

COMMISSION OF INQUIRY

Ruling : 7 December 2012

Applications for the adjournment of the Hearings

1. At the Preliminary Hearing, held on 5 December 2012, Mr Zervos S.C., the Director of Public Prosecutions, applied to the Commission to adjourn the calling of evidence in relation to the first of the Terms of Reference, stipulated by the Chief Executive in Council, until the end of January 2013. That requires the Commission to inquire into the facts and circumstances leading to and surrounding the collision of the two vessels and:

" (a) ascertain the causes of the incident and make appropriate findings thereof".

In the course of his submissions, he reduced the period of adjournment that he sought to the "second week of January 2013".

2. The twin bases advanced by Mr Zervos in support of his application were that the first of the Terms of Reference went to the heart of an ongoing investigation by the police into criminal offences arising from that conduct, which might be prejudiced by the calling of evidence in the Commission relevant to the issue, and to prejudice resulting to any criminal trial that might result from the investigation.

3. On 2 October 2012, the three crew of the vessel *Lamma IV* and the four crew of the vessel *Sea Smooth* were arrested by police officers on suspicion of having committed criminal offences by their conduct on their respective vessels in the period of time leading up to the collision of the two vessels. Three of them were arrested in respect of the offence of manslaughter and four of them in respect of the offence of endangering safety of a person on a vessel.

4. Mr Zervos said that his concern as to the integrity of the police investigation was one that echoed that which was given voice before Lord Justice Levenson in his Inquiry in the United Kingdom, namely that the premature release of information or material into the public domain might have an impact on the course of the police investigation or related operational decisions. However, he acknowledged that the circumstances obtaining in this case in Hong Kong were quite different in that, as he put it, the police were "not far off completing their investigation". Further, he informed the Commission that he anticipated being provided with a report of an expert in respect of the circumstances leading to the collision by the end of December 2012. As a result, Mr Zervos said that he anticipated that the decision whether or not to bring criminal charges would be made by the end of January 2013, or earlier if other matters did not arise which needed to be addressed.

5. One of the concerns that Mr Zervos expressed as to prejudice to any subsequent criminal trial was the effect on witnesses who had given

evidence before the Commission, where the rules of evidence do not apply¹, on their subsequent evidence, where such rules do apply.

6. Of his concern of prejudice, arising from publicity given to the proceedings before the Commission, to any resulting trial on criminal charges of any one of the seven crewmen of the two vessels, Mr Zervos acknowledged that no such concern arose in respect of a prospective trial in the District Court by a judge alone. He was right to do so. There is no dispute that in such a trial a District Court judge would be able to put out of his mind any prejudicial material arising from the Inquiry. Accordingly, the nub of the concerns expressed by Mr Zervos was as to a trial before a judge and jury in the High Court, in particular on an indictment containing a count of manslaughter.

7. Mr Zervos answered in the negative when pressed by the Chairman to address the rhetorical question posed by Mr Paul Shieh S.C: if one or more of the involved persons was charged with manslaughter during the period of adjournment, if one was granted, would the Director of Public Prosecutions apply for a stay of these proceedings?

8. Mr Zervos acknowledged that section 7 of the Commissions of Inquiry Ordinance, Cap. 86 provided in terms that evidence given by a person before the Commission was not admissible against him in any civil or criminal proceedings other than, for example, for a charge of perjury.

¹ Section 4(1) of the Commissions of Inquiry Ordinance, Cap. 86.

A consideration of the submissions

9. We are satisfied that there is simply no force at all in the concerns expressed by Mr Zervos as to the integrity of any ongoing police investigation into the matter. As he conceded, the investigation is all but finished. As Mr Shieh pointed out, the best Mr Zervos could do was to point to some *possibility* of further enquiries by the police that *might* be affected by the evidence taken in the Inquiry.

10. The manner in which witnesses who have testified in the Commission give evidence subsequently in a criminal trial is, of course, subject to the control of the trial judge applying the rules of evidence. There is no reason to think that those rules would not be imposed and observed appropriately. Furthermore, whilst evidence led in the hearings before the Commission is not subject to the rules of evidence the Commission has no intention of presiding over a free-for-all, in which witnesses are invited to speculate or guess in their testimony. In any event, such evidence would have no weight to any fact-finding body.

11. As the Chairman reminded those present at the outset of the Preliminary Hearing, the Chief Executive in Council has directed that:

" the determination of any criminal or civil liability of any person shall be outside the terms of reference of the Commission"

Needless to say, the Commission will abide by that direction.

12. Insofar as the Commission receives evidence to establish the facts and circumstances leading to and surrounding the collision of two vessels" so as to enable it to, "ascertain the causes of the incident and make appropriate findings thereof" such publicity as is given to the evidence led in the Commission relevant to that issue will be subject to the usual direction to be given at any trial by judge to the jury. That standard direction enjoins the jury to reach a verdict according to the evidence presented to them in court and directs them to ignore information that they have received in any other way.

13. As Ribeiro PJ noted in his judgment in the Court of Final Appeal in *HKSAR v Lee Ming Tee* (2001) 4 HKCFAR 133, at page 190G :

"Reliance on the integrity of the jury and its ability to try the case fairly on the evidence, to put aside extraneous prejudice and to follow the directions of the judge is fundamental to the jury system itself."

