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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 Respondent**

**(Counsels on behalf of the Respondent)**

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- Criminal Code Act, 1995
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- 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 GUILTY OF MURDERING HIS BROTHER, RICARDO OLIFANT.

A. That Diego's actions constitute the necessary *Actus Reus*.

B. That Diego's actions were accompanied by the requisite *Mens Rea* .

II. THAT DIEGO OLIFANT IS GUILTY OF MANSLAUGHTER OF THE 33 WORKERS,  
WHO DIED ON 2<sup>nd</sup> FEBRUARY, 2006.

III. THAT OLIFANT LTD. IS GUILTY OF MANSLAUGHTER

## SUMMARY OF ARGUMENTS

1. DIEGO OLIFANT IS GUILTY OF MURDERING HIS BROTHER, RICARDO OLIFANT.

A. DIEGO'S CONDUCT AMOUNTS TO THE REQUIRED *ACTUS REUS*

Diego's actions and participation was essential and in fact, primary in the events that occurred on 2<sup>nd</sup> February, 2006, ending with his brother's untimely death. Having done more than just 'prepare' to kill his brother, he can thus be attributed with the foreseeable results of his acts, which was the death of Ricardo.

B. DIEGO'S ACTIONS WERE ACCOMPANIED BY THE REQUISITE *MENS REA*

Not only did Diego have an absolute motive, but he also intended the death of his brother on that fateful day. It is easily possible to adduce from the facts and conforming to prior case law, that the conduct of Diego, i.e. entering the containment unit, tampering with a cylinder of phosgene and locking his brother inside was mala fide, to say the least.

2. DIEGO OLIFANT IS GUILTY OF MANSLAUGHTER OF THE 33 WORKERS, WHO DIED ON 2<sup>nd</sup> FEBRUARY, 2006.

Diego Olifant was the sole supervisor and person in charge of industrial safety of the factories of Olifant Ltd. His negligence, irrespective of whether he intended it or not, renders him guilty of involuntary manslaughter as defined by S. 303 of the Provisional Penal Code of Alfonso, and as punishable by S.310 of the same. It was his proposed policies and standards that were absolutely unreasonable and dangerous that, directly led to the death of the workers.

3. OLIFANT LTD. IS GUILTY OF MANSLAUGHTER

A. A CORPORATION CAN BE HELD GUILTY FOR THE CRIME OF MANSLAUGHTER

The crime of manslaughter is not just the killing of a human being by a human being anymore, it exists to bring to justice any person, even if only a person on paper, who unlawfully kills another. A corporation can be attributed with the mental state of its

controlling mind and will, or a mental state can be read into its policies and standards. It is the corporation itself that is responsible for the death of a person and therefore can be prosecuted for the charge of manslaughter.

B. OLIFANT LTD IS GUILTY OF MANSLAUGHTER

The corporation Olifant Ltd. Handled phosgene gas, a known lethal weapon used for warfare in such a negligent and reckless manner, having no safety precautions installed in its factories. The direct result of which was the death of the 33 workers that were on-site at the time of a leakage can could have been easily prevented. The gross negligence of the corporation caused the death of the 33 workers and the company is thus guilty of involuntary (or gross negligence) manslaughter.

WRITTEN PLEADINGS

I. DIEGO OLIFANT IS GUILTY OF MURDERING HIS BROTHER, RICARDO OLIFANT.

A. DIEGO'S ACTIONS CONSTITUTE THE REQUIRED *ACTUS REUS*

A harm which has been suffered is an event, and it is difficult to imagine any event which is not the product of a plurality of factors. Thus there may be several causes of one event. It is, however, reasonable to say that an event is caused by one of these factors if it would not have happened without that factor.<sup>1</sup> From this it would follow that a man can be said to have caused the *actus reus* of a crime if that *actus* would not have occurred without his participation in what was done.<sup>2</sup>

The *actus reus* is fully attributed to anyone who has done things which have led or allowed some wholly innocent person to act under mistake so as to cause the harm in question.<sup>3</sup> A simple example would be where the defendant leaves or puts machinery or indeed any object in such a position as that, as he realizes, they may cause harm to person<sup>4</sup> or to property<sup>5</sup> through being operated or moved inadvertently by someone else, or otherwise.<sup>6</sup>

