IN THE SEYCHELLES COURT OF APPEAL

[Coram: F. MacGregor (PCA) , S. Domah (J.A) , A.Fernando (J.A) **]**

Criminal Appeal SCA 22/2013

(Appeal from Supreme Court Decision CR 13/2013)

Stephan Johnny Barreau — Appellant

Versus

The Republic — Respondent

Heard: 09 December 2015

Counsel: Mr. Bernard Georges and Mr. Nichol Gabriel for Appellant

Mr. George Thachett for Respondent

Delivered: 17 December 2015

JUDGMENT

S. Domah (J.A)

[1] On 8th February 2013, a collision between two boats occurred at 10.00 p.m. in the territorial waters of Seychelles in between Roche Caiman and Cerf Island. One of the boats, Plaisance, was carrying tourists and hotel staff and the other, a catamaran Cerf 1, was proceeding to pick up hotel staff. Judging by the time they set out, they may or may not have intersected in their respective courses. But intersect they did, even if not at 90˚, with serious consequences. Cerf 1 hit Plaisance at 8 o'clock at the rear, not without producing casualties. Of them, Rebecca Davidson of New Zealand was seriously injured and would expire as a result of her injuries: dislocation of neck and injury at the chest. Lucy Taylor of the United Kingdom would escape with injuries. The skipper of Cerf 1 was arrested and later charged under four counts of an Information.

[2] The four charges were as follows:

Count 1: for manslaughter contrary to section 192 and punishable under section 195 of the Penal Code for unlawfully killing Rebecca Davidson of New Zealand;

Count 2: for navigating a vessel in a manner so rash or negligent as to be likely to cause harm to any person contrary to section 229 (b) of the Penal Code and punishable under section 229 of the Penal Code. For causing harm to Lucy Taylor;

Count 3: Driving a pleasure boat whilst under the influence of alcohol or a drug to such an extent as to be incapable of having proper control of the motor boat contrary to Regulations 8 of Beach Control Regulations of the Beach Control Act 14 and punishable under Regulation 21 of the Beach Control Regulations of the Beach Control Act Cap 14;

Count 4: Smoking a controlled drug namely, cannabis contrary to section 6(b) read with section 26(1) of the Misuse of Drugs Act Cap 133 and punishable under section 29 (1) of the Misuse of Drugs Act 133.

[3] He pleaded not guilty to the charges and was defended by counsel. At the trial the prosecution called 16 witnesses and the defence called 5.

[4] The trial Judge eventually found him guilty under Count 1, Count 2 and Count 4. He dismissed Count 3. After hearing appellant's plea in mitigation, the learned judge sentenced him to 10 years imprisonment under count 1, 1 year imprisonment under Count 2, with sentence to run concurrently and 1 year imprisonment under Count 4, with sentence to run consecutively. He has appealed against both the conviction and the sentence.

[5] He has offered 7 grounds as follows:

1. *The Supreme Court had no jurisdiction to hear the case brought against the Appellant in that the Penal Code offences with which he had been charged were not committed on any island of the Seychelles Archipelago set out in the Schedule to the Constitution.*
2. *The learned Trial Judge erred in his application of the law relating to manslaughter in that*

(a) *He failed to distinguish between manslaughter by unlawful act and unlawful omission (page 12 of the judgment);*

(b) *He failed to apply the proper tests of what constitutes manslaughter in Seychelles;*

(c) *He failed to consider the unlawful act and unlawful omission which caused the death and therefore failed to apply the evidence to the law;*

(d) *He attributed the wrong cause (no proper look out) to the effect (the collision) and in consequence failed to consider that the main cause of the collision was the fact that the Appellant had not seen the other vessel because of the defective lights of that vessel.*

3. *The learned Trial Judge erred in his propensity to dismiss the evidence supporting the Appellant's case and instead fabricate evidence to bolster the case for the prosecution, in particular:*

(a) *With regard to the respective sizes of the two vessels (page 3 of the judgment);*

