

Perry Wacker – Summary of the Submissions.

These are only summarised notes of the submissions, at times paraphrased and in no way purports to be a verbatim transcript. The reasons for their decisions have not yet been delivered by their Lordships.

Appeal against Sentence

Defence Advocate (D): Each sentence out to be considered separately. As far as the conspiracy is concerned, the aggravating features identified are an inevitable part of the conspiracy in the commission of the offence. The other features are based upon the gross negligence and should not be double-counted.

Conspiracy: - there must be scope for the maximum sentence to be imposed upon the organisers. 8 years therefore is wholly appropriate.

Manslaughter: The death 58 people is obviously horrific, but there was no intention to cause any injury. It was manslaughter by gross negligence. There is a risk that because so many died, the bracket may be extended. However, murder must remain at the top of the scale.

Judge (J): The court must always have regard to the context of the offence. In this case it was in the circumstances of criminal activity or enterprise. In such circumstances, double figures must be appropriate, even if only one death were caused.

D: If the appropriate sentence is double figures, concurrent sentences ought to be imposed.

J: But is 14yrs really wrong in totality?

D: This is a case of gross negligence manslaughter, and an *omission* to act.

J: The number of deaths is relevant to the extent of the gross negligence.

D: So too is the fact that 2 people survived. The evidence is that at a certain point, the carbon dioxide levels caused death. If 2 survived, it shows that because the journey was longer than anticipated, the threshold was only just crossed.

J: However, morbid speculation suggests that as people died, so the remaining oxygen would be depleted at a slower rate.

D: No, if death resulted, the oxygen levels had already depleted to fatal levels, naturally. Therefore there is a line that was crossed.

The principle organisers were convicted for the offence in Holland received sentences of 9 years for 'killing with intent', apparently the equivalent of involuntary manslaughter. One in fact responsible for the warehousing only received 4 years.

J: Why should we level down to the lowest common denominator? Is that really your argument? The tariffs are fixed by each jurisdiction. Had they imposed higher sentences, why ought we not by the same reasoning 'level up' and increase Mr Wacker's?

D: That is not my argument. I base my comments on the roles played by the offenders, and place them no higher than that.

J: Different jurisdiction, different offence, different legal forces and defences at play. It would be wholly inappropriate to use those sentences for guidance.

J: Closing the vent was a deliberate act to avoid detection. Did he forget to open it, or did he keep it closed to avoid detection? What did the jury make of it?

D: We get no assistance.

J: There was an obligation on him to remedy the situation in any case.

Appeal against sentence dismissed. Leave to appeal refused. Reasons to be delivered in due course.

Appeal Against Conviction

D: It is inappropriate to impose tort law on criminal law. It takes no account of public policy. There is great uncertainty – it is unsatisfactory to make enquiries to establish duty of care.

In looking at the whole range of cases led the trial judge to perform a balancing act between those matters for which the victims were responsible, and the matters for which the Defendant was responsible.

If the victims conduct is unconnected with the criminality, they ought to be protected. That was the way that the matter was approached. The civil cases are tainted against those who come to the court with unclean hands.

J: But in *Adomako*, were all the civil principle imparted? Is the matter to be approached in the same way in the criminal context? Surely not.

D: The House of Lords were never concerned with that argument, they never grappled with it.

J: Public policy demands an alternative approach to the criteria in a criminal context. Totally different considerations apply.

J: Yes – are you saying that you *cannot* have gross negligence manslaughter where in a civil context the plaintiffs would not recover? Is that your argument – that gross negligence manslaughter is just very bad tortious negligence where death occurs?

D: So far as the law is concerned, there is the maxim of *res ipsa loquitur*...

J: That is a civil maxim, and plays no part in criminal proceedings.

D: We rely on the dicta in various cases that demonstrate that the law will not entertain actions by individuals jointly involved in a crime. In this case there was a mutual criminality between the Defendant and the victims. They knew that their behaviour was wholly illegal: false passport jumping borders at night, concealment etc. They had a common interest in *not being discovered*...