Even if the victim himself caused the result, the defendant would be held guilty if he had done things which led or allowed the victim to cause the harm.<sup>7</sup> In the case of *Governor Wall*<sup>8</sup>, the prisoner was found to be guilty of murdering a sergeant upon whom he had caused to be inflicted an illegal and brutal flogging from which the man died 5 days later. There was evidence that in the military hospital in which the deceased had been placed after the flogging, a quantity of brandy had been supplied to him in accordance with the medical practice of that establishment, and that but for his drinking this there would have been a chance of his recovery. However, the Court held that the flogging was the act which caused him to be placed in a situation where drinking the brandy became fatal and therefore the defendant was found guilty. In the case of *Holland*<sup>9</sup>, the defendant was convicted of the

<sup>1</sup> *R v. Towers* [1874] 12 Cox 530 (T.A.C)

<sup>2</sup> Cecil Turner, *Kenny's Outlines of Criminal Law*, 19<sup>th</sup> Edition, Universal(2004), p.20

<sup>3</sup> *Id.* p.21

<sup>4</sup> *R v. Martin* [1881] 8 Q.B.D. 54

<sup>5</sup> *R v. Pembrilton* [1874] 2 CCR 119 (T.A.C)

<sup>6</sup> *R v. Dant* [1865] L and C 567

<sup>7</sup> *Kenny's Outlines*, *supra* note 2, p.24

<sup>8</sup> *R v. Wall* [1802] 28 St Tr. 51

<sup>9</sup> *R v. Holland* [1841] 2 M and R. 351 (T.A.C)

murder of a man whom he had wounded and who refused to follow medical advice and submit to the amputation of a finger, which would have saved his life, the reasoning of the Court being the same as *Governor Wall*. That the victim of an offence may have contributed to the harm by his own actions and/or negligence affords no defence to the accused in criminal proceedings<sup>10</sup> as was upheld in *Swindall and Osborne*<sup>11</sup>.

In the present case, Diego Olifant entered the containment unit in advance, tampered with the valve of one phosgene cylinder and engineered a situation where he could lock his brother inside the unit.<sup>12</sup> He, therefore, knowing very well that his brother suffered from a congenital heart disease caused the events which led to his brother suffering a heart attack, and therefore caused the *actus reus* of the crime, in spite of his brother having tried to break open the door which might have set off the cardiac attack, as this would not have happened without his i.e., Diego's participation.

Where the defendant, with *mens rea* has gone beyond the stage of mere preparation and is in the course of committing an offence, it should be no answer that the final step was involuntary<sup>13</sup> or accidental<sup>14</sup>. In the present case, Diego entered the containment unit beforehand and had tampered with the valve of a particular phosgene cylinder, releasing the pressure on the valve slightly, to allow the dangerous phosgene gas to escape.<sup>15</sup> He had then engineered a situation where he could lock his brother inside the containment unit, hence causing his death<sup>16</sup>. The fact that Ricardo suffered a heart attack, which was an accident, did not absolve Diego of responsibility in his brother's death as his prior actions constituted the necessary *actus reus*. It can even be adduced that Ricardo, having smelt the phosgene leaking in the room, panicked due to it and his ensuing struggle for freedom caused his heart attack. Diego is therefore guilty of accelerating his death, under S. 296<sup>17</sup> of the Provisional Penal Code of Alfonso.

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<sup>10</sup> Kenny's Outlines, *supra* note 2, p.25

<sup>11</sup> *R v. Swindall and Osborne* [1846] 2 C and K. 230 (T.A.C)

<sup>12</sup> Fact Sheet, p.5

<sup>13</sup> *Burke* [1987] Crim LR 480

<sup>14</sup> David Ormerod, *Smith and Hogan Criminal Law*, Twelfth Edition, Oxford (2008), p.129

