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BEFORE THE COURT OF APPEAL OF ALFONSO

Diego Olifant and Olifant Ltd.,

**(Appellants)**

v.

The State,

**(Respondent)**

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THE K.K. LUTHRA MEMORIAL MOOT COURT, 2012

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**Memorial for the Appellants**

(Counsels on behalf of the Appellants)

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- The Indian Penal Code, 1860
- The Provisional Criminal Procedure Code of Alfonso, 2002
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### **MISCELLANEOUS**

The Constitution of Alfonso

The Constitution of India, 1950

**STATEMENT OF JURISDICTION**

The Appellants humbly approach the Honourable Court of Appeal under section 383(1) of The Provisional Criminal Procedure Code of Alfonso, 2002 and article 34 of The Constitution of Alfonso. The Respondent humbly submits to the jurisdiction of this Honourable Court.

### STATEMENT OF FACTS

- Alfonso, a small island nation, gained independence from Chorizo in 1999. A Drafting Committee was set up to translate the democratic, liberal and secular vision of a fledgling nation into a Constitution and a set of statutes which would safeguard the rule of law in Alfonso.
- The drafts had been completed in 2002, and a 5 year interim was granted to study and amend the laws as need be.
- Vincenzo Olifant built Olifant Ltd (a public company limited by shares) which became a pharmaceutical giant. He had 2 sons, Ricardo and Diego. Ricardo, who studied at Harvard Business School, was his father's protégé, gradually taking control of his father's business, Ricardo since birth, had a congenital heart condition which endeared him to his father. Diego studied to be a biochemist, and then a biomedical engineer. He joined Olifant Ltd. as a lab-assistant, slowly working his way up, playing a key role in product development and research. Given his qualifications, he was also charged with overseeing industrial safety of the company's industrial facilities.
- Both sons started out with 15% of the issued and paid up share capital in Olifant Ltd. When Vincenzo died in 2004, he left his 40% shares to Ricardo. By 2005, Ricardo had become the Chairman of the company's Board of Directors.
- In 2005, the media was filled with stories of a growing enmity between the brothers. In February 2005, newspapers reported that Diego had asked Ricardo to leave the Olifant Mansion, which had been willed to Diego by his father. Ricardo built himself an enormous city home close to the business district of Xanadu, the capital of Alfonso. In December 2005, Olifant Ltd. expanded its capital base significantly by issuing fresh shares. Ricardo's shareholding increased proportionately and he remained a 55% shareholder in the company. Diego, was left with only a 0.5% stake in the company. One business magazine carried an informed piece - "Ricardo's Revenge", on how Ricardo had engineered the dilution of Diego's shareholding.
- On the 2<sup>nd</sup> of February, 2006, a major leakage occurred at the plant, resulting in the death of 33 factory workers who were on site at the time. Phosgene, once used in chemical warfare, was being used as an industrial reagent in the Olifant plant.
- Police also found in the containment unit the lifeless body of Ricardo. Trace amounts of phosgene were found in his lungs. As per the post-mortem report, however, the cause of

his death was not pulmonary oedema, which is the usual cause of death for human being exposed to phosgene gas, it was a heart attack.

- The police on review of CCTV footage found that Ricardo and Diego had entered the containment unit at around 1:30 PM. They appeared to have had a heated exchange, after which Diego stormed out of the unit. Ricardo remained in the room. He then tried to open the door of the containment unit which, it appeared, had been locked from outside. He started sniffing the air and began inspecting the phosgene cylinders lying on the shelves, until he arrived at one particular cylinder. He took that cylinder and tried to break the door open. He was successful, only in breaking the small viewing window on the door. He threw the cylinder he had been using at the stacks of other phosgene cylinders in the room, which cascaded and fell. Almost immediately, as if he was suffocating, he began opening the top buttons of his T-shirt, and, clutching his chest, he collapsed on the floor.
- Further, the footage from cameras outside the unit had been deleted for the corresponding period of time, and Diego's access code had been used to access the company's mainframe in the last 24 hours. Cameras in the parking lot showed Diego leaving the premises at about 1:40 PM. Earlier footage revealed that Diego had entered the unit at about 1:00 PM with a clipboard, seemingly for an inspection. He had handled one particular cylinder of phosgene, but it was unclear from the footage as to what exactly he did with this cylinder. Investigation revealed that the very same cylinder which had been thrown by Ricardo also had Diego's fingerprints near the valve of the cylinder. The pressure on the valve had been released slightly, in a manner which would have allowed a small amount of gas to escape.
- In his statement to the police, he admitted to having locked the door behind him when he left the containment unit. He did not, however, admit to having released the valve on any phosgene cylinder. He also did not admit to deleting any CCTV footage.
- Simultaneously, a social action group called "People Power" elicited public records (using the Right to Information Act which had recently been enacted in Alfonso in January 2006) regarding Olifant Ltd.'s corporate policies and resolutions. Apart from the fact that a nearly no funds were spent on industrial safety, it was found that the company's Board of Directors had, from time to time, approved industrial safety codes for its facilities formulated by Diego with minimal deliberation, which were woefully inadequate compared to international best practices to be followed by companies using dangerous gases and chemicals. "People Power" instituted a complaint with the State