(b) *With regards to the lights of the vessel of the Appellant (page 4 of the judgment) and the lights of the other vessel (page 5 of the judgment);*

(c) *With regard to the angle at which the Appellant's vessel collided with the other vessel (page 6 of the judgment);*

(d) *With regard to the excuse as to why the other vessel had not observed the Appellant's vessel (page 8 of the judgment);*

4. *The learned Trial Judge erred in not considering all the evidence of contributory negligence on the part of the other vessel, in particular the matters set out below, and in his finding (page 13 of the judgment) that contributory negligence is not a defence in an accident case:*

(a) *The consequences as to visibility of that vessel by reason of it not having a 360 degree all-round light;*

(b) *The testimony of the witness Valmont that the other vessel should not have left port on account of its defective navigation lights;*

(c) *The testimony of witness Khan that that vessel should have kept a sharp all-round lookout and maintained a slow speed;*

(d) *The fact that the other vessel also had a duty to avoid a collision and failed in that duty by not taking evasive action;*

(e) *The fact that, had that vessel not left port, the collision would not have occurred.*

5. *The learned Trial Judge erred in the absence of any evidence of impairment from either cause, in taking into consideration the fact that the Appellant had consumed alcohol and smoked cannabis prior to the collision as a factor establishing his guilt;*
6. *The learned Trial Judge erred in his refusal to take into consideration, when sentencing the Appellant, the contributory negligence of the skipper of the other vessel.*
7. *The sentence of 10 years imprisonment is manifestly harsh and excessive in all the circumstances of the case, especially considering:*

(a) *The sentencing pattern of courts for similar offences;*

(b) *The contributory negligence of the other vessel in the collision.*

[6] As may be seen, five of them relate to the conviction and two of them to the sentence. We note that learned counsel for the Appellant in his Skeleton Heads of Argument merged Grounds 1 and 3 and Grounds 2 and 4. We find it more convenient to deal with each Ground in the order in which it has been raised in the Grounds of Appeal.

GROUND 1

[7] The issue under Ground 1 is that the accident took place at a place between islands so that the provisions of the penal code do not apply in these places. The short answer to this submission which was not pursued with much seriousness by learned counsel is that the accident happened in the territorial sea of the Republic of Seychelles. The territory of Seychelles, as per Section 2(1) of the Constitution comprises the territorial waters and the historic waters and the seabed and the subsoil underlying. The Maritimes Zones Act gives

further details thereon. The territorial sea for Seychelles extends to 12 nautical miles from the baseline and the sovereign jurisdiction of Seychelles extends and has always extended to the internal waters, territorial sea and the archipelagic waters of Seychelles and the seabed and the subsoil underlying, and the air space over, such sea and waters: section 7. That should be the answer to this ground. This ground is, accordingly, dismissed.

GROUND 2

The learned Trial Judge erred in his application of the law relating to manslaughter in that

(a) He failed to distinguish between manslaughter by unlawful act and unlawful omission (page 12 of the judgment);

(b) He failed to apply the proper tests of what constitutes manslaughter in Seychelles;

(c) He failed to consider the unlawful act and unlawful omission which caused the death and therefore failed to apply the evidence to the law;

(d) He attributed the wrong cause (no proper look out) to the effect (the collision) and in consequence failed to consider that the main cause of the collision was the fact that the Appellant had not seen the other vessel because of the defective lights of that vessel.

[8] The respondent in his argument has controverted the above ground in Ground 2. In his view, the trial judge treated the case as one of gross negligence manslaughter, took into account the submissions which learned counsel for appellant had made in law and on the facts to come to the conclusion that all the elements of the offence as charged stood to be duly proved. He had identified the facts as appellant's manner of navigating his vessel, at night-time, after consuming alcohol and smoking cannabis, at a speed of 25-27 knots, without a boat boy who could alert him of any danger and his not keeping a proper look out for impending danger to other users of the area.