He went on to note the importance of the trial process itself in that regard (page 191 I-J) :

"Secondly, the jury may sensibly be credited with the ability to overcome any pre-trial prejudice because of the nature and atmosphere of the trial process itself. Whatever impression of the case members of the jury may have gained beforehand, at the trial, they are given direct, first-hand access to the actual evidence in the case, presented systematically and in detail, with live witnesses tested by cross-examination and exhibits tendered for inspection. They are addressed as to the significance of such evidence by counsel on both sides and guided by the impartial summing-up of the judge."

Conclusion

14. Given that Mr Zevos has informed the Commission candidly that, even if one or more of the involved persons was charged with the offence of manslaughter during the period of adjournment that he seeks, he would not then seek a stay of these proceedings, there is no point in

delaying the receipt of evidence. It would merely create unnecessary delay. In the result, having regard to all the matters that we have addressed, we refuse his application.

The applications for an adjournment on behalf of the involved persons

15. Mr Grossman S.C., who appears on behalf of the Hong Kong Electric Company Limited and the three crew members of the *Lamma IV*, and Mr Sussex S.C., who appears on behalf of Islands Ferry Company Limited, Hong Kong & Kowloon Ferry Holdings Limited and the crew of the *Sea Smooth*, each seek an adjournment of the hearings of the Commission until early January 2013. They do so on the basis that, at the time of their applications, they had received none or very little material relevant to the anticipated evidence to be led by counsel for the Commission. In particular, they have not received the electronic radar records and the anticipated expert report of Captain Pryke. Furthermore, they wished to inspect the vessels with their own expert witnesses and to consider their own positions.

16. Sensibly, Mr Shieh acknowledged those concerns of counsel and their need to digest the material to be provided to them, but he went on to outline the way in which they might be addressed. He indicated that he proposed to lead evidence as to the collection of the raw data of the radar images that depict the vessels colliding. That evidence would be supplied by three witnesses, two from the Marine Department and one from the Hong Kong Police. Then, Captain Pryke would be called. His report had been signed off on 4 December 2012 and was available in the hearing room for distribution to the parties. Captain Pryke had been asked to

address matters in two reports. First, in the report then available, he reported as to the circumstances of the collision of the two vessels. Later, he would be asked to report on issues of ship management, harbour management and safety measures. In the third category of witnesses were some of those who were passengers aboard the vessels *Lamma IV*, *Sea Smooth* and *Lamma II*. He anticipated that some of those witnesses would be called only after the anticipated end of the first period of proceedings, namely on 21 December 2012.

17. Mr Shieh said that thought was being given to identifying which of the witnesses involved in the rescue ought to be called. Also, he informed the hearing that the Commission had engaged a naval architect to give the Commission expert assistance as to ship construction, in particular the reason why *Lamma IV* sank so quickly.

18. Noting that evidence of electronic radar records had been accepted previously in the courts of Hong Kong, Mr Shieh suggested that the evidence of the three witnesses who spoke to that issue was unlikely to be controversial. Even if it was, it did not involve a great deal of reading of the material about to be supplied. Recognising that the involved parties had not yet received Captain Pryke's report, he suggested that Captain Pryke might be called and questioned by counsel for the Commission but, if other counsel wished to apply to question him, such questioning might be deferred until the New Year, when it was envisaged that he would be recalled to deal with his second report.

19. Mr Shieh suggested that in all the circumstances it was to be anticipated that, if counsel for the involved parties wished to question the witnesses who were passengers on the three vessels, and they were permitted to do so, such questioning would likely not be over-elaborate. Their statements were relatively short, the relevant nub of which was contained in several paragraphs only.

20. Mr Shieh said that Captain Pryke's report would be served on the parties as soon as the Commission adjourned and that lists of witnesses and witness statements would be served during 5 December 2012.

A consideration of the submissions

21. Given that the involved parties were not stipulated as such by the Commission until during the course of the hearing on 5 December 2012, it was not appropriate that prior to that date they were provided with material received by the Commission from the Hong Kong Police, Marine Department and Fire Services Department pursuant to the Commission's compulsory orders. To expedite that process the Commission had invited those representing them to make written applications in advance of the hearing.

22. At the request of the involved parties the Commission ordered that arrangements be made for them and their expert witnesses to inspect the vessels. Although arrangements were made for an inspection to take place on 6 December 2012, perhaps understandably given the short notice, none of the involved parties felt able to take up the offer.

23. The Commission is mindful, on the one hand, of the limited time period in which it is required to report but also, on the other hand, of the need to ensure that those representing the involved parties have time to digest the material served upon them.

Conclusion

24. We are satisfied that there is considerable merit in Mr Shieh's suggestion that the evidence in respect of the system of storage and recovery of the radar track of the vessels be led first and that then Captain Pryke be questioned by counsel for the Commission as to his report. It is to be noted that the most relevant part of the radar track occupies about five minutes. The nub of Captain Pryke's report is contained in nine pages of text in his report. There is no reason why that evidence should not be led on 12 December 2012 onwards. If the involved parties wish to apply to question those witnesses, no doubt they will do so. If they are permitted to question them, but contend that they need further time to digest the material provided to them or to obtain other material, no doubt they will make the appropriate application, which the Commission will then consider. Similarly, on the same basis there is no reason why evidence should not then be led from witnesses who were passengers on the three vessels.

25. Accordingly, the applications by Mr Grossman and Mr Sussex for an adjournment of the proceedings are refused.

Hon Lunn JA
(Chairman)

Benjamin Tang
(Commissioner)