<sup>15</sup> Fact Sheet, p.3

<sup>16</sup> *Id.* P.5

<sup>17</sup> Annexure A

B. DIEGO'S ACTIONS WERE ACCOMPANIED BY THE REQUISITE *MENS REA*

Where the *actus reus* of the crime charged is a continuing act, it is sufficient that the defendant has *mens rea* during any point in its continuance.<sup>18</sup> Where the *actus reus* is part of a larger transaction, it is sufficient that the defendant has *mens rea* during the transaction, though not at the moment when the *actus reus* is accomplished.<sup>19</sup> In *Thabo Meli*<sup>20</sup>, the appellants, in accordance with a pre-arranged plan, took a man to a hut, gave him beer so that he was partially intoxicated and then struck him over the head. Believing him to be dead, they took his body and rolled it over a low cliff, dressing the scene to look like an accident. In fact, the man was not dead, but died of exposure when unconscious at the foot of the cliff. The point of law which was raised was that two acts were done: first, the attack in the hut (which was pre-meditated) and, second, the placing of the body outside afterwards (after the defendants thought the victim was dead and as a result of which the victim actually died) - and that they were separate acts. While the first act was accompanied by *mens rea*, it was not the cause of death, whereas the second act, which was the cause of death, was not accompanied by *mens rea*. The *mens rea* required to establish murder is an intention to kill. The Privy Council held that it was "impossible to divide up what was really one series of acts. There is no doubt that the accused set out to do all these acts in order to achieve their plan, and as part of their plan; and it is much too refined a ground of judgment to say that, because they were at a misapprehension at one stage and thought that their guilty purpose was achieved before it was achieved, therefore they are to escape the penalties of law." Their crime is not reduced from murder to a lesser crime merely because the accused were under some misapprehension for a time during the completion of their criminal plot.<sup>21</sup>

Given the instant facts, Diego's actions exhibited an intention to kill his brother by phosgene poisoning and his actions were a means to that end. The fact that Ricardo died of a heart attack and not pulmonary oedema, does not absolve Diego from having *mens rea* in the death as his actions were guided by the *mens rea* to kill Ricardo, and were a series of continuing acts towards a larger transaction, even though he had no part to play in the final act and therefore had no *mens rea* when the death actually occurred. Diego Olifant, therefore, possessed the requisite *mens rea*.

<sup>18</sup> *Fagan v. Metropolitan Police Comr* [1969] 1 QB 439

<sup>19</sup> Smith and Hogan, *supra* note 14, p.129

<sup>20</sup> *Thabo Meli v. R* [1954] All ER 373

<sup>21</sup> D. Ormerod, *Smith and Hogan- Cases and Materials on Criminal Law*, 9th Edition, Oxford (2006), p.48

To prove *mens rea*, there is no requirement to prove that there was a pre-conceived plan.<sup>22</sup> In *Church*<sup>23</sup>, the Court of Criminal Appeal applied *Thabo Meli*. The defendant, in a sudden fight, knocked the victim unconscious and, wrongly believing her to be dead, threw her in the river where she drowned. He was charged with murder and his conviction was upheld. Here there was no antecedent plan. The point was not considered by the court, however. It was thought to be enough that the accused's conduct formed "a series of acts which culminated in (the victim's) death". In *Le Brun*<sup>24</sup>, while the appellant and his wife were walking home, they got into a heated argument. He hit her on the jaw, knocking her down unconscious. He then attempted to lift her and carry her away from the scene but she slipped from his grasp and hit her head causing a fracture to her skull from which she died. The court followed *Church* and pronounced him guilty, holding that it was immaterial that there was no pre conceived plan and that the same principles apply to manslaughter and murder in this aspect, thereby answering the question left open by the court in *A-G*<sup>25</sup>.

In the present case, even if Diego's actions were said to carry no pre-conceived intention to kill his brother, it would afford him no defence and he would still be guilty of murdering Ricardo.

The Causation principle holds that the initial act, if accompanied by *mens rea* is the cause of death if there is a sequence of acts leading to murder.<sup>26</sup> The causation principle represents the *ratio decidendi* of the South African case of *Masiela*<sup>27</sup>. In this case, the defendant, intending to kill the victim, knocked him unconscious and, believing him to be dead, set fire to the house. The victim died from the fumes. If the victim had not been unconscious, he would have been able to walk out, so knocking him unconscious was the cause of death.

If these facts were to be applied to the instant case, Ricardo Olifant would have been able to walk out of the containment unit had Diego not locked it from outside. Even though Ricardo died of a heart attack, by applying the Causation principle, it can be concluded safely that Diego Olifant's actions of entering the containment unit beforehand and tampering with the valve of a particular phosgene cylinder, releasing the pressure on the valve slightly, to allow the dangerous phosgene gas to escape and then having an argument with his brother inside

<sup>22</sup> Smith and Hogan, *supra* note 14, p.129

<sup>23</sup> *R v. Church* [1965] 2 All ER 72

<sup>24</sup> *R v. Le Brun* [1991] 4 All ER 673

<sup>25</sup> *Attorney General's Reference (No. 4 of 1980)* [1981] 2 All ER 617

<sup>26</sup> Smith and Hogan, *supra* note 14, p.130

<sup>27</sup> *S v. Masiela* (1968) (2) SA 588 (AD)

the same containment unit and finally locking it from outside, knowing only too well that Ricardo suffered from a congenital heart disease<sup>28</sup>, was the cause of Ricardo's death. Diego's conduct was a 'but-for' cause i.e. 'but for' the defendant's act, the result would not have occurred.<sup>29</sup> Hence, Diego Olifant is guilty on the charges of murder of his brother.