[9] We agree with the submission of learned counsel for the appellant that the Court should have seen the distinction that law makes between constructive manslaughter and gross negligence manslaughter. However, as rightly conceded by him, the learned judge did not stray from the actual test applicable to gross negligence manslaughter. The test he used was "*proof that the conduct of the accused which caused the death of the deceased amounted to a breach of duty owed towards the deceased and was so serious as to justify the imposition of criminal penalty."*

[10] In the case of **Ragain v R [2013] SLR 619**, Fernando JA, went to length in elucidating the distinction to be drawn between the two. He referred to the case of **R v Bateman (1925) 19 Cr App R 8** to emphasize as follows:

> *"the negligence of the accused should have gone beyond a mere matter of compensation between subjects and showed such a disregard for the life and safety of others as to amount to a crime against the State and conduct deserving punishment."*

[11] We cannot do better than refer parties to that judgment of this Court. If we were to add anything at all, we would say this by way of elaboration. To the extent that negligence is dependent upon a duty of care in the common law system and because we have in Seychelles the law of *delict* based on article 1382 sourced from the French Civil Code, the legislator saw it fit to introduce a statutory duty of care for the purpose of giving effect to section 192 of the Penal Code. The duty under section 192 is a duty tending to the preservation of life or health. It reads:

> *"Any person who by an unlawful .... omission causes the death of another is guilty of the felony termed "manslaughter." An unlawful omission is an omission amounting to culpable negligence to discharge a duty tending to the preservation of life or health, whether such omission is or is not accompanied by an intention to cause death or bodily harm."*

[12] Now, the term duty relating to the "preservation of life and health" is specially provided for in sections 202 to 206. For the purposes of our case, section 206 reads as follows:

> *"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 and precaution in its use and management, the life, safety or health of any person may be endangered, to use reasonable care and take precautions to avoid such danger; and he is held to have caused any consequences which result to the life or health of any person by reason of any omission to perform that duty."*

It is worthy of note that the duty of care inherent in English law is statutory in our jurisdiction for the purposes of section 192 of the Penal Code. In this regard, we agree with learned counsel for the appellant that the proper approach to the guilt or otherwise of the appellant should have been as follows: whether there was omission in the first place, an omission which was unlawful and tantamount to culpable negligence to discharge a duty tending to the preservation of life, safety or health; and which omission resulted in death of a person.

[13] On the facts, learned counsel for appellant submitted that the learned judge, in applying the relevant test, should have taken into account two factors: (a) that the accused had taken all his precautions before setting out; and (b) the accused had shown due regard for life and safety of others. The appellant had been following the same track every night which was a dedicated and marked out route for him; that this route kept him clear of any corals or islands; that he had been doing the same speed every night; that his boat was navigationally seaworthy; that he had never envisaged the possibility of meeting a boat without lights ahead of him; that even if a boat found itself on his way, that boat should have steered itself out of the path of the boat of the appellant.

[14] Instead, learned counsel for the appellant submitted, the learned judge concentrated on the following factors: that there would be small boats with flashlights and no navigational

lights; that appellant should not have consumed alcohol and puffed cannabis while on duty; and that the appellant should have taken on board a boat boy and if he had not should have exercised proper look out.

[15] That appellant had been following the same track every night points to the dangerous assumption the appellant had made in the discharge of his duties that because he had not met with any obstacle before, he would never ever meet with any at any time. Negligence does not stop being negligence for having been carried over a number of years. From his own evidence, all his concern was the avoidance of corals and islands for which he relied on his GPS. It shows that he was completely oblivious of the presence of people in boats when he knows from his experience that there are always boats. That he was navigationally seaworthy gives him credit for technical compliance with the law but does not give him credit for his speed in on a dark night in the territorial waters where he should have been aware that he was not on the high seas where traffic is rare and spare. That he never expected the possibility of meeting a boat without an anchor light shows his lack of anticipation in his job. A reasonable skipper would have foreseen that there will be, in the territorial waters of Seychelles, fishermen and tourists at one time or another. He was not an ignoramus of the area to assume that he was the sole master of the domain. That the other boat had a duty owed to the appellant to steer clear of him and he owed no duty to the other boat to steer clear of it is another instance of the negligent manner in which he had undertaken the trip.