police, which launched a parallel investigation against Olifant Ltd. Diego was indicted and tried for the murder of his brother Ricardo, and for the charges of murder and manslaughter in respect of the 33 dead factory workers who died due to phosgene poisoning. A separate prosecution was launched against public officials for failing to ensure compliance with internationally accepted industrial safety standards (which is pending till date). The public officials arraigned as accused claimed that no such industrial standards have been codified in Alfonso, and therefore, they cannot be held liable.

- Olifant Ltd. was indicted and tried for manslaughter. In the course of trial, an expert witness from the World Health Organization detailed Olifant Ltd.'s shortcomings in respect of industrial safety, most particularly in its handling of phosgene. For example, the containment unit which had been used to hold the phosgene container was like any other room in the building, except that it had a reinforced door. Other failures included the lack of dedicated leak detection monitors and a vacuum sealed enclosure. The valves also did not adhere to basic standards. Further, phosgene cylinders, during storage or transportation, should be secured or lashed in a manner which would prevent them from falling. The expert hypothesised that the massive leakage occurred due to the faulty valves and the failure to secure the cylinders.
- On 9th November, 2006, Diego was found guilty of murdering his brother and was sentenced to life imprisonment. He was, however, acquitted of the charge of manslaughter in connection with the death of the factory workers. On 3rd December, 2006, Olifant Ltd. was found guilty of manslaughter, having indirectly caused the death of its 33 factory workers. It was fined 33 million Alfonsian dollars for the crime of manslaughter.



STATEMENT OF ISSUES

I. THAT DIEGO OLIFANT IS NOT GUILTY OF CAUSING THE DEATH OF HIS BROTHER, RICARDO OLIFANT

- A. That there is no *Actus Reus* on the part of Diego Olifant.
- B. That Diego Olifant did not possess the requisite *Mens Rea*.
- C. That there is no requisite co-incident of *Actus Reus* and *Mens Rea*.

II. THE PROSECUTION CANNOT PROVE THE GUILT OF DIEGO OLIFANT AS THE CCTV EVIDENCE CANNOT BE ADMITTED.

- A. That someone tampered with the evidence by deleting it from the mainframe.
- B. That using tampered evidence would lead to violation of right to fair trial.
- C. That such evidence is excluded under Article 35(5) of The Bill of Rights of The Constitution Of Alfonso.

III. THAT OLIFANT LTD. IS NOT GUILTY OF MANSLAUGHTER

- A. That Olifant Ltd. cannot and/or should not be prosecuted for manslaughter.
- B. That a company/corporation like Olifant Ltd. cannot be attributed with *Mens Rea*.
- C. That an alternate remedy to fining Olifant Ltd., an exorbitant 33 million Alfonsian Dollars is viable.

## SUMMARY OF ARGUMENTS

### 1. DIEGO OLIFANT IS NOT GUILTY FOR THE MURDER OF HIS BROTHER.

#### A. THERE IS NO ACTUS REUS ON THE PART OF DIEGO OLIFANT

The allegation that Diego had a premeditated plan to kill Ricardo in the storage chamber is false. Ricardo Olifant died of a heart-attack, and not due to any action of Diego. It cannot be proved beyond reasonable doubt that Ricardo's death was caused by Diego and the events occurring in the containment unit.

#### B. DIEGO OLIFANT DID NOT HAVE THE REQUISITE *MENS REA*

*Mens Rea* is an essential element of the crime that the prosecution must prove, however in this case, Diego did not have any intent to kill Ricardo. The events that occurred in the containment unit were not intended, Diego did not wilfully cause the death of Ricardo. The prosecution cannot prove that Diego had intended to kill his brother.

#### C. THERE WAS NO CO-INCIDENCE OF *ACTUS REUS* AND *MENS REA*

It is mandatory that the criminal act and the intent to commit it should co-incide in time. However that was not the case in the instant case, and therefore Diego is not guilty.

### 2. THE PROSECUTION CANNOT PROVE THE GUILT OF DIEGO OLIFANT AS THE CCTV EVIDENCE CANNOT BE ADMITTED.

#### A. SOMEONE TAMPERED WITH THE EVIDENCE BY DELETING IT FROM THE MAINFRAME.

The CCTV footage having been partially deleted is tampered evidence and is therefore damaged. Diego Olifant cannot be punished for the prosecution's failure to gather evidence.

#### B. USING TAMPERED EVIDENCE WOULD LEAD TO VIOLATION OF RIGHT TO FAIR TRIAL.

The right to fair trial is enshrined not only in European and Universal statutes, but also in Art. 35 of the Constitution of Alfonso, and being convicted with tampered evidence is repugnant to the concept of a fair trial.