The defence of *novus actus interveniens* means that "the intervening act was so independent of the act of the accused that it should be regarded in law as the cause of the victim's death to the exclusion of the act of the accused"<sup>30</sup> However this maxim offers no defence in the instant case. Here, the intervening act was Ricardo's attempt to escape. The accused is guilty when the victim is killed trying to escape, unless the escape was not foreseeable by a reasonable person.<sup>31</sup> In *Royall v. R*<sup>32</sup>, the victim was found on the ground below the bathroom window of the flat in which she and the accused had lived for the previous four months. There were many signs of a struggle. The accused, while not denying that he was present, said that the victim had voluntarily jumped out of the window and that he did not intend to kill or harm her. The High Court of Australia, however, held the accused guilty, stating "the intervening act of the deceased does not break the chain of causation." In *Daley*<sup>33</sup>, it was held that "where the conduct of the accused induces in the victim a well founded apprehension of physical harm such as to make it a natural consequence (or reasonable) that the victim would seek to escape and the victim is injured in the course of escaping, the injury is caused by the accused's conduct."

Applying the law to fact, in the instant case, Ricardo had smelt the distinctive smell of phosgene gas in the containment unit, which had leaked due to Diego releasing the pressure on the valve of one of the phosgene cylinders. Ricardo tried to escape by forcing open the door of the unit which had been locked from the outside by Diego<sup>34</sup>. The conduct of Diego had induced in Ricardo "a well founded apprehension of physical harm such as to make it a natural consequence (or reasonable) that the victim would seek to escape". Ricardo's heart attack was brought on by his struggles to escape and therefore, Diego is guilty of the murder of his brother.

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<sup>28</sup> Fact Sheet, p.1

<sup>29</sup> Smith and Hogan-Cases, *supra* note 21, p.53

<sup>30</sup> *R v. Pagett* (1983) 76 Cr App R 279

<sup>31</sup> Michael Jefferson, *Criminal Law*, First Edition, Pitman (1992)

<sup>32</sup> *Royall v. R* (1991) 65 ALJR 451

<sup>33</sup> *DPP v. Daley* [1980] AC 237

<sup>34</sup> Fact Sheet



## II. DIEGO OLIFANT IS GUILTY OF MANSLAUGHTER OF THE 33 WORKERS, WHO DIED ON 2<sup>nd</sup> FEBRUARY, 2006.

Diego Olifant was the sole supervisor and person in charge of industrial safety of the factories of Olifant Ltd.<sup>35</sup> His negligence, irrespective of whether he intended it or not, renders him guilty of involuntary manslaughter as defined by S. 303 of the Provisional Penal Code of Alfonso, and as punishable by S.310 of the same.

Involuntary manslaughter needs no intention to kill or cause any harm, bodily or otherwise, but still has an element of unlawfulness.<sup>36</sup> The complete lack of safety standards maintained in the usage and storage of phosgene gas, as certified by the expert from the World Health Organisation, was what caused the death of the 33 workers, and the buck stops at Diego Olifant, who sanctioned and promoted the grossly negligent procedures/safety measures. The crime of manslaughter comprises of: i) An unlawful or illegal act, intentionally performed; ii) In circumstances rendering it dangerous; iii) Causing death.<sup>37</sup> In the current case, the storage and usage of phosgene gas was itself dangerous and the lack of safety precautions was grossly negligent, and reckless on the part of Diego.

Whether the death or the actual leakage was unforeseeable is irrelevant as the acts of Diego (being the proposed policies and standards) were flagrantly reckless and dangerous for the workers. Further, for the crime of manslaughter, in *Goodfellow*<sup>38</sup>, the defendant's argument that he was not guilty of manslaughter was not directed against the victim was rejected. The conviction was upheld on the grounds of reckless manslaughter. Therefore, even if Diego had no personal contact or even knowledge of the victims (the workers), he is still guilty of being the cause of their deaths. In *Bateman*<sup>39</sup>, "In the opinion of the jury the negligence of the accused went beyond a mere matter of compensation between subjects and showed such disregard for the life and safety of others as to amount to a crime against the State and conduct deserving of punishment".