[16] The omissions of the appellant were serious enough in the manner of his navigation as to amount to a very high degree of negligence within the meaning of **R v Adomako (1994) 3 WLR 288: Joubert (1976) SLR 39 at p. 42; [see also Archbold 19-109/10/11]**. In other words, it satisfied the test of "*having regard to the risk involved, was the conduct of the appellant ... so bad in all the circumstances as to amount to a criminal act or omission?*" The appellant was taking obvious and serious risks of causing damage to other seafarers: **Kong Cheuk Kwan v R [1986] 82 Cr. App. R. 18.** Being in the tourism sector, he should have realized – which he did not – that there are marine users in the dark and the manner in which he navigates pays scant regard to the presence of others on

his path. If there is anyone on his path, his view is that it is they who should move out of his way as he approaches. He, for one, owed no duty of care to them; they have a duty of care to him. That is the state of mind in which he navigates: **R v Lidar CA 11/11/99.** The fact that he takes cannabis puffs before he takes the gear to navigate does not mean anything to him. The state of mind with which he navigates leaves a lot to be desired. In the territorial waters between the islands where he knows he meets commuting tourists, he gave evidence he did not foresee the possibility of an accident with anyone, let alone the probability of it. He treated the area between tourists as though he was on the high seas. His state of mind clearly points the fact that he had not foreseen the risk of serious injury or death to people on his path as well as the high probability of that risk: **R v Lamb .....; Archbold 43rd Ed. Para. 20-49; R v Marzetti (1970) SLR 20 at p. 22; R v Hoareau (1972) SLR 60 at p. 62.**

[17] Learned counsel for the appellant on this ground submits that Plaisance should not have left out for sea in the first place because it had a missing anchor light whereas Cerf 1 had all its lights and could do so. It is not the negligence in setting out on the trip that matters. If such an argument was accepted, we would be introducing an evil precedent in our law. No one will know how far back in time one should go. The principle is what precautions one takes in the minutes and the seconds prior to the collision and not what one did or did not do far back in the day or time. One may refer on this issue the manner in which such cases are assessed from the decision of the Privy Council in the Hong Kong case of **Kong Cheuk Kwan v The Queen Privy Council June 17, 18, July 10, 1985**.

[18] When the relevant proximate time is looked at, the skipper of Plaisance had passed the intersection point and was directing its attention to the course ahead. Appellant was coming from behind at a speed of 25-27 knots, had failed to see a white object in front of him, which he however did see after impact. If he saw a boat after impact, he could have seen it before and should have seen it before. That he did not do. Also, in the minutes and seconds prior to the collision, there was a duty on appellant, if his GPS was slipping away, to slow down or stop for the purpose of picking it up. At that moment in time, he

left Cerf 1 basically without control. The manner in which he says he was flung and Cerf 1 hit Plaisance twice shows the degree of negligence with which he was operating his catamaran.

We see no merit under Ground 2.

GROUND 3

The learned Trial Judge erred in his propensity to dismiss the evidence supporting the Appellant's case and instead fabricate evidence to bolster the case for the prosecution, in particular:

(a) With regard to the respective sizes of the two vessels (page 3 of the judgment);

(b) With regards to the lights of the vessel of the Appellant (page 4 of the judgment) and the lights of the other vessel (page 5 of the judgment);

(c) With regard to the angle at which the Appellant's vessel collided with the other vessel (page 6 of the judgment);

(d) With regard to the excuse as to why the other vessel had not observed the Appellant's vessel (page 8 of the judgment).