C. SUCH EVIDENCE IS EXCLUDED UNDER ARTICLE 35(5) OF THE BILL OF RIGHTS OF THE CONSTITUTION OF ALFONSO.

Article 35(5) is a safeguard to the right to fair trial, and the interpretation of the article would show that usage of such evidence as in this case against Diego, would not result in a fair trial and is therefore inadmissible in Court.

3. OLIFANT LTD. IS NOT GUILTY OF MANSLAUGHTER.

A. OLIFANT LTD. CANNOT AND/OR SHOULD NOT BE PROSECUTED FOR MANSLAUGHTER

A corporation is a fictitious legal entity that cannot perform actions or its own nor can it have a mental state. Olifant Ltd. is a multinational corporation that is publicly owned by shares. Its 'owners' by virtue of shares should not be liable for something they might not even have been aware of. Further the charge of corporate manslaughter is ineffective as a criminal standard.

B. OLIFANT LTD. DOES NOT HAVE *MENS REA*

*Mens rea* which is an essential element of crime, cannot be attributed to a corporation, which cannot be said to have intentions (whether to kill or otherwise). Olifant Ltd. is not liable for the deaths of the workers insofar as it did not intend for it, the deaths were the result of an unfortunate accident that the company had no control over.

C. AN ALTERNATE REMEDY WOULD BE A BETTER PRECEDENT THAN CHARGING OLIFANT LTD. WITH MANSLAUGHTER

A court is can order the company to conduct its own investigation to ascertain who was responsible and then take appropriate disciplinary measures against such persons and corrective steps to ensure the wrongdoing does not reoccur. Criminal liability will only be imposed on the company if it fails to comply adequately with the court order. This sort of liability is more effective than the deterrent effect aimed at with corporate criminal liability.

## WRITTEN PLEADINGS

### I. DIEGO OLIFANT DID NOT CAUSE THE DEATH OF HIS BROTHER

It is a fundamental principle of criminal law that a person may not be convicted of a crime unless the prosecution have proved beyond reasonable doubt both (i) that responsibility is to be attributed to the defendant for certain behaviour or the existence of a certain state of affairs (in a conduct crime), which is forbidden by criminal law and that the defendant has caused a certain event (in a result crime) and (ii) that the defendant had a defined state of mind in relation to the behaviour, existence of the state of affairs or causing of the event.<sup>1</sup>

#### A. THERE IS ABSENCE OF ACTUS REUS ON THE PART OF DIEGO OLIFANT

The physical element of the crime that is the event, behaviour or state of affairs connected to the crime is called the *actus reus* of the crime.<sup>2</sup> A person can only be held guilty of murder if it is absolutely clear that he killed the victim. He must be acquitted if there is a reasonable possibility that the killing was accidental.<sup>3</sup> It was laid down in *Woolmington*<sup>4</sup>, overruling earlier authorities that the defendant must satisfy the court that the killing was an accident. The rule is that the court must acquit even if they are not satisfied that the defendant's story is true, if the court thinks that it might reasonably be true. They should convict only if satisfied beyond reasonable doubt that it is not true. This rule is of general application.<sup>5</sup>

It is possible for courts to dispense with *mens rea* i.e. the mental element of the crime in whole or in part, but they can never dispense with *actus reus*.<sup>6</sup> There are no 'thought crimes' i.e. crimes without *actus reus*.<sup>7</sup> If the *actus reus* of a crime does not exist or occur, the crime is not committed<sup>8</sup>

Every element of the *actus reus* must be proved. If the defendant's conduct fails to fulfil all the requirements of the different elements of the *actus reus* there would be no *actus reus*.<sup>9</sup>

<sup>1</sup> David Ormerod, *Smith and Hogan Criminal Law*, Twelfth Edition, Oxford(2008), p.42

<sup>2</sup> *Id.*

<sup>3</sup> *Id.* p.43

<sup>4</sup> *Woolmington v. DPP* [1935] AC 462

<sup>5</sup> *Mancini v. DPP* [1942] AC 1; *Chan Kau v. R* [1955] AC 206

<sup>6</sup> Smith and Hogan, *supra* note 1, p.44

<sup>7</sup> R.A Duff, *Philosophy and the Criminal Law*(1998)

<sup>8</sup> Smith and Hogan, *supra* note 1, p.50

<sup>9</sup> *Id.* p.45

The *actus reus* of murder comprises the elements of conduct, circumstances in which the conduct takes place and result i.e. the consequences of the conduct.<sup>10</sup>

In the present case, Diego Olifant's conduct, which was said to cause his brother's death by the prosecution, involved entering the containment unit in advance, allegedly tampering with the valve of one phosgene cylinder and thereafter engineering a situation where he could lock his brother into the containment unit and thereby cause his death.<sup>11</sup> However, this conduct cannot be proved beyond reasonable doubt, to have caused the death of Ricardo Olifant.