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<sup>35</sup> Fact Sheet

<sup>36</sup> Smith and Hogan, *supra* note 14, p.515

<sup>37</sup> Per Lord Hope, *A-G's Reference (No 3 of 1994)* [1998] AC 245

<sup>38</sup> (1986) 83 Cr App R 23

<sup>39</sup> (1925) 19 Cr App R 8 at 11

In Britain, the Law Commission's latest proposals regarding murder, manslaughter and infanticide<sup>40</sup>, are that a person is guilty of manslaughter if:

- i. A person by his or her conduct causes the death of another;
- ii. A risk that his or her conduct will cause death...would be obvious to a reasonable person in his or her position;
- iii. He or she is capable of appreciating that risk at the material time;
- iv. ..His or her conduct falls far below what can be reasonably expected of him or her in the circumstances..

In the current case, Phosgene was used as an industrial reagent by Olifant Ltd., Diego having had two degrees in biomedical engineering<sup>41</sup> must of course have known its lethal potential and must have been able to appreciate the effects of its escape. Any reasonable person would make sure adequate precautions were taken to prevent such escape, Diego, however did not. This gross recklessness having caused the death of 33 workers makes him guilty of manslaughter under S. 310<sup>42</sup> of the Provisional Penal Code of Alfonso, 2002.

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<sup>40</sup> The Murder, and Manslaughter and Infanticide Report, LC 304, para 3.60

<sup>41</sup> Fact Sheet

<sup>42</sup> Annexure A

### III. OLIFANT LTD. IS GUILTY OF MANSLAUGHTER.

#### A. A CORPORATION CAN BE HELD GUILTY FOR THE CRIME OF MANSLAUGHTER

A company/corporation, being a separate legal entity can full well be said to responsible for its acts or omissions. The main opposition therefore, to the assertion that a company can commit manslaughter is that it cannot be said to have the requisite *mens rea*.

It is often asserted that companies themselves cannot commit crimes; they cannot think or have intentions. Only the people within a company can commit a crime<sup>43</sup>. However, once one accepts that the entire notion of corporate personality is a fiction - but a well-established and highly useful one - there seems no reason why the law should not develop a concomitant corporate *mens rea* fiction. Most of the other doctrines - identification, aggregation etc. - involve fictitious imputations of responsibility. The real question is not whether the notion of a corporate *mens rea* involves a fiction, but whether, of all the fictions, it is the one that most closely approximates modern-day corporate reality and perceptions.

Such notions of direct corporate liability (as opposed to attribution doctrines) have been strongly advocated in the United States under various nomenclatures such as the "corporate ethos standard" or "strategic *mens rea*"<sup>44</sup>, introduced in Australia<sup>45</sup> and most prominently proposed in the UK by Wells (in 1993). The doctrine to be argued, termed the "corporate *mens rea* doctrine" draws on all the above. The basic idea here is that all the other doctrines ignore the realities of complex corporate organisations and "the dynamic of organizational processes, structures, goals, cultures, and hierarchies"<sup>46</sup> which can combine and contribute to an ethos that permits or even encourages the commission of crimes. According to this view, companies can be conceived as culpability-bearing agents<sup>47</sup> who "act" through their officers and employees and whose "*mens rea*" is to be found in their corporate practices or policies. For example, for the purposes of manslaughter if a company, such as P&O prior to the

<sup>43</sup> G.R. Sullivan, 'Expressing Corporate Guilt (1995) 15 *Oxford Journal of Legal Studies* 281.

<sup>44</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; W.S. Laufer, 'Corporate Bodies and Guilty Minds' (1994) 43 *Emory Law Journal* 647

<sup>45</sup> Criminal Code Act 1995; A. Rose, '1995 Australian Criminal Code Act: Corporate Criminal Provisions' (1995) 6 *Criminal Law Forum* 129; C. Wells, 'The Law Commission Report on Involuntary Manslaughter: The Corporate Manslaughter Proposals: Pragmatism, Paradox and Peninsularity' (1996) *Criminal Law Review* 545

<sup>46</sup> Laufer (1994), *supra* note 44, p.660

<sup>47</sup> C.M.V. Clarkson, 'Kicking Corporate Bodies and Damning Their Souls' (1996) 59 *Modern Law Review* 557, p.566-569.

