (see *R v Huggins* 92 ER 518 and generally "Vicarious Liability in the criminal law" PT Burns LL.M, 1 Otago Law Review 134 (1965 – 1968). The fault found must be personal.

56. In that context, I turn to the State's submissions concerning Captain Sharp. Some of those have relevance also to Captain Tsiau.

**Seaworthiness**

57. Mr. Bannister, for the State, offers as a starting point a dictionary definition:

> *"In a limited sense, [it is] a ship's fitness to withstand the action of the sea, wind, and weather. In a broader, and legal, sense, it requires that a ship must be handled and navigated competently, fully manned, adequately stored, and in all respect fit to carry the cargo loaded."*

58. The vessel was issued with a Survey Certificate dated 21 May 2008 by the National Maritime Safety Authority which was current at the time of the sinking and effective up until 23 March 2012. It did contain an express restriction on weather and sea conditions under which it could safely operate that is up to force 7. Exhibits 35 & 36also indicate that when the ship was first surveyed, it was accepted by Captain Sharp that the ship would not operate in conditions of force 7 or above.

59. Mr. Bannister accepted that the ship was seaworthy on departing Kimbe on 1 February 2012.

60. He did raise a question as to whether the Master of the ship, Captain Tsiau was properly informed of impending weather conditions.

61. He referred to exhibit 25. However, at each point the National Weather Service simultaneously issued two warnings.

62. The first is headed:

*"**GALE WIND WARNING***

…

***INITIAL GALE WIND WARNING ISSUED BY PNG NATIONAL WEATHER SERVICE AT 05:00AM Wednesday, February 01, 2012 FOR ALL COASTAL AREAS SOUTHERN PNG / INDONESIA BORDER THRU WESTERN PROVINCE TO GULF PROVINCE TO CENTRAL PROVINCE AND MILNE BAY ISLANDS, INCLUDING FINSCHAFFEN / VITIAZ STRAIT TO WEST NEW BRITAIN.***

***SYNOPTIC SITUATION AT 04:00 AM Wednesday, February 01, 2012:***

*A monsoon zone off the Southern coast of PNG, with a strong northwesterly surge.*

***WARNING:***

*NORTHWEST WINDS OF 34/48 KNOTS ARE EXPECTED TO PERSIST FOR NEXT 24 HOURS CAUSING VERY ROUGH AND HIGH SEAS.*

***NOTE:***

*ALL BOATS & SMALL CRAFT ARE ADVISED TO TAKE THE NECESSARY PRECAUTIONS WHILST AT SEA.*

***NEXT REVIEW**: 11:00AM (01/02/2012)"*

63. The second is headed:

*"**STRONG WIND WARNING***

…

***RENEWAL STRONG WIND WARNING ISSUED BY PNG NATIONAL WEATHER SERVICE AT 05:00AM Wednesday, February 01, 2012 FOR ALL COASTAL WATERS OF PAPUA NEW GUINEA.***

***SYNOPTIC SITUATION AT 04:00 AM Wednesday, February 01, 2012:***

*A strong NW surge is dominant over the country.*

***WARNING**:*

*STRONG NORTHWEST WINDS OF 25/34 KNOTS ARE EXPECTED TO CONTINUE FOR THE NEXT 24 HOURS CAUSING ROUGH SEAS.*

***NOTE**:*
*ALL BOATS & SMALL CRAFT ARE ASKED TO TAKE NECESSARY PRECAUTIONS WHILST OUT AT SEA.*

***NEXT REVIEW**: 11:00AM (01/02/2012)*"

64. The first warns of gale force winds, 34-48 knots, force 7; the second of strong winds, 25-34 knots, ie up to but not exceeding force 6.

65. In each case the warning is directed to "all boats and small craft".

66. Attention is also drawn to ex 26 which contains progressive analyses of wind speeds actually recorded in the relevant area between Sunday 29 January 2012 through to "RUTC" 4th February 2012, none show winds beyond force 6 at sea. For the most part they do not exceed force 5.

67. It follows that whilst Captain Sharp did provide only "in-house" forecasts to Rabaul Shipping vessels indicating winds up to 30 knots, implying wave heights up to 4 - 5.5 metres, it has not been demonstrated that those forecasts were so inaccurate as to put the Rabaul Queen at risk.

68. In so finding I accept the State submission that, though not the 'owner' of the Rabaul Queen, Captain Sharp was, as managing director of the owner, the directing mind and force of the owner.

69. I also accept that, analogous to a motor vehicle, a ship, unless carefully managed and used may endanger the life, safety or health of persons either carried by it or potentially coming into contact with it.

