

IN THE HIGH COURT OF BOMBAY AT GOA**CRIMINAL WRIT PETITION NO. 6 OF 2015**

Peter alias Petra Fernandes,
Major of age,
R/o H. No. 7/32A,
Sauta Waddo,
Calangute, Bardez – Goa.

... Petitioner

Versus

1. State,
(Through Police attached to
Calangute Police Station).

2. Public Prosecutor,
High Court of
Bombay at Goa,
Panaji – Goa.

... Respondents

Shri Galileo Teles, Advocate for the Petitioner.

Shri Mahesh Amonkar, Additional Public Prosecutor for the
Respondents.

CORAM:- C. V. BHADANG, J.

RESERVED ON:- 19th MARCH, 2015

PRONOUNCED ON:- 24th MARCH, 2015

JUDGMENT:

Rule. Rule made returnable forthwith. The learned
Additional Public Prosecutor waives notice for the respondents. Heard
finally with the consent of the learned Counsel for the parties.

2. This is a case where a frolic ride in a boat, turned into a tragic accident, resulting into death of a young medical student and seriously injuring the other.

3. The brief facts necessary for the disposal of the petition may be stated thus:-

That the complainant, Prateek Shukla alongwith his friends including now deceased Shrey Makhija and injured Sanjay Singh Rawat had come to Goa on a vacation. On 18.11.2010, the complainant alongwith his friends had gone at the Calangute beach. After sometime, Sanjay Singh Rawat and now deceased. Shrey Makhija had gone on a bumper ride in a boat. It so happened that the rider/mariner of the boat while returning back to the shore, suddenly took a turn, as a result of which, the bumper tied to the boat hit another stationary boat. The incident occurred between 15:15 to 15:30 hours in front of Lucky Star Shack, Sauta Waddo, Baga, Calangute. In the incident, Shrey Makhija and Sanjay Singh Rawat, both sustained injuries. They were taken to Vrindavan hospital, where Shrey Makhija was declared dead.

4. It appears that Prateek Shukla lodged a complaint with Calangute Police Station, on the basis of which, an offence at Crime No. 240/2010 was registered against the owners/riders of both the boats, for the offences punishable under Sections 280, 336, 338 and 304-A of the Indian Penal Code (I.P.C., for short). Upon investigation, a charge sheet came to be filed against in all four persons, including the petitioner. That case being Criminal Case No. 361/S/2011/B is pending in the Court of the Judicial Magistrate First Class at Mapusa, Goa. The accused no. 1, Appa Sulgar is the mariner/rider of the boat belonging to accused no. 2, Peter Thinock, in which the deceased Shrey Makhija and Sanjay Singh Rawat were riding. The present petitioner, Peter alias Petra Fernandes, accused no. 3, is the owner, while accused no. 4, Yamanur Harijan is the rider/mariner of the stationary boat, against which the bumper hit, resulting into the accident.

5. It appears that the original accused nos. 3 and 4 filed an application (Exhibit D-25) before the learned Magistrate purportedly under Section 258 of the Code of Criminal Procedure (Cr.P.C. for short), seeking discharge on the ground that no offence is made out

against them, on the allegations, as made in the charge sheet. The learned Magistrate, by an order dated 14.02.2013, found that the boat belonging to the petitioner (accused no. 3) was found parked in the bathing zone and as such, there was *prima facie* material to show that they had failed to exercise necessary caution and employ necessary safety measures. It was also found that "Navigation" as used under Section 280 of I.P.C., involved supply of necessary implements and skillful mariners. The learned Magistrate was of the opinion that it would be a matter of evidence whether the accused no. 3 has employed skillful mariners/riders. The learned Magistrate also found that *mens rea* is not the necessary ingredient of the offence. With such finding, the application came to be rejected. The petitioner unsuccessfully challenged the order dated 14.02.2013 before the learned Additional Sessions Judge, Panaji in Criminal Revision Application No. 27/2013, which was dismissed on 04.12.2014. That is how the petitioner/original accused no. 3 has approached this Court under Section 397 read with 482 of Cr.P.C. seeking discharge.

6. I have heard Shri Galileo Teles, the learned Counsel for the petitioner and Shri Mahesh Amonkar, learned Additional Public

Prosecutor for the respondents.

7. It is submitted on behalf of the petitioner that admittedly, the boat belonging to the petitioner was stationary. The deceased as also the injured, were not riding in the boat owned by the petitioner. It is submitted that even as per the prosecution version, the accused no. 1, who is the mariner/rider of the boat, in which the deceased and the injured were riding, had abruptly taken a turn, resulting in the bumper attached to the boat hitting the stationary boat. It is, thus, submitted that the boat belonging to the petitioner and for the matter of that, the rider of the said boat had absolutely no role to play in the incident. The learned Counsel has taken me through the various sections under which the charge sheet has been filed, in order to demonstrate that, by no stretch of imagination, the allegations can make out any case against the petitioner. It is submitted that even so far as the allegation that the boat belonging to the petitioner was allegedly parked in the bathing zone is concerned, no knowledge much less an intention can be attributed to the petitioner. It is submitted that in this case, neither *actus reus* nor *mens rea* on the part of the petitioner, has been demonstrated. The learned Counsel