[19] Under Ground 3 reproduced above, learned counsel for the respondent has directed our mind to a misapprehension of learned counsel for the appellant. What he thought came out of propensity and fabrication of the learned judge in fact came legitimately from the evidence which comprised photos and what the learned judge found in his locus visit. This related to the respective size of the vessels, the port side red light of the vessel around where the deceased was seated, the angle at which the collision took place etc.

[20] In the light of the above, we do think the words "propensity" and "fabricate" were unfelicitously used. We see no merit in Ground 3. It is dismissed.

GROUND 4

The learned Trial Judge erred in not considering all the evidence of contributory negligence on the part of the other vessel, in particular the matters set out below, and in his finding (page 13 of the judgment) that contributory negligence is not a defence in an accident case:

(a) The consequences as to visibility of that vessel by reason of it not having a 360 degree all-round light;

(b) The testimony of the witness Valmont that the other vessel should not have left port on account of its defective navigation lights;

(c) The testimony of witness Khan that that vessel should have kept a sharp all-round lookout and maintained a slow speed;

(d) The fact that the other vessel also had a duty to avoid a collision and failed in that duty by not taking evasive action;

(e) The fact that, had that vessel not left port, the collision would not have occurred.

[21] Ground 4 questions the treatment by the learned judge of the issue of contributory negligence in this area of criminal law of culpable criminal omission. He argues that the learned judge brushed aside valuable testimony in appellant's favour which was given by witness Valmont and witness Khan and that the learned judge played it down. According to the evidence, Plaisance with defective lights should not have left the port at all; its duty of care was higher because it had tourists on board whereas the appellant was alone; its boat boy had been sitting at the wrong place; it was travelling at the speed of 4000 rpm. The trial Judge, according to learned counsel, also ignored the decisions cited by him: namely, **Adam v Republic [1981] SLR 39 and R v Hoareau (1972) SLR 60** at p. 62. **R v Marzetti (1970) SLR 20 at 22.**

[22] There is no doubt of the fact that contributory negligence is not a defence to a charge under culpable homicide. It would be a defence if the contributory negligence were so gross as to override the negligence of the defendant. However, in assessing culpable

homicide there arose a duty upon the learned judge to weigh whether Plaisance was equally negligent so as to dilute the culpability of the defendant. We have gone through the judgment. The learned judge does address the issue in one paragraph. He considered that the omission of the Plaisance was not of such a degree that it should have a bearing on the culpability of the appellant so as to dilute it or negate it. True it is, he does not elaborate upon it. But this was not a head-on collision. Plaisance had been hit at the rear and the only duty of care it had was to those in front and not those at the back. We find no merit under this Ground. It is dismissed.

[23] We have to say that we are in the realm of criminal law where contributory negligence is not a defence to a charge. But it does play a part in the assessment whether the negligence of the defendant is of a criminal nature or a civil nature. As authorities establish, in determining whether the negligence was also culpable, contributory negligence can assist: **Archbold 19-111; *R v Marzetti* (1970) SLR 20, 22: *R v Hoareau* (1972) SLR 60, 62**. If gross negligence is proved it is enough that it was a substantial cause of death Archbold 19-111. This does not only mean that contributory negligence will not matter, but rather that a less than substantial cause of death arising of the gross negligence will not suffice.

[24] In this case, the learned judge had weighed the conduct of the appellant with that of the skipper of Plaisance to come to the conclusion he did. We find Ground 4 lacking substance. It fails.

GROUND 5

The learned Trial Judge erred in the absence of any evidence of impairment from either cause, in taking into consideration the fact that the Appellant had consumed alcohol and smoked cannabis prior to the collision as a factor establishing his guilt;

[25] Under Ground 5, it is the submission of learned counsel for the appellant that the fact that the appellant had consumed alcohol and smoked cannabis made the judgment sway

against him and that he had given evidence that he had not been affected by the drink and the smoke. In our assessment, it is not the drink and the puffs that reflected the culpable omissions but it is the culpable omissions that reflected the drinks and the puffs. A reasonable person in reasonable control of his senses does not end up causing such a violent accident. The passenger in the boat was killed not by drowning but by impact. St Anne had two holes in it and his own boat was so damaged that he began to take water and had to be taken fast enough to safety. He spoke of how he was thrown off his chair out of the window and was able to stay in only by holding to the gear. The boat turned and hit at the boat a second time. And his explanation is that he had not seen the boat!