Even if we were to consider that Diegos's actions were somehow connected to the death of his brother, we see cases which frequently arise in which it would seem that the harm could not have occurred but for an act or omission on the part of the defendant, but in which he has been excused on the ground that some other person intervened and appeared to have been the more immediate and direct cause of the harm<sup>12</sup>; in such circumstances the defendant has been exonerated, the reason being given that the harm was not a consequence of what the defendant did, but was a consequence of what the intervener did.<sup>13</sup>

The trace amounts of phosgene found in the lifeless body of Ricardo Olifant was not adequate to cause the death of a human being. Also, the cause of his death was not pulmonary oedema, which is the usual cause of death for a person exposed to phosgene gas. The post-mortem report had revealed that the cause of death was a heart attack.<sup>14</sup> In *R v. Jordan*<sup>15</sup> the appellant had been convicted of murder on evidence that he had stabbed the deceased who subsequently died in the hospital of bronchia-pneumonia following a penetrating abdominal wound. The Court of Criminal Appeal which, after hearing the Appeal, quashed the conviction as the death was not caused as a result of the stab wound but by a mistaken administration of antibiotics and intravenous injection of liquid.

It is, therefore, clear that the actions of Diego Olifant did not cause the death of his brother. He, therefore, lacks the requisite *actus reus* in the death of his brother and cannot be held guilty of the same.

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<sup>10</sup> *Id.* p.47

<sup>11</sup> Fact Sheet, p.5

<sup>12</sup> Cecil Turner, *Kenny's Outlines of Criminal Law*, 19<sup>th</sup> Edition, Universal(2004), p.20

<sup>13</sup> *R v Huggins* [1730] 1 Barn 396

<sup>14</sup> Fact Sheet, p.2

<sup>15</sup> *R v. Jordan* [1956] 40 Cr. App. R. 152

## B. DIEGO OLIFANT DID NOT HAVE THE REQUISITE *MENS REA*

The mental element of a crime is called *mens rea* which literally translates to-‘guilty mind’. It is the fault element of a crime, the element consisting of (i) a state of mind with which a person acts; or (ii) a failure to comply with a standard of conduct; or (iii) partly of such a state of mind and partly of such a failure.<sup>16</sup> All serious crimes and many minor offences require proof that the defendant had the relevant blameworthy state of mind.<sup>17</sup>

For murder, proof of a real state of mind is required. The prosecution has to satisfy the Court so as to make them sure that the person in the dock had the requisite state of mind, whatever it is, when he did the fatal act.<sup>18</sup> The defendant is said to have sufficient *mens rea* in a case of murder where he has as his purpose i.e. ‘intention’ that the victim will be killed or caused grievous bodily harm by his actions or that he foresees the victim’s death or grievous bodily harm as highly probable or virtually certain.<sup>19</sup> Where the defendant’s intended aim was harmless, then the unexpected result of his conduct, since it was not foreseen by him cannot, at common law, bring criminal liability upon a man, however harmful it may be, for he had no *mens rea*, since he did not foresee the harm.<sup>20</sup> Where the offender does an act attended with manifest danger to life wilfully, that is with knowledge of the consequences, he may properly be said to have the ‘*mens mala*’ or ‘heart bent upon mischief’; but if he does an act, however dangerous it be in its own nature, without any knowledge or suspicion of its tendency, that is, if he does not wilfully place life in peril, he cannot be said to show *mens mala*.<sup>21</sup> In *Moloney*<sup>22</sup>, the Court laid down that the *mens rea* of murder is the intention to cause death or serious bodily harm. The above decision was further elucidated upon by the Courts in *Hancock and Shankland*<sup>23</sup>, *Nedrick*<sup>24</sup>, and *Woollin*<sup>25</sup>, where it was held that: (i) A result is intended when it is the actor’s purpose to cause it, and (ii) A result is intended, though it is not the actor’s purpose to cause it, when the result is a virtually certain consequence of that act, and the actor knows that it is a virtually known consequence.

<sup>16</sup> A. Ashworth, *Logic, Reasoning and Criminal Liability*

<sup>17</sup> Smith and Hogan, *supra* note 1, p.94

<sup>18</sup> D. Ormerod, *Smith and Hogan- Cases and Materials on Criminal Law*, 9th Edition, Oxford(2006), p.560

<sup>19</sup> *Id.* p.98

<sup>20</sup> Kenny’s Outlines, *supra* note 12, p.40

<sup>21</sup> *Id.* p.33

<sup>22</sup> *R v. Moloney* [1985] 1 All ER 1025

<sup>23</sup> *R v. Hancock and Shankland* [1986] 1 All ER 641

<sup>24</sup> *R v. Nedrick* [1986] 3 All ER 1

<sup>25</sup> *R v. Woollin* [1999] AC 82

In the present case, Diego Olifant had gotten into a heated argument with his brother in the containment unit<sup>26</sup>. He had merely left the unit after this exchange. Ricardo's cause of death was a heart attack. In no way can the prosecution prove beyond reasonable doubt that Diego had gotten into an argument with his brother with the intention to kill or that he foresaw Ricardo's death as a consequence of the argument. In no way can Diego's actions be said to have been governed by an intention to kill Ricardo, nor was Ricardo's death a virtually certain consequence of Diego's actions.