Herald of Free Enterprise capsized<sup>48</sup>, fails to institute obvious and necessary safety procedures, the requisite gross negligence for the crime can be found in these corporate practices and (lack of) safety policies. While it is perhaps easy to grasp the notion of a company being grossly negligent in that no subjective mental element is required, it is important to stress that either recklessness or intention can also be found in a company's policies, operational procedures and lack of precautions. If the corporate culture permitted or encouraged the wrongdoing, it may be easy to infer that the corporate body itself must have foreseen the possibility of the harm occurring or that it has created an obvious and serious risk of the wrong resulting or that the consequence was virtually certain to occur from which intention may be inferred. The important point about this approach is that it is not whether any individual within the company would have realised or foreseen the harm occurring but whether in a properly structured and organised careful company the risks would have been obvious. This is not "objectivising" intention and recklessness and therefore having a different culpability criterion for companies. With human individuals, in the absence of a confession, intention and foresight has to be inferred from objective actions. This can only be done on the basis of what a reasonable person would have foreseen - unless the defendant's state of mind is in some way different to that of a reasonable person because of, say, mental illness or drunkenness<sup>49</sup>. As companies cannot be mentally abnormal or drunk the result is that juries and magistrates will draw the same inferences as with individuals: if the consequences were objectively likely/virtually certain etc. then the defendant must have foreseen the result and therefore possessed subjective *mens rea* consistent with section 8 of the Criminal Justice Act 1967. Possibly the only avenue of escape would be for a company to assert that while the risks looked objectively obvious, they had special expertise enabling them to rule out the risk (which would negate both species of recklessness and intention). In the unlikely event of this claim being believed (bearing in mind that the risk clearly did materialise), the company would (rightly) escape liability.

In the case of *R v. Adumako*<sup>50</sup>, it was held by the House of Lords that involuntary manslaughter could be proved by gross negligence.

In the United Kingdom, a law commission report from 1996<sup>51</sup> recommended the creation of a new offence of "corporate killing"<sup>52</sup>. A corporation would commit this offence if its

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<sup>48</sup> *R v. P & O European Ferries(Dover) Ltd.* (1990) 93 Cr App R 72

<sup>49</sup> C.M.V. Clarkson and H.M. Keating, '*Criminal Law: Text and Materials*' (1994) London: Sweet and Maxwell, p.217-221

<sup>50</sup> (1994) 99 Cr. App. R. 362

'management failure' was a cause of a person's death, and that failure fell below what could reasonably be expected of the corporation in the circumstances. The proposal was, as professor Wells noted, the start of the fundamental change in the UK to move the corporate manslaughter offence away from individual liability, bedevilled as it was by the identification doctrine, towards liability based on 'management failure'.<sup>53</sup> This report was followed by a Home Office Consultation Paper in which the Government accepted the need for reform,<sup>54</sup> recognizing the need to restore public confidence that companies responsible for loss of life can properly be held accountable in law.

The law recognises corporate liability; the device of incorporation is not a bolthole for people who commit offences. A company can act only through human beings, and a human being who commits an offence on account of or for the benefit of a company will be responsible. The importance of incorporation is that it makes the company itself liable in certain circumstances for offences, as well as the human beings. Corporate liability was developed by judges, with some help from statute on the procedural side<sup>55</sup>

If there is social justification for bringing the name of the company before the public when it is involved in an offence of strict liability, then with much stronger reason it should be possible to bring in the company when there has been negligence or wilful misbehaviour by its controlling officers<sup>56</sup>

Further, the theory of criminal law in cases of pseudo-personal liability is not that the employee commits a crime for which the employer is made liable but that in certain cases the employer is debited with the act of the employee (or certain other persons) more or less as though it were his own act.<sup>57</sup> "In short, the law on *mens rea* illustrates the eternal tension in the position of the judge. He is supposed to be an impartial adjudicator, applying the law and protecting the rights and liberties of the subject; but he is also a State instrumentality – in the wider sense, an organ of government"<sup>58</sup> Thus, it is humbly submitted before the Court, that

<sup>51</sup> No. 237, '*Legislating the Criminal Code: Involuntary Manslaughter*'

<sup>52</sup> [1998] Crim LR 535; A McColgan, 'Heralding corporate liability' [1994] Crim LR 547

<sup>53</sup> C Wells (1996), *supra* note 45, p. 553

<sup>54</sup> Reforming the Law on Involuntary Manslaughter: The Government's Proposals (2000) : [www.homeoffice.gov.uk/documents/cons-2005-corporate-manslaughter/2000-cons-invol-manslaughter.pdf?view=binary](http://www.homeoffice.gov.uk/documents/cons-2005-corporate-manslaughter/2000-cons-invol-manslaughter.pdf?view=binary).