was at pains to point out, that in a criminal case of the present nature, vicarious liability for the act of commissions/omissions of the mariner/rider employed by the petitioner cannot be fastened. He submitted that none of the offences involve the concept of strict liability, ruling out necessary ingredient of *mens rea*. He submitted that thus, the learned Magistrate was in error in holding that it would be a matter of evidence whether there was any negligence or lack of diligence by the petitioner, in employment of skillful mariners/riders. It is also submitted that the learned Sessions Judge was in error in affirming the order passed by the learned Magistrate. It is submitted that even taking the prosecution case on the face value, no offence can be said to be made out. He therefore, submitted that the petition be allowed.

8. On the contrary, it is submitted by Shri. Amonkar, learned Additional Public Prosecutor for the respondents that during the course of investigation, it is found that the boat belonging to the petitioner was parked in the bathing zone and not in the parking zone. He submitted that *prima facie* there is material to show that the petitioner failed to take the required care and caution to avoid an

untoward incident, endangering the life of the public at large. He submitted that the learned Magistrate has rightly considered the import of the term "Navigation" as used in Section 280 of I.P.C. in order to hold that it would be a matter of evidence, as to whether the petitioner has employed trained/skillful mariners/riders, so as to absolve himself of any liability. The learned Additional Public Prosecutor thus, urged that the petition be dismissed.

9. I have given my anxious consideration to the rival circumstances and submissions made. At the outset, it would be worthwhile to reproduce the gist of the prosecution case as contained in the charge sheet, as under:-

"In the limits of your Honourable Court and within the jurisdiction of Calangute Police Station, that on 18.11.2010 between 15:15 hours to 15:30 hours at in front of Lucky Star Shack, Sautawaddo, Baga, Calangute, accused persons shown in Column No. 11 at Serial No. A-1, namely Appa Muruti Salgar, rider of Thinock water sports boat, drove his boat in rash and negligent manner and while coming towards the shore from the bumper ride, suddenly took the turn, as the result the bumper, which was tied to the said boat, hit another stationary boat,

causing death of occupant namely Shrey Makhija, age-21 years, r/o H. No. 200 Sector 16, Faridabad, Haryana and grievous inujury to Mr. Sanjay Singh Rawat, age-21 years, r/o Maulana Azad Medical College New Delhi, N/o Kurgama Baseri, Dholpur, Rajasthan.

Accused persons shown in Column No. 11 at Serial No. A-2 namely Peter Thinock owner of boat failed to provide safety equipments to the customers. Accused person shown in column no. 11 at Serial No. A-3 namely Peter Fernandes, owner of other parked boat and his rider accused person shown in Column No. 11 at Serial No. A-4 namely Yamanur Harijan, parked their boat in the bathing zone, thereby failed to take precaution/safety measures for the lives of the customers/tourists enjoying the beach water in the sea.

Thus, accused persons committed an offence punishable under Sections 280, 336, 338, 304-A of I.P.C.”

(emphasis supplied)

10. It would be thus clear that the only allegation, so far as the present petitioner (accused no. 3) is concerned, is that the boat was parked in the bathing zone, whereby he alongwith the rider/mariner, accused no. 4, Yamanur Harijan had failed to take

precautionary/safety measures. It is not the case of the prosecution that the petitioner and for that matter, the accused no. 4 was responsible for failing to keep/provide any safety instruments/measures/equipments to the customers. Admittedly, the deceased and the injured were not riding in the boat belonging to the petitioner. It would be necessary to consider the ingredients of the various Sections in respect of which the petitioner has been charged. The various Sections can be reproduced as under:-

*"Section 280 of I.P.C:- Rash navigation of vessel.
—Whoever navigates any vessel in a manner so rash or negligent as to endanger human life, or to be likely to cause hurt or injury to any other person, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.*

Section 336 of I.P.C:- Act endangering life or personal safety of others.—Whoever does any act so rashly or negligently as to endanger human life or the personal safety of others, shall be punished with imprisonment of either description for a term which may extend to three months, or with fine which may extend to two hundred and fifty rupees,

or with both.

Section 338 of I.P.C:- Causing grievous hurt by act endangering life or personal safety of others.— Whoever causes grievous hurt to any person by doing any act so rashly or negligently as to endanger human life, or the personal safety of others, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine which may extend to one thousand rupees, or with both.

Section 304-A:- Causing death by negligence.— Whoever causes the death of any person by doing any rash or negligent act not amounting to culpable homicide, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.”

11. The arguments of the learned Counsel for the parties had centered only around Section 280 of I.P.C. It would be significant to note that, while rash and negligent “Navigation” is the gist of the offence under Section 280 of I.P.C., rash and negligent act is the common thread running through the offences defined under Sections

336, 338 and Section 304-A of I.P.C. Nonetheless, the allegation may also be considered in the context of the other Sections, for which the petitioner has been charge sheeted.