Therefore, it is clear that Diego did not possess the requisite *mens rea* to murder his brother.

Where the definition of a crime includes a result, it must be proved that the defendant caused that result. An act done with intent to cause a result will not be the full offence unless it causes the result. It makes no difference that the event desired by the defendant happens if it does not happen as a result of his act.<sup>27</sup> In *White*<sup>28</sup>, the defendant administered poison to the victim, with the intention of killing her and she died, not of poison, but of a heart attack. The defendant was held not guilty of murder. The reasoning of the Court was that the death of the victim was the event which the defendant had desired to bring about but was not the result of his act.

In the instant case, even if Diego Olifant's actions were (allegedly) to be guided by the intention to kill his brother Ricardo, he could not be held guilty for Ricardo's death. The death of his brother may have purportedly been the desired result of his actions but Ricardo did not die as a result of his acts. He could not, therefore, have possessed the requisite *mens rea* for the crime.

### C. THERE IS NO CO-INCIDENCE OF ACTUS REUS AND MENS REA

Even if Diego's actions were said to be the cause of Ricardo's death, there was no coincidence of *actus reus* and *mens rea*. It is mandatory that the *mens rea* must co-incide in point of time with the act which causes the *actus reus*.<sup>29</sup> "If I happen to kill my neighbour accidentally, I do not become a murderer by thereafter expressing joy over his death. My

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<sup>26</sup> Fact Sheet, p.3

<sup>27</sup> Smith and Hogan-Cases, *supra* note 18, p.53

<sup>28</sup> [1910] 2 KB 124

<sup>29</sup> *Jakeman* [1983] Crim LR 104

happiness over the result is not the same as a willingness to commit the illegal act.”<sup>30</sup> *Mens rea* implies an intention to do a present act, not a future act.<sup>31</sup> It has been held in an Indian and a Rhodesian case<sup>32</sup> that if there were two acts and the first act, though accompanied by *mens rea* was not the cause of death, whereas the second act, not accompanied by *mens rea* was the cause of death, the defendant must be acquitted of murder.

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<sup>30</sup> Anandes, GPCL of Norway, 194

<sup>31</sup> Smith and Hogan, *supra* note 1, p. 128

<sup>32</sup> *Khandu* (1890) ILR 15 Bom 194; *Shorty* [1950] SR 280



## II. THE PROSECUTION CANNOT PROVE THE GUILT OF DIEGO OLIFANT AS THE CCTV EVIDENCE CANNOT BE ADMITTED.

### A. SOMEONE TAMPERED WITH THE EVIDENCE BY DELETING IT FROM THE MAINFRAME

The problem states<sup>33</sup> “Someone had deleted the CCTV footage for the corresponding period in respect of the cameras located directly outside the containment unit.” It merely suggests that the Access Code of Diego Olifant was used. The access code may have been used by anybody to access the company mainframe. Adducing it to Diego Olifant would be unreasonable. It is the duty of the prosecution to preserve evidence before trial and to collect evidence from the crime scene before it is damaged.<sup>34</sup> Diego Olifant cannot be penalized for the failure of the prosecution to gather evidence before it was damaged, and he cannot be attributed for the same as access code may have been used by anybody.

### B. USING TAMPERED EVIDENCE WOULD LEAD TO VIOLATION OF RIGHT TO FAIR TRIAL

Article 35(3) of the Bill of Rights of the Constitution of Alfonso provides that every accused shall have a right to fair trial.<sup>35</sup> The Universal Declaration of Human Rights<sup>36</sup> provides for “full equality to a fair and public hearing by an independent and impartial tribunal.” The European Convention on Human Rights and International Covenant for Protection of Civil and Political Rights<sup>37</sup> provide for the same.<sup>38</sup> A person has a right to be represented and have a fair trial where evidence is not tampered.<sup>39</sup>

### C. SUCH EVIDENCE IS EXCLUDED UNDER ARTICLE 35(5) OF THE BILL OF RIGHTS OF THE CONSTITUTION OF ALFONSO

Article 35(5) of the Constitution of Alfonso, under its Bill of Rights clearly states that:-

<sup>33</sup>Fact sheet, p. 3

<sup>34</sup>California Law Review, Vol. 72, No. 5, 1984

<sup>35</sup>Annexure C, p. 23

<sup>36</sup>Art 10

<sup>37</sup>Art 15

<sup>38</sup>Art 6

<sup>39</sup>*In re Oliver*, 333 U. S. 257, 273 (1948)

“Evidence obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice”

Evidence which has been tampered will make the admission of such evidence unfair and that would defeat the right to fair trial which is also followed under national as well as international law. Therefore admissibility of such evidence would defeat the very provision of the Bill of Rights and hence it cannot be accepted by the court.

