DISTRICT COURT OF QUEENSLAND

CITATION:	*R v Santos & Ors* [2011] QDC 1
PARTIES:	**The Queen** v **Bernardino Gonzales Santos** and **Blue Wind Shipping Limited** and **China Navigation Co Ltd** and **Swire Navigation Co Ltd** and **Swire Shipping Ltd**
FILE NO/S:	Indictment No. 2355 of 2010
DIVISION:	Criminal
PROCEEDING:	Application pursuant to s 590AA *Criminal Code*
ORIGINATING COURT:	District Court of Queensland at Brisbane
DELIVERED ON:	28 January 2011
DELIVERED AT:	Brisbane
HEARING DATE:	25 January 2011
JUDGE:	Robin QC DCJ
ORDER:	**1. That the prosecution's revised question is answered in the affirmative.**
CATCHWORDS:	*Criminal Code* s 590AA – *Transport Operations (Marine Pollution) Act 1995* s 28(1)(b) – defence to discharge offence when discharge resulted from damage to a ship – prosecution contend discharge through holes made in fuel tanks by cargo falling overboard "resulted from" lashings not properly maintained – what question the court should consider – factual issues should not be determined
COUNSEL:	Mr P. J. Davis SC, Ms E. S. Wilson and Mr B. McMillan for the Prosecution Mr A. J. Glynn SC and Mr M. C. Chowdhury for the

Defendants

SOLICITORS: Crown Law for the Prosecution

Thynne and Macartney for the Defendants

[1] The defendants are charged with being master or an owner of the ship MV Pacific Adventurer between 10 and 13 March 2009 when oil was discharged from it into Queensland coastal waters by reference to s 26(1) and s 9 of the *Transport Operations (Marine Pollution) Act 1995*. The discharge occurred through a hole or holes in the hull of the vessel. The holes were caused by impact from one or more of a considerable number of shipping containers which were being carried on the deck of the ship from Newcastle to Brisbane in stormy weather. The lashings which ought to have secured the escaping containers failed, the prosecution says because relevant components from the rails welded to the deck to the "hook and eye" fastenings had been allowed to rust and corrode.

[2] 25 January 2011 had some months ago been made available by the Chief Judge for consideration of a defence application under s 590AA of the *Criminal Code*. The prosecution had a general idea of what rulings might be sought by the defence and by arrangement produced the first Outline of Submissions dated 6 January 2011. It was not known until the defendant's Outline dated 19 January 2011 was produced what the precise terms of rulings to be sought would be. In the end the defendants (who have common representation) identified the following questions:

> "(a) Whether damage to the fuel tanks of the Pacific Adventurer on 11 March 2009 at a location east of Cape Moreton which resulted in the discharge of oil was 'damage' in terms of section 28(1)(b) of the *Transport Operation (Marine Pollution) Act* (TOMPA).

(b) If yes to (a), was the damage 'intentional damage' excluding the defendants from relying on the defence pursuant to section 28(1)(b) of TOMPA, by the operation of section 28(2)(b) of TOMPA."

An affirmative answer to (a) was sought, a negative answer to (b). The questions relate to the availability of a potential defence under TOMPA.

[3] The prosecution objected to the form of both questions. It was accepted that the second question involved a mixture of law and fact, as illustrated by a case on which the defence placed some reliance, *Goldman v Thai Airways International Limited* [1983] 2 All ER 693, especially at 699-703 and 705 in which subjective "knowledge" an airline pilot had was considered crucial. In the event, ruling (b) was not pursued.

[4] The formulation of an appropriate question proved problematic in the leading case, decided by reference to the comparable New South Wales provisions, *Morrison v Peacock* (2002) 210 CLR 274. An appeal was allowed from a New South Wales Court of Appeal decision reported at (2000) 50 NSW LR 178 dismissing an appeal from the Land and Environment Court. See [1999] NSW LEC 182. What was in issue in that litigation, as is the case here, was the availability of a statutory defence under s 28 of TOMPA, which provides:

Defences to discharge offence

(1) Each of the following is a defence to a prosecution for a discharged offence-

(a) the discharge was necessary for the purpose of securing the safety of a ship or saving life at sea;

> *(b) the discharge resulted from damage, other than intentional damage, to the ship or its equipment and all reasonable precautions were taken after the damage happened or the discharge was discovered to prevent or minimise the discharge of the oil;*
> *(c) for an oily mixture – the discharge was made to combat specific pollution incidents to minimise the damage from pollution and was approved by an authorised officer;*
> *(d) the discharge was authorised by an authorised officer for training purposes*
>
> *(2) For subsection (1)(b), damage to a ship or its equipment is intentional damage only if the damage arose in circumstances in which the ship's owner or master or, for a discharge offence against section 26(1), another member of the ship's crew –*
> *(a) acted with intent to cause damage; or*
> *(b) acted recklessly and with knowledge that damage would probably result.*

In subsection (1), only (b) is relevant. There is no suggestion that paragraph (a) of subsection (2) applies; however the outline of 6 January 2011 suggests that (ii)(b) may apply.