<sup>55</sup> *The General Part*, 2<sup>nd</sup> Edition, s.278

<sup>56</sup> Glanville Williams, *Textbook of Criminal Law*, Second Edition, Universal(2003), p. 974

<sup>57</sup> *Id.*, p. 953

<sup>58</sup> *Id.*, p.143

corporate manslaughter be recognised for the serious offence it is, in the interests of the people of the nation of Alfonso and the establishment of reasonable justice in the land.

#### B. OLIFANT LTD IS GUILTY OF MANSLAUGHTER

In *Bateman*<sup>59</sup>, the Court of Criminal Appeal said: "To support an indictment for manslaughter the prosecution must prove...that the negligence or incompetence of the accused went beyond a mere matter of compensation and showed such disregard for the life and safety of others as to amount to a crime against the State" In the course of these arguments, it shall be substantially proved that Olifant Ltd. was in fact grossly negligent in its conduct and therefore guilty of manslaughter of the 33 people who died on 2<sup>nd</sup> February, 2006.<sup>60</sup>

Manslaughter consists in killing another person unlawfully, yet under conditions not so heinous as to render the act murder<sup>61</sup>. It is well settled that manslaughter can also be a killing which the killer neither intended nor foresaw as likely to happen.<sup>62</sup> It has been laid down in an American case by Justice Holmes:" But knowledge of the dangerous character of a thing is only the equivalent of foresight of the way in which it will act."<sup>63</sup> In the instant case, Olifant Ltd. Used phosgene gas, which was once used to something as brutal and dangerous as chemical warfare<sup>64</sup>, an obviously lethal substance, and therefore it must be inferred that the company had knowledge of the dangerous substance on its premises and the consequences of its escape thereof.

A company can be liable for an offence requiring *mens rea*, even in circumstances where a human employer would not be held liable, as was first put forth in the case of *ICR Haulage Ltd*<sup>65</sup>, where a company, its managing director and others were indicted for conspiracy to defraud. The Court of Criminal Appeal upheld the indictment.

Although the courts do not generally impose criminal liability for omissions, they have sometimes construed apparently positive words to cover inactivity. One Court, taking strong exception to the conduct of the defendant before it, held that a statute in terms referring to action applied also to an omission to prevent, where the defendant was well placed to do the

<sup>59</sup> (1925), *supra* note 39

<sup>60</sup> Fact Sheet, p.2

<sup>61</sup> Kenny's Outlines, *supra* note 2, p.130

<sup>62</sup> *Ante*, p.517 et seq.

<sup>63</sup> *Commonwealth v Pierce* (1884) 138 Mass. 165

<sup>64</sup> Fact sheet, p.2

<sup>65</sup> [1944] KB 551

preventing.<sup>66</sup> The case of *Miller*<sup>67</sup> is closely related to the current case, and must hold great sway. In *Miller*, a squatter smoked in bed and accidentally caused a small fire in the bed. He didn't bother to put it out, so the fire spread to and destroyed the house. The House of Lords affirmed the squatter's conviction, because he had created the danger on his own act and had then intentionally or recklessly failed to avert it. In the case before us, Olifant Ltd. used phosgene in its industries, knowing it to be lethal, but then abjectly ignoring the need to take any precautions against it.

The principle in *Miller* was that where a person accidentally creates a danger he can be liable for letting the danger eventuate. More technically, the rule is that where the law forbids a particular result (whether we call the crime a result-crime or not), then *mens rea* conceived after the act and before the result occurs (but at a time when the defendant could still have prevented the result) can lead to liability, provided the defendant's conduct falls within the terms of the offence. Here, the offence is manslaughter, which "includes all felonious homicides not amounting to murder"<sup>68</sup>