The trial judge tried to balance responsibilities. That is not justified by the authorities. THERE CAN BE NO DUTY OF CARE IN MUTUAL CRIMINAL ENTERPRISE – that is my submission.

J: Consider this scenario. If a gunman negligently shoots an accomplice in the course of a robbery, while the accomplice would not have a civil action against the gunman, that is not to say the gunman is not guilty of a criminal offence against the person.

D: But *Adomako* imparts civil principles.

J: Only to the extent of ‘ordinary’ negligent situations, not unusual situations. We cannot always impart the ordinary principles of tort into the criminal context. The concept of duty of care does not necessarily lead you down the tortious road.

J: We need to put these scenarios in the context of public policy. There are quite different objectives in civil and criminal matters, and therefore the criteria is applied towards those differing goals.

D: The enterprise would involve danger and criminality, inevitably.

J: If the Defendant chose to take a risk in order to effect a criminal enterprise, the criminal law cannot countenance such risk taking. It is absurd to rely upon your criminality.

J: Yes – consider this scenario. Imagine a lorry driver who agrees to transport football fans who had missed their bus back to the UK. If he does so, but commits no offence, and the same were to happen to them he cannot be more liable than Mr Wacker. That would turn the criminal law on its head. Mr Wacker cannot rely on his criminality to escape his duty of care, albeit his criminality is mutually shared by his victims.

D: It is an unattractive argument, but nonetheless the courts have directed that there would have to be a duty of care, we must address that issue.

J: *Bateman* provides that where there is a duty of care in a criminal context, the act or omission must give rise to a duty so as to fail uphold such a duty would amount to an offence against the State – if death were to result. Quite different from matters of compensation between individuals.

J: Indeed, I do not consider ‘duty of care’ to be a purely civil concept. It is recognised in both fields, and consideration as to what constitutes a duty may be quite different.

D: The criminality relates to the standard.

J: No, it is for the jury to consider – a simple concept.

D: Nevertheless, the trial judge did employ a balancing act. One of the hazards of the clandestine crossing was the discomfort and heat. The oxygen would have been depleted at a faster rate than envisaged due to the heat. Death was by no means inevitable, it was a hazard.

J: Are you saying that a civil claim by dependants would necessarily fail because of the knowledge of the hazard and illegality that were inseparable from the conduct of this Defendant?

D: Yes.

J: Couldn't the issue of separation not have been left to the jury? If it was not, why was it not?

J: I think it was, though not given sympathy by the trial judge in his summing up.

D: He shouldn't have left the issue to the jury because if they were all engaged in a criminal enterprise, there could have been no duty of care.

Crown Advocate (C): In criminal prosecutions, it is the State alleging a crime against the Defendant – its very different.

J: Especially in the context of death – consider the exception to the defence of duress.

C: Well, quite. The purpose of this public policy is plain to see, and does no violence to any principle of law. It is common sense.

J: What do you make of Lord McKie's dicta?

C: Although the considerations are the same in both contexts, they are approached differently where appropriate.

J: One can see that the 'ordinary' approach is common to both.

C: But not necessarily in identifying the standard of care to be applied. There are plenty of examples in the criminal law where civil principles are imparted. It is not an impediment by itself, but the question of injustice in the circumstances must be considered.

The parts played by the Chinese have been compared to the role of the offenders. However, they were merely doing what they were told. They had no power, and had entrusted their safety to the Defendant. Where is the difficulty in identifying the duty of care? We must consider the power relationship between the parties.

D: paragraph 72 of *Vellino v Chief Constable of Greater Manchester [2001] EWCA 1249* emphasises a 'clean hands' approach to duty arguments in civil proceedings.

Both *Adomako* and *Bateman* emphasise that to convict the Defendant of manslaughter, the Crown must prove that the degree of negligence amounted to a crime.

Consider p367 of the report. Therein lies the difficulty, as it clearly implies that there cannot be criminal liability without civil liability - that can be the only conclusion. There you have it – this is the dichotomy to be addressed by your Lordships.

J: Indeed.

Appeal Against Conviction dismissed. Reasons to be delivered in due course.

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14th June 2002