12. As noticed earlier, Section 280 of I.P.C. specifically deals with a rash and negligent navigation of a vessel. The following would be necessary ingredient of the said offence:-

- (i) That it was a vessel which was being navigated.
- (ii) The accused was navigating the same.
- (iii) He was doing so in rash and negligent manner.
- (iv) The navigation was such so as to endanger human life or was such so as to likely to cause hurt or injury.

The question is whether the vessel/boat can be said to be "navigated" when it was stationary. The learned Magistrate has found that "Navigation" as used under Section 280 of I.P.C. would include supply of necessary safety equipments and skillful mariner. This is because, according to the learned Magistrate, the instruments would be useless without a skillful mariner/rider. It was, therefore, held that whether or not the owner was negligent in providing proper

instruments, and/or skillful riders/mariners, would be a matter of evidence and it cannot be said, at the threshold, that the petitioner, was not navigating the vessel in a rash and negligent manner so as to endanger human life. The learned Sessions Judge has agreed with this view.

13. On considering the circumstances and the submissions made, I am unable to persuade myself to agree with the view as expressed. As noticed earlier, the vessel belonging to the petitioner was not in motion, nor it is the case, that the petitioner had failed to provide the necessary safety instruments, assuming that they had to be provided even in respect of the persons, who may be riding other vessel/s. The only allegation is that the vessel was parked in the bathing zone and not in the parking zone. The question is whether, for such an act, which may be in a given case, attributable to the mariner/rider, employed by owner, the owner himself can be held liable for the same. It is trite that the concept of vicarious liability, cannot apply in a criminal case, except where the particular provision enacting an offence, provide for strict liability. In the present case, Section 280 of I.P.C and for that matter, other Sections for which the

petitioner has been charge sheeted, require and presuppose negligence, as the basic requirement. The concept of vicarious liability namely the master being held responsible for Act of commission/omission of his servant during the course of employment, would not be applicable to a criminal case. Thus, in the present case, even assuming that there is such an act of commission/omission by accused no. 4, it is difficult to see as to how the petitioner, as an owner can be held responsible for such an act, particularly in the absence of any material to show knowledge.

14. Negligence is basically absence of duty to take care. It would be useful to make reference to a decision of the Hon'ble Supreme Court in the case of "**Jacob Mathew Vs. State of Punjab and Another**", reported in **(2005) 6 SCC 1**. Undoubtedly, the case involved, the question of medical negligence, unlike the present case. However, the legal propositions enunciated in so far as the concept of negligence in civil jurisprudence vis-a-vis criminal jurisprudence would be useful for the present purpose. The Hon'ble Supreme Court has *inter-alia* held that nature of negligence required under Section 304-A of I.P.C and the expression rash and negligent act as used

under Section 304-A has to be read as qualified by word "grossly". The Hon'ble Supreme Court *inter-alia* held that "Negligence" is the breach of duty caused by the omission to do something which a reasonable man, guided by those considerations which ordinarily regulates the conduct of human affairs would do, or doing something which a prudent and reasonable man would not do. There are three essential components of negligence, namely (1) duty, (2) breach of duty and (3) consequential damage.

It has been further held that the jurisprudential concept of negligence differs in civil and criminal law. An act which may be negligent in civil law may not necessarily be negligent in criminal law. For negligence to amount to an offence, the element of *mens rea* must be shown to exist. For an act to amount to criminal negligence, the degree of negligence should be much higher i.e. gross or of a very high degree. Negligence which is neither gross nor of a higher degree may provide a ground for action in civil law but cannot form the basis for prosecution.

15. It would be worthwhile to reproduce para 38 of the judgment, as under:

"The question of degree has always been considered as relevant to a distinction between negligence in civil law and negligence in criminal law. In Kurban Hussein Mohamedalli Rangawalla v. State of Maharashtra while dealing with Section 304-A of IPC, the following statement of law by Sir Lawrence Jenkins in Emperor v. Omkar Rampratap was cited with approval:

"To impose criminal liability under Section 304-A, Indian Penal Code, it is necessary that the death should have been the direct result of a rash and negligent act of the accused, and that act must be the proximate and efficient cause without the intervention of another's negligence. It must be the causa causans; it is not enough that it may have been the causa sine qua non."

16. The net result is that the concept of negligence would defer in a criminal case vis-a-vis a civil case of negligence. In the matter of criminal case, involving an offence, much higher degree of negligence would be required and insisted upon. I am conscious that the discharge is being sought at the threshold. However, in the face of the contents of the charge sheet, it is difficult to hold that there is any

case of negligence or absence of due care and caution at least on the part of the present petitioner, made out.

17. In the result the following order is passed.

(a) The petition is allowed.

(b) The impugned order dated 04/12/2014 passed by the Additional Sessions Judge, North Goa, in Criminal Revision Application No. 27/2013 and the order dated 14/02/2013 passed by the learned Judicial Magistrate, First Class, Mapusa in Criminal Case No.361/S/2011/B are hereby quashed and set aside and the petitioner is discharged of the offences punishable under Sections 280, 336, 338 and 304-A of I.P.C.

(c) Rule is made absolute in the aforesaid terms, with no order as to costs.

C. V. BHADANG, J.