As was held in *Tesco*<sup>69</sup> and *DPP v Kent & Sussex Contractors Ltd*<sup>70</sup> and *ICR Haulage Ltd*, which are the principal authorities on the identification of a individual in a company, whose acts or mental state is attributed to the company, 'A living person has a mind which can have knowledge or intention or be negligent and has hands to carry out his intentions. A corporation has none of these: it must act through living persons. Then the person who acts is not speaking or acting for the company. He is acting as the company...he is not acting as a servant, representative, agent or delegate... If [his mind] is a guilty mind, then that guilt is the guilt of the company.' In the current case, Diego Olifant who was in-charge of overlooking the policies and safety standards of Olifant Ltd<sup>71</sup> was clearly grossly negligent and failed to uphold any semblance of a standard of care expected of a reasonable human being. His negligence directly resulted in the deaths of the 33 workers on site at the time of the leakage of phosgene on 2<sup>nd</sup> February, 2006, and further, the fact that Olifant Ltd.'s Board of Directors allowed and vindicated such frivolous and haphazard policies only serves to inculcate the company itself in the crime.

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<sup>66</sup> Speck, S.10.5

<sup>67</sup> [1983] 2 WLR 539

<sup>68</sup> Harris, *Criminal Law*, 20<sup>th</sup> edition, p.230

<sup>69</sup> *Tesco supermarkets Ltd v Natrass* [1972] AC 153

<sup>70</sup> [1944] KB 146

<sup>71</sup> Fact Sheet p 2

However, even if the Court finds Diego to not be responsible for the deaths of the 33 workers, the company is clearly responsible, given the fact that they had maintained absurd and woefully inadequate safety standards<sup>72</sup> with respect to the storage and usage of phosgene gas. The eminent jurist J. Gobert has written : “The subject of corporate criminality is ripe for systematic review by Parliament. Liability should not depend upon the identification of those persons responsible for the crime in question, a task which is difficult at best; let alone on the determination of the perpetrators’ status within the company, as required under *Natrass*. Instead, a model of ‘corporate fault’ should be adopted<sup>73</sup>. A company should be criminally liable where a crime is authorised, permitted or tolerated as a matter of company policy or de facto practice. In this situation liability should be the substantive offence which has occurred.”<sup>74</sup> Such liability is predicated on an implied duty of care to be maintained by a company with respect to its conduct with third parties as well as its own employees.<sup>75</sup>

Further, in *AG*<sup>76</sup>, the question that was referred was whether a non-human defendant could be convicted of the crime of manslaughter (by gross negligence) in the absence of evidence establishing the guilt of an identified human individual for the same crime. His Lordship, Rose LJ, fined the defendants 1.5 Million GBP for what he described as a ‘serious fault of senior management’. No employee of the defendant (apart from a driver who caused the accident) was prosecuted. Further, Mr. Lissack (counsel for the Attorney) suggested that aggregation has a role to play i.e. where a series of venial management failures are aggregated and cumulatively amount to gross negligence, a company can be convicted. This suggestion is also supported by Smith and Hogan.<sup>77</sup> In our case, given that the company used phosgene as an industrial reagent over a period of years and continuously passed policies and safety codes (suggested by Diego Olifant) with minimum deliberation and no heed for basic international standards of safety, knowing well the kind of chemical phosgene is<sup>78</sup> (having even been used for chemical warfare), it is absolutely clear that the Company has been grossly negligent, flouting the most basic expectations of safety standards, and is itself undeniably responsible for the deaths of the 33 workers who died on 2<sup>nd</sup> February, 2006. It is humbly submitted therefore, that the Company Olifant Ltd. be held guilty of the charge of manslaughter under S.310 of the Provisional Penal Code Of Alfonso, 2002.

<sup>72</sup> Fact sheet, p. 4

<sup>73</sup> J. Gobert, ‘Corporate Criminality: Four Models of fault’ (1994) 14 LSJ

<sup>74</sup> J. Gobert, ‘A Corporate Criminality: New crimes for the times’, [1994] Crim LR 722

<sup>75</sup> Smith and Hogan-Cases, *supra* note 21, p. 358

<sup>76</sup> *Attorney General’s Reference (No. 2 of 1999)* [2000] 2 Cr App R 207, Court of Appeal

<sup>77</sup> Smith and Hogan, *supra* note 14, p. 186

<sup>78</sup> Fact sheet



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 guilty of murdering his brother Ricardo Olifant, upholding the verdict of the trial court.
2. Diego Olifant is guilty on the charges of manslaughter in respect to the 33 deceased workers, overturning the judgment of the trial court.
3. Olifant Ltd. is guilty on charges of manslaughter in respect to the 33 deceased workers, upholding the verdict of the trial court.

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 "Respondent"*