[26] In this case, we have had the opportunity of reading the answers given by the appellant who elected to give evidence. Any doubt that anybody could have entertained on his guilt was cleared by him to confirm the degree of his culpable negligence. Who would have believed him when he stated he had drinks but he was unaffected by them, he had taken a couple of cannabis puffs but his faculties were unimpaired. The mere fact that he saw the white thing after the accident shows that the white thing was visible. If it was visible to him after, it must have been visible before. He cannot tell from where the white thing came. It cannot have dropped from the sky. Anyone who is walking, moving, driving, rowing, piloting looks in front. That is the duty of care one owes when one is not stationary. He for one does not. He expects others to have a duty of care towards him. It is they who should flash torches at him when he is coming. He relies for his trips on his GPS which he has adjusted for his work. If it slips, he panics. He has to pick it up right away. That he does without slowing or stopping in his speed of 25 knots which is his usual speed and, in his own words is “some speed.” The violence with which he hit shows the dangerous speed with which he was going. He was himself thrown out of the window and the catamaran hit at the boat twice. He knows that finding any of the small boats fishing or otherwise is not an impossibility, yet he was oblivious of this possibility. If this is not culpable negligence, we wonder what would be.

GROUND 6 AND 7

The learned Trial Judge erred in his refusal to take into consideration, when sentencing the Appellant, the contributory negligence of the skipper of the other vessel.

The sentence of 10 years imprisonment is manifestly harsh and excessive in all the circumstances of the case, especially considering:

(a) The sentencing pattern of courts for similar offences;

(b) The contributory negligence of the other vessel in the collision.

[27] Grounds 6 and 7 have to do with sentence. We have been favoured with authorities on the pattern that has been followed lately with regard to sentences for manslaughter. It was submitted before us that the sentences were harsh and excessive. The learned Judge examined a number of decisions of our Courts. The fact that appellant had consumed alcohol and smoked cannabis were regarded as aggravating factors while he was on duty. We would not wish to underrate these factors except that to say that account taken of the level of inebriety, an excessive emphasis was given to the drink and the fact that he had smoked was subject-matter of another count. In matters of sentencing for manslaughter, a difference should be made between constructive manslaughter and gross negligence manslaughter. A further distinction should be made between deaths or injuries caused in course of use of motorised vehicles unless these were used deliberately to kill. Our decision in **Ragain v R [2013] SLR 619** should be given its jurisprudential value in the distinctions to be made in sentencing in cases of deaths occurring by unlawful act and unlawful omission.

[28] We agree with the submission of learned counsel that it was incumbent upon the learned judge to consider the mitigating circumstances in a better light. The learned judge should have taken into account the fact that the appellant was a first offender and this offence arose out of certain omissions in the use of a motor vehicle as opposed to certain acts of

criminal conduct. A sentence of 10 years for an accident at sea in the circumstances it happened is harsh and excessive.

[29] We take the view that a sentence of 4 years would be more appropriate account taken of the gravity of appellant's negligence. We accordingly reduce the sentence under Count 1 to a period of 4 years imprisonment. We maintain the sentence of one year under Count 4 relating to the smoking of cannabis. A term of 4 years for a motor vehicle offence is serious enough and a consecutive order would amount to double counting his gravity. There was little justification in making the sentence under count 4 consecutive. We amend the consecutive order and substitute thereof a concurrent order.

Time spent on remand should count in the computation of sentence.

S. Domah (J.A)

I concur:. **…….** F. MacGregor (PCA)

I concur:. **…….** A.Fernando (J.A)

Signed, dated and delivered at Palais de Justice, Ile du Port on 17 December 2015