70. However, the authorities also make it plain that the relevant control is as, in the case of a motor vehicle, exercised by the driver, in the case of a ship, the master.

71. Section 287, *Criminal Code Act* 1974 provides:

> "*(1) It is the duty of every person who has in his charge or under his control any thing, whether living or inanimate, and whether moving or stationary, of such a nature that in the absence of care or precaution in its use or management the life, safety or health of*

*any person may be endangered, to use reasonable care and take reasonable precautions to avoid that danger.*

*(2) A person on whom a duty is imposed by Subsection (1) shall be deemed to have caused any consequences that result to the life or health of any person by reason of any omission to perform that duty.*"

72. It has limited application to Captain Sharp, though direct application to Captain Tsiau.

73. Nevertheless, it does not change the fundamental principle that to be guilty of manslaughter the breach of duty must be so egregious as to be described as gross negligence worthy of criminal sanction.

**Safety Management**

74. It may be accepted that Rabaul Shipping had a duty whether arising from contract or the general law to safeguard passengers and crew on its vessels. Captain Sharp was the directing mind of the Company and, hence, had a personal obligation to ensure safe operation of its ships.

75. His duty of oversight would have included ensuring that Masters were properly instructed and equipped to carry out safety precautions on board.

76. It seems to me that this vessel failed in terms of safety drills and announcements and in having at least one life jacket cabinet locked.

77. However, there is no evidence adduced by the State to point to Captain Sharp failing properly to instruct, in particular, Captain Tsiau, in the safe operation of the vessel.

78. Indeed, the evidence suggests that the vessel was properly equipped but, for example, life jackets and drills were not deployed.

79. It follows that no failure of Captain Sharp is identified in this respect. It is purely speculative to postulate any failure let alone one amounting to recklessness.

**Ship Stability**

80. Mr. Bannister alleged that Captain Sharp had failed to ensure that there was a copy of the Trim and Stability Book provided on board. The only evidence for that is that on inspection at Madang in October 2011 the inspector neither saw nor asked to see a copy of the Book on board.

81. That is insufficient to prove the negative even if it could be established that the absence of the Book had any causative relationship to the capsize of the vessel.

82. There is no evidence that the buoyancy or integrity of the vessel was compromised by any failure of the Master to observe the load line (i.e. the Plimsoll Line) or that the vessel did not operate with sufficient free board.

83. Nor is there any evidence that the heavy winds and seas contributed to any lack of buoyancy or stability of the vessel.

84. The three (3) so-called "rogue" waves did compromise the vessel but in the absence of those waves there was no reason to doubt that the vessel would have safely continued to Lae.

**Appropriately qualified crew**

85. It appears that Captain Tsiau possessed a Master's Certificate one grade below that required to be in command of the Rabaul Queen. The crew, though a correct number for the ship, lacked the appropriate qualifications.

86. However, as Mr. Bannister acknowledged, that did not demonstrate any lack of competence for the tasks they were performing though it breached s.103 of the *Merchant Shipping Act* 1975.

87. Whilst I agree that that failure could be placed under the responsibility of Captain Sharp as the controlling mind of Rabaul Shipping, there is no evidence that it compromised the safety of the vessel or those on board.

88. The mere fact that a motor vehicle driver is unlicensed or is driving an unregistered motor vehicle does not logically enable a conclusion that the safety of the public has been thereby endangered.

**Excessive number of passengers**

89. I can find on the evidence thus far that the number of passengers aboard the Rabaul Queen after leaving Kimbe exceeded the number limited by the Survey Certificate.

90. The evidence establishes, in the absence of contradiction that there were no less than 386 persons including crew, on board.

91. The causal connection between this number and the capsize is relevant particularly to the case against Captain Tsiau but it fails as a particular of negligence against Captain Sharp.

92. The reason for that is that, although Captain Sharp was well aware of the passenger limits, there is no evidence that he instructed or was aware of the excess passenger load on this voyage.

93. There being no other respect in which it is alleged that Captain Sharp failed in his duty of care towards passengers and crew of the Rabaul Queen, it follows that he has no case to answer and a verdict of acquittal must be entered.

**Captain Tsiau**

94. The duty of care to be expected of Captain Tsiau is that of a competent Master Mariner Class 3. As Captain Hussain deposed, the Master of a vessel has the ultimate responsibility for the safety of all on board. He has command of the crew and must properly instruct them to perform their duties and take all reasonable precautions to ensure the health and safety all on board.

