

Nippon Yusen Kaisha - - - - - Appellant

v.

The China Navigation Company, Limited - - - - - Respondents

FROM

THE SUPREME COURT OF HONG KONG (APPELLATE JURISDICTION)

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL, DELIVERED THE 4TH DECEMBER, 1934.

Present at the Hearing :

LORD ATKIN.

LORD MACMILLAN.

LORD WRIGHT.

Nautical Assessors :

CAPTAIN A. H. RYLEY.

CAPTAIN W. E. CRUMPLIN.

[*Delivered by* LORD MACMILLAN.]

On the 22nd March 1931 a collision occurred in the harbour of Hong Kong between the appellants' steamship "Toyooka Maru" and the respondents' steamship "Kiangsu." Each vessel blamed the other and cross-actions of damages, subsequently consolidated, were instituted by their respective owners against each other in the Supreme Court of Hong Kong. The trial judge, Sir Joseph Kemp, C.J., found the "Toyooka Maru" solely to blame and his decision was affirmed by the Full Court on appeal. There were, however, considerable divergencies of view among the learned judges below (and also apparently among the nautical assessors who assisted them) on certain aspects of the case. The learned Chief Justice, who sat as a member of the Appellate Court, altered the opinion which he had reached at the trial and was ultimately in favour of holding both vessels to blame.

The material facts are not complicated and are to a large extent common ground. It appears that the "Toyooka Maru"

on the morning of the day in question left Kowloon Wharf outward bound shortly after seven o'clock. When she had proceeded some distance but was still within the harbour waters her master observed a bank of fog approaching from the N.E. She was then on the starboard or south side of the channel, being the proper side for an outgoing vessel. Her master, judging it unsafe to proceed in the fog, resolved to anchor and as the local Ordinances forbade vessels to anchor in the fairway he decided to make his way to the anchorage for foreign men of war, shewn on the chart to the north of the fairway. To reach this he had to direct his course to the N.E. across the fairway and at 7.43 a.m. he altered his course accordingly. No incoming vessel had been seen by him. He gave the usual fog-signals by sounding prolonged blasts at short intervals. At 7.44 he heard an answering fog-signal apparently from a vessel at some distance on his starboard bow, and immediately stopped his engines. Several more fog-signals were interchanged between the vessels and at 7.48 the master of the "Toyooka Maru" which still had some way on, hearing a blast from the other vessel close on his starboard bow ordered his engines full speed astern. At 7.49 the "Toyooka Maru" for the first time sighted the other vessel, which proved to be the "Kiangsu," proceeding on a west north-westerly course at a distance of about 600 feet. A collision was then inevitable and at 7.50 the port side of the "Kiangsu" about amidships struck and buckled over the stem of the "Toyooka Maru." At the time of the collision the "Toyooka Maru" had reached the area marked as the anchorage for foreign men of war and the collision occurred within the anchorage.

The "Kiangsu" was inward bound. She had entered the harbour waters through the Lyemun Pass at 7.35. At 7.44, as she was proceeding on the northern side of the channel, which was her proper side, she heard a fog-signal some points on her port bow, from a vessel which was invisible in the fog, and which subsequently proved to be the "Toyooka Maru." She assumed that the vessel from which the signal came was outward bound and would be keeping to her own, the southern, side of the channel so that the vessels would pass port to port. The "Kiangsu" did not stop her engines but put them to slow and after altering her course a point to starboard she proceeded on her way, sounding fog-signals at short intervals. The fog-signals from the other vessel were heard increasingly near and fine on the "Kiangsu's" port bow and at 7.49 the vessels, as already stated, became visible to each other for the first time. The "Kiangsu" put her engines full steam ahead and first ported and then immediately starboarded her helm so as to lessen the impact of the then inevitable collision. (The helm orders are in the old form throughout.)

The faults attributed to the "Toyooka Maru" are (1) that she adopted a negligent and dangerous course in crossing the fairway in fog; (2) that she failed, on hearing the "Kiangsu's" first fog-signal, to port her helm and resume the proper course for outgoing vessels on the south side of the channel; and (3) that she failed to drop her anchors when she sighted the "Kiangsu" at 7.49. The faults attributed to the "Kiangsu" are (1) that she acted in breach of Art. 16 of the Regulations for Preventing Collisions at Sea by not stopping her engines on hearing the fog-signal from the "Toyooka Maru"; and (2) that she proceeded at a dangerously high speed through the fog.

The learned Chief Justice at the trial found that the "Toyooka Maru" was to blame for having directed her course across the fairway in fog and also in not having dropped her anchors on sighting the "Kiangsu." He further found that the "Kiangsu" in not stopping her engines at latest at 7.47 had acted in breach of Regulation 16 and he held (erroneously, in view of section 4 (1) of the Maritime Conventions Act, 1911) that the onus of showing that this breach did not contribute to the collision was thereby imposed on her. In his opinion "she obviously failed to discharge that onus". He nevertheless held the "Toyooka Maru" solely responsible for the collision on the ground that she mainly contributed to the accident by crossing the fairway in fog and that by dropping her anchors she could have avoided the collision at the last moment, whereas the default of the "Kiangsu" was minor in degree and was due merely to an error of judgment in the "ambiguous position created by the 'Toyooka Maru.'" He absolved the "Kiangsu" from the charge of excessive speed. As already indicated, the learned Chief Justice when sitting in the Full Court on appeal modified his original view and was in favour of holding both vessels to blame. Sir Peter Grain in the Full Court was of opinion that the "Toyooka Maru" was wholly to blame on account of her having crossed the fairway in fog and also on account of her not having altered her course to starboard when she heard the "Kiangsu's" second blast and knew that the "Kiangsu" was an incoming ship. He further held that the "Kiangsu" was not in breach of Regulation 16. Wood, J., took the same view, while also holding that the "Toyooka Maru" was not to blame for not dropping her anchors when she first saw the "Kiangsu."

