Regina v. Johnson Kengalu and Moses Tagakule

Central Magistrates' Court
Lodge, Principal Magistrate
20 January 1988

Shipping Act, s. 18—proceeding to sea without a valid safety certificate—master "under orders" of charterer—whether valid defence.
Shipping Act, s. 24—act "tending immediately to endanger life or limb"—distinction between s. 19(2) and s. 24—"immediate" danger.
Shipping (Dangerous Goods) Regulations—regulation 15(d)—reasonable steps to prevent contravention—whether verbal warning to passengers sufficient.
Sentence for offences under s. 19 Shipping Act—custodial sentences for gross disregard of marine safety.

Facts:
The first accused was the charterer and the second accused the master of the vessel *Ufi Na Tasi*. The vessel was licensed for coastal and inner-island voyages, and also had an exemption certificate for outer-island voyages subject to certain conditions being complied with.

On 20 December 1987, in breach of those conditions, the vessel set sail from Honiara bound for Ontong Java (an outer island voyage). She carried a total of twenty-seven persons and ten forty-four-gallon drums of petrol on board. The vessel strayed off course in bad weather and returned to Honiara on 23 December 1987 without reaching Ontong Java.

Both accused pleaded guilty to charges under section 19(1) of the Shipping Act of sending a vessel to sea in such an unseaworthy state that the lives of persons on board were likely to be endangered.

Tagakule was charged under section 24 of the Shipping Act with misconduct endangering life, and under section 18 with proceeding to sea without a valid safety certificate.

Both accused were charged with breaches of the Shipping (Dangerous Goods) Regulations in relation to the ten drums of petrol carried on board.[1]

After a full trial the accused were convicted on all charges. Kengalu was sentenced to four months' imprisonment and fines totalling $950, and Tagakule was sentenced to four months' imprisonment and fines totalling $1150.

HELD:
(1) It is no excuse, and no defence, to a charge under section 18 of the Shipping Act that a master was acting under orders of the charterer.
(2) A verbal warning that passengers should not smoke near the drums was not sufficient to relieve the master of liability under regulation 15(d) on the

1 Laws of Solomon Islands, vol. VI, page 3989 (L/N 150/1967)

ground that he "took all reasonable steps to prevent the contravention of the regulations".

(3) Section 24 of the Shipping Act requires the prosecution to prove that by wilful neglect of duty an act was done which tended immediately to endanger the life or limb of a person on board the vessel. The section can be contrasted with section 19(2) which does not require that the danger be immediate. Although the prosecution had proved that Tagakule was in neglect of his duty as master by proceeding to sea with insufficient life-saving equipment, inoperative radio equipment, and without a valid licence, they had not proved that life was immediately endangered thereby. On the other hand, the fact that there were 405 gallons of petrol on board in excess of that permitted by the regulations did establish that there was an immediate danger to life and limb. Tagakule was accordingly convicted of the offence under section 24.

Counsel:
Captain M. A. Bowman, Superintendent of Marine, for the prosecution
T. Kama for Tagakule and Kengalu

LODGE P.M.

Judgment:

Both accused are charged with a number of offences under the Shipping Act (cap. 98). The first accused, Johnson Kengalu, has pleaded not guilty to a charge contrary to regulation 15(c) of the Shipping (Dangerous Goods) Regulations made under section 28 of the Shipping Act. The second accused has pleaded not guilty to a charge of misconduct endangering life or ship under section 24 of the Shipping Act, a charge of breach of regulation 15(c) and 15(d) of the Shipping (Dangerous Goods) Regulations, and a charge of proceeding to sea without a valid safety certificate contrary to section 18 of the Shipping Act.

At the outset I remind myself that it is for the prosecution to prove the case against each accused beyond reasonable doubt. I must consider the case against each accused separately. The agreed facts are that in December 1987 the vessel *Ufi Na Tasi* was on charter to Johnson Kengalu. The vessel had a safety certificate as a coastal and inner-islands vessel. However, for the period of charter the Principal Licensing Officer had issued an exemption certificate, subject to certain conditions being complied with, under regulation 39 of the Shipping Regulations. On 20 December 1987 *Ufi Na Tasi* set sail from Honiara for Ontong Java. She never reached Ontong Java as, due to bad weather, the master, Moses Tagakule, was forced to turn back. The vessel had also strayed off course and got lost. She returned to Honiara on 23 December 1987.