95. Mr. Bannister submits, and I agree,

> *"Before a person can be guilty of the offence of 'Manslaughter' by negligence the prosecution has to prove that he is guilty of such gross negligence that it is a crime against the State."*

96. That is re-stated in a number of ways but the accused must be shown to have been reckless. Whether a degree of negligence proved against an accused, shown to have been causally connected to the relevant death or deaths is sufficient, is a question of fact for the tribunal of fact to determine.

97. Mr. Bannister submitted that Captain Tsiau was culpable in a number of respects.

**Ship stability**

98. It has already been noted that in October 2011 Mr. Karl Kamang inspected the vessel at Madang. He neither noticed nor asked to inspect the Trim & Stability Book. As I have stated that does not establish that there was no such book on board.

99. Captain Tsiau was undoubtedly aware of the requirements of s.91 of the *Merchant Shipping Act* 1975. If not, in assuming the role of a Master Class 3 he is to be taken as aware of it.

100. However whilst there is evidence that though the load lines were not submerged, the ship at Kimbe had a slight list to port. Section 91 provides:

> *"(2) A passenger ship must not be so loaded that –*

*(a) if the ship is in still water of specific gravity of 1.025 and has no list – the appropriate subdivision load line on each side of the ship is submerged, or*

*(b) the appropriate subdivision load line on each side of the ship would be submerged if the ship were in still water of specific gravity of 1.025 and had no list."*

101. This does not require a vessel to have no list before setting out to sea. There is no evidence that the vessel was, in any event, overloaded within the meaning of s.91.

102. However, the presence of the slight list to port noticed by a number of witnesses is not irrelevant to the safety of the vessel or to the duty imposed on the Master.

103. As Dr. Renilson deposed, the stability of the vessel could be compromised in heavy seas if the stability tanks were not fully pressed, that is, filled to the brim with water. That is because the movement of water in the tanks would exaggerate any listing of the vessel.

104. Evidence was forthcoming that, at Kimbe, some effort was made to fill one of the tanks, probably on the port side. A hose being deployed for that purpose broke away gushing water onto the deck. It appears that the officer on the bridge was satisfied to seal the tank at that point. That does give rise to a doubt as to whether that tank was fully pressed but it by no means evidences the contrary proposition.

105. The list to port on departure could support that view but there are so many competing hypotheses (loading of cargo, movement and distribution of varying weights of passengers) that no adverse conclusion would be drawn beyond reasonable doubt if it became necessary so to conclude.

106. The loading of passengers and their distribution is another issue. In that respect the evidence supports a conclusion that more passengers were loaded than the vessel was licenced to carry. The prosecution estimate may not be totally accurate but given the eye-witness accounts, I could be satisfied beyond reasonable doubt that it represents the minimum number.

107. For this the master must bear responsibility. The evidence discloses that no check was made of actual passenger numbers or of their distribution. The passengers found their own levels. I do accept that open deck areas were subject to rain and sea spray and, to an extent, passengers would have crowded more into sheltered areas, however in this respect, the ship was to the extent the State alleges, overloaded with 386 as opposed to 310 persons allowed under the Survey Certificate (ex 36).

108. The Master, therefore, was in dereliction of his duty in not ascertaining the surplusage and dealing with it, including the relative distribution of those passengers between the decks.

109. On the evidence to date, the Master further, in my view, failed to ensure that life-jackets were readily available to all on board if and when required and to sufficiently instruct in their use. The only instruction the evidence discloses was at Rabaul where, incidentally, Captain Sharp was based.

**Qualified Crew**

110. It is apparent that not all the crew, including Captain Tsiau, held appropriate qualifications. How that contributed to the deaths of passengers is entirely speculative.

**Sea & weather forecasts**

111. I have already addressed this issue. It is apparent that Captain Tsiau had warning of near gale force winds and rough seas. The evidence is not sufficiently clear that the forecast or experienced weather conditions exceeded the rating of the vessel to navigate in conditions of force 6 but not force 7 wind conditions. Nor do the weather reports (ex 26) indicate that those conditions were exceeded even in the Vitiaz Strait area. The force 8 – 9 winds referred to in ex 26 were, according to the mapping, over the land not the sea, as Mr. Kaluwin pointed out.

**Cause of the Capsize**

112. The evidence is uncontradicted, and indeed, not disputed by the State, that the proximate cause of the capsize and, hence, the drowning of 140 passengers was the concatenation of 3 very large waves striking the starboard side of the ship and turning it over to port. From the 1st to the 3rd strike was no more than 20 seconds.

113. It was Dr. Renilson's opinion, and I accept it at face value, that there is no evidence that the stability of the vessel was materially compromised when it left Kimbe port and that but for the 3rd wave, the vessel would have righted itself and not capsized.