The "Toyooka Maru" having been found by concurrent judgments in the courts below to have been at fault in crossing the fairway in fog, their Lordships accept this finding, from which they see no reason to differ, and they therefore find that the "Toyooka Maru" was to blame for the collision. But there remains the question whether she was solely to blame or whether the "Kiangsu" was also to blame. This question their Lordships now proceed to consider.

The critical point for determination is whether the "Kiangsu" was or was not in breach of Regulation 16. That Regulation provides in its second paragraph that

"A steam vessel hearing, apparently forward of her beam, the fog-signal of a vessel the position of which is not ascertained, shall, so far as the circumstances of the case admit, stop her engines, and then navigate with caution until danger of collision is over."

The "Kiangsu" admittedly heard apparently forward of her beam the first fog-signal of the "Toyooka Maru" at 7.44 and also the subsequent fog-signals and admittedly she did not stop her engines either at 7.44 or at any time before the collision. Her argument is that the Regulation did not apply because the fog-signals which she heard were those of a vessel the position of which was "ascertained," inasmuch as when she heard the first fog-signal she judged the vessel from which it emanated to be an outward bound vessel and thus "ascertained" her position to be on the south side of the channel, the proper side for an outgoing vessel. Sir Peter Grain states that counsel for the appellants admitted, and that it was in fact admitted by all, that as far as the captain of the "Kiangsu" was concerned the "Toyooka Maru" was an "ascertained" vessel up to 7.47 when her signals became nearer and finer on the "Kiangsu's" port bow.

Their Lordships doubt the justification of this admission but accepting it they have still to consider whether during the three minutes from 7.47 to 7.50, when the collision took place, the "Toyooka Maru" was a vessel whose position had been ascertained by the "Kiangsu." The learned Chief Justice at the trial and when sitting in the Full Court on appeal was of opinion that from 7.47 "at latest" the position of the "Toyooka Maru" was not ascertained by the "Kiangsu." Sir Peter Grain and Wood, J., were both of opinion that the "Toyooka Maru's" position was throughout "ascertained" on the ground that the "Kiangsu" was entitled to assume that she was an outward bound vessel whose position was necessarily on the southern side of the channel. Their Lordships do not agree with the view taken by the majority of the Full Court. The position of the "Toyooka Maru" was not, in their Lordships' opinion "ascertained" within the meaning of the Regulation. It was inferred, not ascertained, and as it turned out the inference was wrong. The data on which an inference is founded may be so conclusive as to raise the inference to the level of a certainty, but in the present case the only data were that the fog-signals were heard on the "Kiangsu's" port bow, that outward bound vessels keep to the south side of the channel and that it was improbable that a vessel would be crossing the fairway in a fog. An inference based on these data was not in their Lordships' opinion an ascertainment on which it was justifiable to disregard the precaution enjoined by Regulation 16. In order that the position

of a vessel may be ascertained by another vessel within the meaning of the Regulation she must be known by that other vessel to be in such a position that both vessels can safely proceed without risk of collision. (See, e.g. per Sir Gorell Barnes, P., in "The Aras" [1907] P. 28 at p. 34.) The "Kiangsu" did not know the position of the "Toyooka Maru" in this sense; she inferred it and took the chance of her inference being right.

Then it was pointed out that the Regulation is further qualified by the words "so far as the circumstances of the case admit" and it was suggested that the "Kiangsu," inward bound with the tide behind her, could not safely have stopped her engines in the fairway and lost steerage way. Their Lordships are satisfied that the "Kiangsu" entirely failed to establish that the circumstances did not admit of her stopping her engines.

The result is that their Lordships are of opinion that the "Kiangsu" was in breach of Regulation 16 by reason of her failure to stop her engines, if not when she first heard the "Toyooka Maru's" fog-signal at 7.44, at any rate from and after 7.47 when she heard the "Toyooka Maru's" further fog-signals. This is also the view of the nautical assessors who assisted their Lordships at the hearing, and who advised that the "Kiangsu" ought to have stopped her engines when she heard the first fog-signal of the "Toyooka Maru" at 7.44.

In view of this grave breach of the Regulation on the part of the "Kiangsu" she cannot be absolved from a share in the blame for the collision. Their Lordships cannot too emphatically express their sense of the importance of implicit obedience to the Regulations on whose observance navigators are entitled at all times to rely. If a vessel unjustifiably takes the risk of disregarding one of their injunctions, as the "Kiangsu" did on this occasion, she must suffer the consequences. In the whole circumstances their Lordships are of opinion that both vessels should be held equally to blame.

Their Lordships will humbly advise His Majesty that the appeal be allowed, the judgments of the Chief Justice of the 19th February 1932 and of the Full Court of the 15th August 1932 be reversed and the case be remitted to the Supreme Court of Hong Kong with a direction to find the "Toyooka Maru" and the "Kiangsu" both equally to blame for the collision and to dispose of the consolidated actions, including the costs in the courts below, in accordance with this finding.

The appellants having been in part successful and in part unsuccessful before their Lordships, will have one half of their costs of the appeal.

NIPPON YUSEN KAISHA

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THE CHINA NAVIGATION COMPANY, LIMITED.

DELIVERED BY LORD MACMILLAN

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