I can deal first with count six against Moses Tagakule. As I have indicated above it is not disputed that *Ufi Na Tasi* was not licensed for outer-island trade. It is not disputed that on 20 December she set sail under the command of Moses Tagakule to prosecute a voyage to Ontong Java. There was in existence a certificate of exemption which was produced as Exhibit A. That certificate, however, is only valid providing the conditions set out on it are complied with. I need not go into the conditions or the evidence in great detail. The matter seems to me to be very straightforward.

Moses Tagakule himself admitted in evidence, and in cross-examination, that:

there was no first-class mechanic on board in addition to a 300 HP engineer; there was no life-raft capable of holding one hundred per cent of the people on board; and there were far in excess of seven persons on board. In these respects the certificate of exemption was not complied with, and was therefore invalid. The offence under section 18 of the Shipping Act is clear. The master of any vessel which sets out on a voyage for which it does not have a valid safety certificate or exemption is guilty of an offence. It is no excuse, and no defence, that the master was under orders and had no time to get a valid certificate.

I find Moses Tagakule guilty and he is convicted on count six.

I now turn to consider the charges against both accused under the Shipping (Dangerous Goods) Regulations. Moses Tagakule is charged with breach of regulations 15(c) and 15(d), and Johnson Kengalu with breach of regulation 15(c).

It is admitted that *Ufi Na Tasi* was laden with ten drums (each holding forty-four gallons) of petrol when she sailed. According to both accused, and I accept their evidence on this point, the drums were stowed five on either side of the hatch cover and were lashed to the ship's rail. The vessel also carried a number of passengers, between fourteen and seventeen in addition to the crew, as defined by section 2 of the Shipping Act.

It became clear in evidence that both accused are experienced seamen and there can be no doubt that they knew or ought to have known that petrol is an inflammable liquid to which the requirements of regulation 15 apply.

Regulation 15(c) stipulates that no deck passengers are to be carried except where the dangerous goods are stowed on deck in a part of the ship to which passengers are not permitted access *and* in such small quantities and containers and so stowed that the goods may easily be jettisoned. Regulation 15(c) requires that adequate measures must be taken to prevent smoking or the use of naked lights in the vicinity of such goods; such measures must include the prominent display of notices prohibiting smoking or the use of naked lights.

Under Regulation 19(2) the master of the vessel is responsible for ensuring that regulation 15 is complied with. He shall be guilty of an offence in respect of any contravention thereof unless he proves that he took all reasonable steps to prevent contravention.

The prosecution called a passenger, Richard Moka, to give evidence relevant to this charge. I formed a favourable impression of this witness and I believed what he said. He told the Court that he heard no warning about smoking near the drums from either Kengalu or Tagakule. There were no notices displayed. He agreed that he did not hear if warnings were given to other passengers, and he confirmed that he only saw people smoking at the aft part of the vessel. He said that some passengers went near the drums and some ate their meals near the drums.

Johnson Kengalu gave evidence on oath. He began by saying that he warned all the passengers not to smoke near the drums, but eating food was a different matter. If he saw people near the drums he would warn them to smoke near the stern. He then said that all twenty-four people on board stayed near the stern for the whole voyage. He did not see anyone go near the drums at all.

Moses Tagakule admitted that he knew that the regulations prohibited the carriage of petrol with passengers, but said that he warned all the passengers not to smoke near the drums. He did not put up any notices. He denied that anyone ate near the drums.

I did not find either accused to be a very convincing witness. Johnson Kengalu in

particular contradicted himself and changed his story from saying that he told people not to smoke, to saying that he never saw anyone near the drums at all.

I do not accept that no passengers went near the drums. *Ufi Na Tasi* is sixty feet long and has a twelve-foot beam. There were at least twenty-four people on board. I am satisfied that passengers did sit near the drums and were permitted access to the cargo hold area. I do accept that some of them at least were warned not to smoke near the drums by both accused. I am satisfied that no notices prohibiting smoking were displayed in any place.

A warning not to smoke is not enough to comply with regulation 15(c). The passengers must not be permitted access to the place where the drums are. In any event the second limb of regulation 15(c) provides that the petrol must be in small containers and quantities, so stowed that they may easily be jettisoned. The evidence satisfies me that this petrol was in a large quantity, at least 400 gallons, in large containers, and stowed in such a way that it would not be easy to jettison — i.e., lashed to the side of the ship in forty-four-gallon drums. I am satisfied therefore that regulation 15(c) was not complied with.