### III. OLIFANT LTD. IS NOT GUILTY OF MANSLAUGHTER

#### A. OLIFANT LTD. CANNOT AND/OR SHOULD NOT BE PROSECUTED FOR MANSLAUGHTER

Firstly, a crime can be committed by omission, but there can be no omission in law in the absence of a duty to act.<sup>40</sup> The extended construction of the word "kill" in murder and manslaughter by Common Law Judges is vastly anomalous.<sup>41</sup> Generally, statutes are aimed against bad acts, not bad omissions, and judges do not construe active verbs as covering omissions. They do not say, for instance, that a person 'wounds' another by failing to save him from being wounded, or 'damages' a building by failing to stop a fire<sup>42</sup> At least, this has never been decided. It was held on one occasion that a statute forbidding the 'doing' of an act did not cover omissions<sup>43</sup>. Nor did an offence of 'causing' something<sup>44</sup> or 'assisting' the doing of something.<sup>45</sup> A draftsman who uses these words is obviously thinking of positive acts, not of failing to do something. The principle is, or should be that words implying active conduct are not to be stretched by interpretation to include inactivity. "One may suggest that except where these judicial manipulations are a settled part of law, ambiguous words should never be interpreted to cover omissions; parliament should be required to do the job expressly"<sup>46</sup> (For instance, in the country of India, S.304 (A) of the Indian Penal Code creates the specific offence of causing death by negligence)<sup>47</sup>. Therefore, Olifant Ltd. cannot be held liable under current Alfonsian laws.

Further, a corporation being just a legal entity with no physical means to act individually must act through its agents, i.e. through humans. Crime is defined as the illegal conduct of a human being, and every man is responsible for his own actions. In *Meridian Global Funds Management Asia Ltd v Securities Commission*<sup>48</sup> Lord Hoffman stated that there is no such thing as a company "of which one can meaningfully say that it can or cannot do something. There is in fact no such thing as a company as such." Crimes can only be committed by

<sup>40</sup> Glanville Williams, *Textbook of Criminal Law*, Second Edition, Universal(2003), p. 148

<sup>41</sup> *Id.*

<sup>42</sup> Contra, J C Smith in [1982] Crim L.R 527

<sup>43</sup> *Red House Farms (Thorndon) Ltd v. Mid Suffolk DC*, The Times, April 30 1980

<sup>44</sup> *Price v. Cromack* [1975] 1 WLR 988

<sup>45</sup> *Brown* [1970] 1 QB 105

<sup>46</sup> Glanville, *supra* note 40, p.151

<sup>47</sup> The Indian Penal Code, 1860

<sup>48</sup> [1995] 2 AC 500

human, moral agents<sup>49</sup>. One might wish to attribute their wrongdoing to a company but ultimately it is the individual within the company who is the culpable agent deserving punishment.<sup>50</sup>

To charge a person of a crime where the conduct of a third person is involved is akin to making him 'vicariously liable', a term derived from the law of tort, which does not sit well in criminal law. The civil courts hold that an employee commits a tort in the course of employment, the employer as well as the employee is liable for it. The object being to compensate the victim, it is believed to best effected by giving the victim alternate remedy (against the employer) as well as against the employee. However, vicarious liability is difficult, if not impossible, to support if considered in terms of justice.

The same reasoning does not apply in criminal law, the chief object of which is deterrence. Here, it would seem an elementary principle both of justice and utility that one man should not be held accountable for the wrong of another. For the utilitarian, punishment can only be justified by reason of its useful effect in the future. In general, there is no utility; any more than there is justice, in imposing punishment on a person who did not do a wrong act.<sup>51</sup>

The independent legal existence of a company is useful because its individual shareholders may come and go, and it has the great advantage of creating limited liability. Only the company is liable for its debts. If the company is insolvent, creditors cannot go against the private property of shareholders. The shareholders are responsible only to the extent of their shares, and when their shares are fully paid up they are not liable at all. Few people would invest in a large company if they were liable without limit for the debts of the company if things went wrong. In the instant case, punishing the company (through an enormous fine of 33 Million Alfonsian dollars) is not only a punishment on the company, but every employee and every shareholder that has a stake in the company. Neither of whom had any responsibility in the accident.

Moreover, there is no general principle whereby a person is held criminally liable merely because a criminal act is committed by his employee (even in the course of employment). Common law courts have pressed towards such a principle, but have not reached it. *Qui*

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<sup>49</sup> G.R. Sullivan, 'Expressing Corporate Guilt' (1995) 15 Oxford Journal of Legal Studies 281; C.M.V. Clarkson, 'Kicking Corporate Bodies and Damning Their Souls' (1996) 59 Modern Law Review 557.