[5] The High Court's reasons in *Morrison v Peacock* conclude as follows:

> "35. The various provisions of the 1973 Convention concerned with certification, survey and the provision of equipment all indicate that ships and tankers are required to be so equipped and maintained that oil will only be discharged in circumstances where the Regulations permit the ship to discharge oil into the sea or where oil escapes through some sudden change in the condition of the ship that could not be foreseen and avoided.
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> 36. For these reasons the appeal should be allowed. In so far as the order of the Court of Criminal Appeal made on 30 October 2000 ordered that question (i)(a) of the questions reserved be answered "Yes", it should be set aside and, in its place, there should be an order that question (i)(a) be answered as follows:
> Question (i)(a)

> As a matter of law can the wear and tear in consequence of which oil escapes come within the word "damage" under s 8 of the *Marine Pollution Act* 1987?
>
> Answer
>
> In that section, "damage" means a sudden change in the condition of the ship or its equipment that was the instantaneous consequence of some event, whether the event was external or internal to the ship or its equipment. The Court considers the question otherwise not appropriate to answer."

[6] It appeared to be common ground on 25 January 2011 that despite minor differences in expression of the New South Wales and Queensland provisions, the same approach ought to be taken to their interpretation. As it happens, in a prompt reaction to the decisions in the courts of New South Wales, the Queensland Legislature amended the Act to include a definition of damage:

> "Damage, in an express reference to damage to a ship or its equipment, does not include any existing defect in the ship or its equipment resulting from an event, a lack of maintenance or anything else."

[7] The difference the parties have here concerns the width of the inquiry to be made by the jury at the forthcoming trial as to whether "the discharge resulted from damage". It is incontrovertible that the discharge occurred by reason of the holing of the hull which clearly is "damage". The defence submit that no further inquiry is necessary or appropriate. It was not in the end contended that the defence had been established. It was conceded that whether the damage was "intentional damage" which could not found a defence was an issue for another day. The prosecution approach is that whether the discharge "resulted from damage" involves a question of fact for the jury, that the jury would be entitled to take a broad approach to this causation issue having regard to the condition of the ship and of the lashings

securing the cargo of containers. The submissions in reply summarise the prosecution assertion that a chain of events caused the discharge:

> "The lashings (and other equipment associated with the lashings) were not properly maintained … they were therefore weakened … in heavy seas they failed … that caused the containers to fall overboard … the containers punctured the hull … the oil was discharged."

It was submitted that if, as a matter of fact, the discharge "resulted from" damage which was caused by a lack of maintenance (ie the faulty lashings constitute "damage" as they were a defect in the ship's equipment), s 28 does not afford a defence. Reference was made to *Royall v The Queen* (1991) 172 CLR 378, in which it was held that murder by an act of the accused causing the death charged done with reckless indifference to human life or intent to kill could occur where the deceased, having a well-founded and reasonable apprehension of life-threatening violence by the accused, jumped from a window.

[8] I agree with the prosecution's assertion that the question framed by the defence in the outline of 19 January 2011 mixes fact and law and assumes (and therefore asks for tacit acceptance of) a factual issue, namely whether "discharge" "resulted from" the damage. In the circumstances, where evidence is before the court tending to show a lack of maintenance, etcetera, it would be wrong for the court to make a determination that would take the important causation issue from the jury. That is what the defendants' application apparently seeks to do. Indeed, it treats "resulted from" in s 28(1)(b) as meaning "followed". I do not think it is correct to say, as the defence do, that once there is damage to the ship by way of holing of the hull, a discharge of oil that follows must be characterized as the result of that damage and that other circumstances become irrelevant.

[9] The hearing proceeded on the basis of the "evidence" provided by the prosecution. The circumstances may well emerge in a different light when that material is tested at a trial or supplemented by defence evidence.

[10] Legislators cannot hope to provide adequately for all scenarios. One wonders whether, if the defence submissions are correct, this is not a case of a "windfall" defence (of which it would not be the first example). There could be circumstances in which the availability of the defence was quite fortuitous and had nothing to do with a defendant's conduct or the blameworthiness of it. The example was suggested of a hatch over oil tanks allowed to become unsound. If it became loose in consequence, allowing discharge of oil, there would be no "damage" defence available. But the defence might be available if the hatch happened to fall overboard, holing the hull and permitting oil to escape into the water. It is hardly useful for the court to rule that the damage to the hull of the Pacific Adventurer is or is capable of being "damage" within s 28(1)(b) when the question for the jury is what a discharge of oil resulted from.