114. Some of his opinions were necessarily speculative. For example, the relative distribution of passengers between the top and bottom decks.

115. He further speculated that the lightship mass and VCG (vertical centre of gravity) had likely changed since 1983. He therefore postulated that using the Trim and Stability Book was likely to have been misleading.

116. That, if so, could not, in my view, be a valid criticism of the accused. They could not be expected to know or even suspect that the Trim and Stability Book was misleading, if, indeed, it was.

117. It follows that, but for the 3 waves striking the ship of Finschaffen it would not have capsized.

118. Whether any of the measures taken or omitted would, if performed otherwise, have prevented the capsize, is merely speculation.

**Safety Management**

119. It is, nevertheless, an element of the State's case that, granted an unforseen emergency had or might have emerged, it was the duty of the Master to take all reasonable steps to safeguard the life and safety of all on board in anticipation of such an unforseen but possible event.

120. The State points to the absence of any muster of passengers, of emergency signal recognition instruction, of life raft embarkation areas and of effective life-jacket usage or access.

121. I accept that the evidence supports those criticisms.

122. That was a failure of the Master's duty to passengers and his crew.

123. It may be added that the logs do not indicate the mandated contact with Coastal Radio.

124. It is suggested that Captain Tsiau thereby evidenced:

> *"complete lack of concern … for*
> - *the safe operation of the Rabaul Queen; and*
> - *the life, safety and health of its passengers and crew".*

125. I would agree whilst substituting "significant" for "complete".

126. In the respects I have mentioned, I find there is evidence to support the prima facie conclusion that Captain Tsiau failed in his duty as master towards passengers and crew.

**Causal relationship to deaths at sea**

127. It is trite that, even if negligence exists, it becomes supportive of the charge of manslaughter if, and only if, it was causative of, or, at least, materially contributed to the death of a person or persons.

128. In that context, the failure to maintain contact with Coastal Radio does not seem to me to be causally related to the capsize of the vessel or subsequent drownings.

129. The evidence does not support the view that any death occurred otherwise than in the immediate aftermath of the capsize. If the failure to report to Coastal Radio had delayed rescue, and that is speculative, it has not been causative of any fatality.

**The minor list to Port**

130. That list does not evidence in itself a diminution in the stability of the vessel unless it establishes the failure to press the starboard tanks.

131. As Dr. Renilson could not, as an expert, so conclude, neither can I.

**Navigating into Vitiaz Strait**

132. An alternative route was open. However, whether it should have been chosen is the question. If it was a reasonable choice so to proceed, then, even if, in hindsight, the alternative route would have been safer, that does not render the choice made as causative in any relevant sense of the disaster.

133. There was no reason to suppose that the conditions in Vitiaz Strait would or did exceed force 6.

134. There was, as I have found, evidence of failure to carry out safety drills to prepare passengers and crew for the emergency which happened.

135. It is, however, important to bear in mind, as Mr. Kaluwin submitted, the practical likelihood in the circumstance of any of those measures in actually safeguarding any life at risk from the kind of emergency which manifested itself.

136. There was but 20 seconds, during which the ship was unexpectedly and significantly pitched to starboard, not once, but twice before the 3rd wave struck capsizing the vessel. To assume that musters or emergency assemblies or distribution of life-jackets, or, even, access if not impeded could have led to the donning of life-jackets is to my mind, fanciful.

137. Not even Captain Tsiau had time to locate and don a life-jacket and he was in the wheelhouse.

138. Nevertheless, it would be possible for a jury properly instructed to conclude that the instances of negligence as to safety precautions even as far as a failure to mandate that passengers don life vests in the rough weather both to be expected and when experienced, even to guard against a passenger being

washed overboard, might have been prudent. It is a jury question as to the extent of that negligence in the circumstances. There is, therefore, as a matter of law a prima facie case against Captain Tsiau.

139. There is, however, the further question raised both by *State v Paul Kundi Rape* [1976] PNGLR 96 and indeed *R v Prasad* (supra) as to whether on the evidence adduced thus far the accused ought to be acquitted. If the evidence is such that, I am of the view the accused should be acquitted, the State case being closed, I have a discretion not to call upon the accused to proceed but enter a verdict of acquittal.

140. Bearing in mind the tenuous causal connection between the negligence of Captain Tsiau and any death that occurred, it seems to me that a verdict of not guilty of causing death by gross negligence is mandated.

141. I enter that verdict accordingly.

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Public Prosecutor's Office: *Lawyers for the State*
Public Solicitor & D.R. Cooper, QC: *Lawyers for the Accused*