As for regulation 15(d), I accept that verbal warnings were given to prevent smoking. However, the regulation specifically states that measures to be taken must include the prominent display of notices. I am satisfied that no notices were displayed. Regulation 15(c) was therefore contravened.

On these facts and in these circumstances, Moses Tagakule would clearly be guilty of an offence unless he can prove that he took all reasonable steps to prevent the contravention of the regulation. The only attempt at compliance that he has proved is a verbal warning not to smoke near the drums, and a rather equivocal warning that passengers should stay away from the drums. He has given no reasonable excuse for failing to display notices, and has offered no explanation as to why it was not possible to comply with the strict requirements of regulation 15(c). To say that he thought he could cope with ten burning drums of petrol on a vessel sixty feet long is, in my view, absurd.

I find Moses Tagakule guilty and he is convicted of contravention of regulation 15 of the Shipping (Dangerous Goods) Regulations.

Johnson Kengalu's liability for breach of regulation 15 rests on regulation 19(3) which provides that:

> any other person who . . . knowingly causes or permits any act or omission that constitutes any failure to comply with or any contravention of these Regulations shall be guilty of an offence.

Kengalu was the charterer of the vessel. It was his petrol on board and his cargo. The master felt that Kengalu was the man in charge. He was on board throughout the voyage. I am satisfied that he was aware of the regulations. Although it was Moses who actually gave instructions for stowing the drums, I am satisfied that Kengalu knew where the drums were and knew that passengers were going near them. He could have provided smaller containers. He could have taken less fuel. He did nothing to prevent passengers from going near the drums, apart from telling them not to smoke there. In all the circumstances I am satisfied beyond reasonable doubt that he knowingly permitted a failure to comply with regulation 15(c) and I find him guilty and convicted on count three.

The final charge I have to consider at this stage is count three against Moses

Tagakule: that is the charge under section 24 of the Shipping Act. It is alleged that Moses Tagakule by neglect of duty did an act tending to immediately endanger the life or limb of all persons on board *Ufi Na Tasi* in that he proceeded to sea:

1. with insufficient life-saving equipment;
2. with inoperative radio equipment;
3. without a valid licence for the voyage to be prosecuted; and
4. with 405 gallons of fuel on board in excess of that permitted by the regulations.

I am satisfied on the evidence, as I have indicated previously, that conditions (1), (3), and (4) subsisted at the time of sailing on 20 December. There is some dispute as to whether the radio was inoperative when the vessel left port or whether it later became inoperative. However, as will be seen, it is not necessary for me to determine that point for the purposes of this charge.

The prosecution must prove that Tagakule was in neglect of his duty as master, and that by proceeding to sea in circumstances (1)–(4) he immediately endangered life and limb.

Having heard Tagakule give evidence I am satisfied that he was fully aware of his duties as master. He was aware that he should have waited and applied for a proper exemption certificate. He was aware that he should have obtained more life-saving equipment, and he was aware that he should have been carrying only one drum of petrol and not ten. Proceeding to sea in these circumstances was a neglect of his duty.

The question is: was it also an act tending to immediate danger to life or limb? Section 24 can be contrasted with section 19(2). Section 19(2) only requires that "the life of any person is likely to be endangered". Section 24 requires "immediate danger to life and limb" at the time of the act complained of—that is, proceeding to sea.

I do not think that the prosecution have proved that circumstances (1), (2), and (3), if they all existed, tended to "immediately endanger life or limb". Quite clearly they were all likely to endanger life or limb, but there is no evidence that there was any immediate danger caused thereby. Circumstance (4), however, is a different matter. From the time of sailing there were ten drums of fuel on board together with at least fourteen passengers, not including the crew. There should only have been one drum. Both accused admitted that they knew that petrol explodes quickly and easily and is highly dangerous. On the evidence, I am satisfied that by proceeding to sea with all that fuel on board there was an immediate danger to life or limb. Fortunately no accident happened, but that does not mean there was no danger. I am satisfied that Tagakule was in neglect of his duty as master and I find him guilty and he is convicted on count three.