<sup>50</sup> G.R. Sullivan, 'The Attribution of Culpability to Limited Companies' (1996) Cambridge Law Journal 515

<sup>51</sup> Glanville, *supra* note 40, p.952

*peccat per alium peccat per se* is not a maxim of criminal law<sup>52</sup>. A defendant to a criminal charge is liable only if he falls within the words of a statute, as interpreted by the courts. However, in the current case, there exists no specific statute governing either safety regulations required of an industrial corporation or one governing its criminal liability (for manslaughter) and therefore the question before the court is not one of liability at all, it is whether a person can be accused of a crime not codified at the time. Corporate Liability requires proof of gross breach of the duty of care by an individual acting as the directing or controlling mind of the corporation. However, the officers of a company do not owe a duty of care to any third party simply by reason of their office.<sup>53</sup>

The country of Alfonso, being a fledgling nation, still setting up a structure and framework of its laws, to be followed and maintained for as long as it exists, must take up a utilitarian and justiciable outlook. The guilty must be punished, but not innocents caught up in a guilty net.

#### B. OLIFANT LTD. DOES NOT HAVE *MENS REA*

For legal purposes *mens rea* means, or should mean<sup>54</sup>:

- a. (if we speak of the consequences of conduct) ‘the desire that the consequence shall follow from a bodily movement (or omission to move), or realisation that the consequence is virtually certain’ or,
- b. (if we speak simply of the act itself) ‘conscious movement (or conscious inactivity) with knowledge of the circumstances’

If a crime is declared in general terms to require intention, that should relate to all three elements – the act, the circumstances and the consequences. A corporation of course, cannot ‘move’ or consciously act with premeditated purpose, and can therefore not be said to commit an act with an overt intention.<sup>55</sup>

A company cannot be attributed with *mens rea*. A company is only the aggregate of its individual members, shareholders, employees etc. And therefore a company cannot be said to form its own mental state or have an indigenous frame of mind. A company does have not have the human capacity of passion, or anger, or sadness, ergo, a company can never be held

<sup>52</sup> Lord Diplock [1972] AC at 199

<sup>53</sup> *Williams and another v. Natural Life Health Foods Ltd and another* [1998] 2 All. E.R 577

<sup>54</sup> Glanville, *supra* note 40, p.123

<sup>55</sup> Andrew Ashworth, *Principles of Criminal Law*, Oxford: Clarendon Press(1995)

to have an intention to kill. The urge to kill is a human feeling that is (wrongly) attributed to a company. Or we can say, the company is identified with the state of mind of that human.

The traditional method by which companies are held criminally responsible in English law (at least, for crimes involving *mens rea*) is under the identification doctrine. If an individual who is sufficiently senior within the corporate structure as to represent metaphorically the "mind" of the company commits a crime within the course of his or her employment, that act and *mens rea* can be attributed to the company<sup>56</sup>

There are, however, significant objections to the identification doctrine particularly with larger companies where it is most unlikely that a senior manager will actually commit the *actus reus* of an offence with the accompanying *mens rea*. Dealing with pollution offences Morland J stated in *National Rivers Authority v Alfred McAlpine Homes East*<sup>57</sup> that: "In almost all cases the act or omission will be that of a person such as a workman, fitter or plant operative in a fairly low position in the hierarchy of the industrial, agricultural or commercial concern". With offences that cause death or serious injury it is even more unlikely that a senior official will directly have "blood on his hands".

Further, in many cases with large complex-structured companies, it can be almost impossible for outsiders to penetrate the corporate shell to ascertain which individual or individuals actually committed the crime. The amount of expertise, time and money involved in such an investigation may be out of all proportion to the wrongdoing committed and, in any event, may prove fruitless if a company is determined to throw a smoke-shield around its internal operations.

Most significantly, however, even if such an inquiry is mounted, it will often be revealed that the fault lay with no specific individuals but rather with the company itself in the sense that its policies and operational procedures did not ensure that preventive measures to ensure safety or limit pollution were in place. The main cause of the collapse of the prosecution in the *P&O* case<sup>58</sup> was the fact that P&O had no director in charge of safety and no clearly articulated safety policies, particularly in relation to open-door sailings. The various personnel involved in the capsizing of the *Herald of Free Enterprise* were each doing their own job (admittedly, some of them not doing it very well); the real cause of the capsizing and

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<sup>56</sup> *Tesco Supermarkets Ltd v. Natrass* [1972] AC 153

<sup>57</sup> [1994] 4 All ER 286 at 298

<sup>58</sup> *R v. P & O European Ferries(Dover) Ltd.* (1990) 93 Cr App R 72

resultant deaths was the lack of co-ordination between them as a result of an absence of safety policies. The Sheen Report investigating the capsizes was in no doubt where the true fault lay: the company itself, with its absence of safety policies and failure to give clear safety directions, was "infected with the disease of sloppiness"

Further, an alternate approach to attribute *mens rea* to a corporation was the Aggregation doctrine. Under this approach one aggregates all the acts and mental elements of the various relevant persons within the company to ascertain whether in toto they would amount to a crime if they had all been committed by one person. This doctrine has the advantage of recognising that in many cases it is not possible to isolate a single individual who has committed the crime with *mens rea*. This doctrine can deter companies from burying responsibility deep within the corporate structure.