[11] The prosecutor asked for a ruling that in determining whether the discharge resulted from damage, the jury may consider not only the immediate proximate cause of discharge (ie holes in the hull) but may consider broader aspects of causation. In similar vein, Mr Davis SC identified what he suggested was a more appropriate question for the court to answer as follows:

> "In determining what damage caused the resultant discharge, is the jury limited to the immediate proximate cause of the discharge, namely the holes in the hull?

The way in which the High Court read down "damage" as commonly understood in the circumstances of *Morrison v Peacock* does not necessarily govern the outcome

here. There, the circumstances were more straightforward ones of an inadequately maintained hose rupturing to permit a tiny leak of hydraulic fluid.

[12] By the end of the hearing, I was persuaded of the correctness of the prosecution submission. However, counsel on both sides joined in asking that no decision be given until they had an opportunity to formulate, if they could, a form of question or potential ruling that seemed suitable to both.

[13] On the afternoon and evening of 27 January 2011 the following further Outlines of Submissions were received:

A. (from Mr Glynn SC and Mr Chowdhury):

> "1. Counsel for the Defendants and the Prosecution have attempted to reach an agreement on an appropriate question to be considered by Your Honour.
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> 2. In the circumstances, it has not been possible to agree and the parties have agreed to provide their alternate versions.
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> 3. The Defendants submit initially that Question 1(a) as identified in the Defendant's Outline of Submissions is an appropriate question to answer in its present form, particularly having regard to the factual matters, not in dispute, identified in paragraphs 5-7 and 9-14 in the Respondent's Original Outline of Submissions.
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> 4. If Your Honour is of the view that the question is inappropriately framed, then the defendants submit that Your Honour would consider the question as follows:
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> > 'If the discharge came from damage to the fuel tanks caused by containers striking the fuel tanks on the Pacific Adventurer on 11 March 2009, did the discharge result from damage to the ship within the meaning of Section 28(1) of TOMPA?"
>
> 5. In their Outline, Counsel for the Respondents have indicated they do not accept this formulation is an appropriate one as it raises matters of both fact and law. They have submitted an alternative formulation.

6. We do not agree that that theirs is the correct formulation. It directs attention away from the true issue as to whether the discharge resulted from damage as defined by the High Court in Morrison v. Peacock. Their proposed question is designed to direct attention to the cause of damage which is not an issue raised under Section 28(1)(b) of TOMPA. In terms of whether what is asked is a question of law or a question of fact, both questions proceed on the underlying assumption that the damage to the hull/fuel tanks arose from the fall of the containers, striking the ship as they fell. As we understand it, this is a fact which is not in dispute between the parties and which is stated in the introductory undisputed facts in paragraphs 5 – 7 and 9 – 13. In our view, their proposed question also ignores the definition of 'damage' in the Act."

And from Mr Davis SC and Ms Wilson:

"1. The defendants have framed a further question to be considered in the application in the alternative to the existing question.

2. The Crown submits that this further question is also inappropriate as it raises matters of both fact and law.

3. We submit that the following is the appropriate question to be considered upon the application:

> 'If the discharge came from the hole(s) in the hull caused by containers striking the hull, then in determining whether the discharge 'resulted from damage', for the purposes of offering a defence pursuant to s. 28 (1) (b) *Transport Operations (Marine Pollution) Act* 1995 ("TOMPA"), can the jury consider the alleged defects in the lashing equipment and any causal connection between those defects and the discharge?'

4. The defendants new proposed question, like the original question, asks the Court to conclude that the discharge resulted from the damage to the hull and that therefore the defendants have a defence, subject to the issue of intentional damage.

5. But the real issue is whether for the purposes of s. 28 (1) (b) TOMPA the 'damage[1] resulted from' damage of a type for which a defence is provided.

[1] Presumably, "discharge" is intended here.

> 6. Therefore the real question (the one that was argued in oral submissions) is as to the significance of the lack of maintenance the lashings and the equipment, the resulting defects (weaknesses in the lashings etc) and the causal connection between the lack of maintenance, the weaknesses to the lashings etc and the discharge.
>
> 7. It is appropriate for the Court to answer the question suggested by the Crown in this submission.
>
> 8. The answer to the question should be 'yes'."

[14] I agree with the latter submissions in respect of the defendants' revised question. Indeed, the revised question more clearly demonstrates that the court is being asked to determine a question which is really for the jury, by ruling that the defence is made out, unless "intentional damage" is established (presumably by the Prosecution). While the court, by reference to s 590AA(2)(e) would be justified in deciding questions of law upon the application of a party, I would be unwilling to determine an important issue of applicability of a defence (which it was common ground the defendants must establish on the balance of probabilities, notwithstanding the apparent absence from the TOMPA of any express provision to that effect) in the absence of a joint invitation from both sides. In the case of an agreed approach to the court for a determination of a particular issue, including a factual one, the court could properly make a ruling under s 590AA(1). See also subsection (2)(m) in relation to narrowing of issues.

[15] It is appropriate to answer the prosecution's revised question notified yesterday evening in the affirmative.