Sentence:

You are both first offenders and entitled to leniency. I give you credit for your pleas of guilty and I accept your counsel's explanation for your pleas of not guilty. You will not lose credit for pleading not guilty. The circumstances of this case are extremely serious. They are aggravated by the fact that you are both experienced seamen. When *Ufi Na Tasi* left port on 20 December she was flagrantly and blatantly in breach of the Shipping Regulations. I am satisfied that you were both well aware that the regulations were being broken. You deliberately made a conscious decision to disregard the law. The breaches of the regulations were not trivial. They were highly dangerous and extremely serious. I will not repeat the evidence here, but I am

satisfied that the vessel was grossly overloaded with passengers, was carrying a dangerous cargo, had completely inadequate life-saving equipment on board, and had an unqualified and inexperienced crew.

The breaches of the regulations are bad enough in themselves, but in my view the case is aggravated by your attitude to the offences. Throughout this case the attitude of both of you has been to say that nothing serious happened so why make a fuss about breaches of the law.

I find this attitude totally irresponsible. The regulations exist to ensure safety at sea. If anything had happened to *Ufi Na Tasi*, this Court may well have been sitting today as a death inquiry into the deaths of both of you and twenty-five other people. Your conduct both in court and during the voyage shows a reckless disregard for human safety and the perils of the sea. I have had to listen to each of you tell the Court how he would have saved the ship and all hands by constructing a life-raft out of burning petrol drums. I am surprised that anyone could have the temerity to put forward such a profoundly absurd story in such circumstances. To my mind it is further evidence of your irresponsibility.

Counsel has asked me to ignore the case of L.C. *Vula*. I cannot do so. It is public knowledge that questions of marine safety were raised by that disaster.[2] The lesson should have been brought home to everyone that safety is of paramount importance. It is clear that people have not learned that lesson, and it must be for the courts to drive home to you and the public the importance of compliance with the law.

I have had some difficulty in sentencing, since it is apparent that the penalties under the Shipping Act and Regulations are many years out of date and many are placed at a derisory level.

There is some scope for proper sentencing in section 19 which provides for a maximum penalty of seven years or $1000 fine.

In my view, for offences of this gravity, a custodial sentence is appropriate. In reaching this decision I have taken into account all that has been said on your behalf, and I have taken into account your good character and lack of previous convictions.

Nevertheless the breaches in count one are so serious, so blatant, and your attitude to them is so unrepentant that I feel there is no alternative to a custodial sentence. Nothing else will teach both of you and the public that the safety laws cannot be ignored.

On count one, each accused will go to prison for four months and will pay a fine of $750, in default three months' imprisonment.

The remaining charges, though no less serious, are limited by the legislation as to the sentence I can impose; particularly under the Shipping (Dangerous Goods) Regulations.

Johnson Kengalu	Count 2	$100, in default two months
	Count 3	$100, in default two months

2. Editor's Note: The learned judge here refers to the 1987 sinking of L.C. (Landing Craft) *Vula* with significant loss of life. The *Vula* was operated by the Marine Division of the Solomon Islands Government as an inter-island cargo carrier.

L.C. *Vula* was chartered to carry earthmoving equipment and fuel from Honiara to the island of Santa Ysabel. The vessel capsized in mid-journey, due to improper cargo stowage and the life-saving equipment was either defective or non-existent. Some twenty-seven people perished, including many passengers who were not meant to be carried on the cargo ship at all. "The incident caused considerable public outcry and led to a Commission of Inquiry". (Correspondence with Judge Lodge, 4 January 1993.)

Moses Tagakule	Count 2	$ 50, in default three weeks
	Count 3	$100, in default two months
	Count 4	$ 50, in default three weeks
	Count 5	$100, in default two months
	Count 6	$100, in default two months

On those charges where the accused are both charged, I find them equally to blame. I accept that Tagakule was an employee of Kengalu, but as an experienced master he should have been, and I am satisfied that he was, aware of his duty and power and he could and should have delayed sailing. In relation to the cargo of petrol I am satisfied that the accused were acting together with full knowledge of the breaches of the regulations. In fixing the fines I take account of each accused's financial circumstances, and in the case of Tagakule I reduce the fine on count 4 to one of $50 in order that the totality of fines is not excessive bearing in mind his means.

As defence counsel stated, the matter of your fitness to hold marine certificates in future is not for this Court to determine or express any view on. I have, however, taken into account the fact that sentences such as these could mean that you lose your livelihood, particularly in the case of Tagakule.

Fines payable in seven days.

Reported by M.L.