This doctrine, however, suffers from many flaws. While the aggregated acts and states of mind of many persons may cumulatively amount to a crime, the reality is that none of these individuals need personally be at fault. Indeed, the company may be structured and compartmentalised, and thus the different persons may not even know each other, or even be aware of the others' acts.<sup>59</sup> Yet, because their actions are in part attributed to the company, they will "fall under the shadow of a serious offence (with possible disciplinary, employment and pension-right consequences)".<sup>60</sup> With large complex corporate structures the doctrine is ineffective in terms of deterrence in that it fails to give advance notice to companies of what they are expected to do to immunise themselves from the risk of criminal liability.<sup>61</sup>

Other methods include a management-failure model as suggested by Britain's Law Commission<sup>62</sup> and as discussed earlier, vicarious liability.<sup>63</sup>

Thus, it is essentially clear that every model/approach tried so far to attribute *mens rea* to a corporation has had inherent flaws and cannot hold up over time in Court. This being a landmark case in the nation of Alfonso, the Judiciary must firstly look closely into the precedent it sets. The application of such principles would not just be errant, but impossible to reconcile with the facts of this case.

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<sup>59</sup>A. Ragozino 'Replacing the Collective Knowledge Doctrine with a Better Theory for Establishing Corporate *Mens rea*: The Duty Stratification Approach' (1995) 24 Southwestern University Law Review 423, p. 468

<sup>60</sup>G.R. Sullivan, *supra* note 50, p. 529

<sup>61</sup>A. Ragozino, *supra* note 59, p.467

<sup>62</sup>Law Com No.237, cl 4(1)

<sup>63</sup>Memo, p.7

In the instant case, Olifant Ltd has been wrongly attributed, the negligence of some of its employees have been attributed to the company, and this negligence even when attributed to the company itself, does not make the company liable for such a serious offence as manslaughter.

C. AN ALTERNATE REMEDY WOULD BE A BETTER PRECEDENT THAN CHARGING OLIFANT LTD. WITH MANSLAUGHTER

A somewhat different approach to corporate criminal liability has been proposed by Fisse and Braithwaite.<sup>64</sup> Where it is established that the *actus reus* of an offence has been committed by or on behalf of a company, a court should be empowered to order the company to conduct its own investigation to ascertain who was responsible and then take appropriate disciplinary measures against such persons and corrective steps to ensure the wrongdoing does not reoccur. If the company takes appropriate measures, no criminal liability will be imposed. Criminal liability will only be imposed on the company if it fails to comply adequately with the court order. The culpability of the company is thus not corporate culpability at the time of the crime but culpability in failing to react appropriately to the wrongdoing caused by its employees.

This approach has the advantage of ensuring that companies themselves, rather than the State, have to conduct appropriate enquiries. Not only will this save much public time and money, but, often, it is companies themselves that are best equipped to understand and penetrate their own complex structures. It is also an approach that recognises that one of the main aims of corporate criminal liability is to ensure that companies remedy their defective policies and practices so as to prevent a recurrence of the wrongdoing.<sup>65</sup>

In the instant case, a fine of 33 Million Alfonsian Dollars, would cripple the company and negatively impact every person associated with it. The Counsel for the Appellants would humbly ask the Court to see the merits in the above argument, and urges the Court to allow companies to empower companies to reform themselves rather than punish them.

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<sup>64</sup>B. Fisse and J.Braithwaite, 'The Allocation of Responsibility for Corporate Crime: Individualism, Collectivism and Accountability' (1988) 11 Sydney Law Review 468.

<sup>65</sup>C.M.V.Clarkson, 'Corporate Culpability' (1998) Web Journal of Current Legal Issues in association with Blackstone Press Ltd



PRAYER

WHEREFORE, in light of the issues raised, arguments advanced and authorities cited it is most humbly and respectfully requested that this Honourable Court may adjudge and declare that:

1. Diego Olifant is not guilty of causing the death of his brother Ricardo Olifant.
2. Olifant Ltd. is not guilty on charges of manslaughter in respect to the 33 deceased workers.
3. Both Diego Olifant and Olifant Ltd. are acquitted of all charges against them.

The Court may also be pleased to pass any other order, which this Honourable Court may deem fit in light of justice, equity and good conscience.

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*All of which is most humbly prayed*

*Counsel for the "Appellants"*