



MALTA

**COURT OF MAGISTRATES (MALTA)
AS A COURT OF CRIMINAL JUDICATURE**

**MAGISTRATE DR.
JOSEPH CASSAR**

Sitting of the 11 th January, 2007

Number 632/2001

The Police
(Superintendent Pio Pisani)

-vs-

David Rigglesford

The Court,

Having seen that David Rigglesford, 28 years old, son of Raymond and Sheila nee' Moore-Haines, born in England on the 23rd March 1978, c/o Nr. 5, "San Paola", Tourists Street, Qawra. Holder of British Passport no. 202870800.

Was charged of having in these islands, at Ghadira, l/o Mellieha on the 16th October 2001 at about 12:00hrs through imprudence, careless, unskillfullness in his art or profession or non – observance of the regulations, driven Jet ski No. S-13362 make Yamaha 700, thereby caused the death of Christian Curmi of Mellieha.

Having seen the note filed by the attorney general on the 17th day of the month of May 2004 (Vol. 3 p 269)

Having seen that the accused made no objection to his case being dealt with summarily by this court after being given reasonable time to reply.

Having heard the evidence on oath.

Having examined all documents submitted including the process verbal.

Having considered that according to the Attorney general there might result offence (offences) under the provisions of article 225 of the Criminal Code and article 533 of the same code.

Having seen that section 225 states that:

“wherever, through imprudence, carelessness, unskillfulness in his art or profession, or non-observance of regulations, causes the death of any person, shall on conviction, be liable to imprisonment for a term not exceeding two years or to a fine (multa) not exceeding two thousand liri.”

Having seen section 533 as amended by Act XXIII of 2005. However this case refers to what happened on the 16th of October 2001 and therefore the said amendment does not apply since it is more burdensome to the accused.

Section 533(1) reads:

“in the case of proceedings instituted by the Police ex officio and if a request to that effect is made by the prosecutor, the court shall, in pronouncing judgement or in any subsequent order, sentence the person convicted or the persons convicted, jointly separately, to the payment, wholly or in part, to the registrar of the costs incurred in connection with the employment in the proceedings of any

expert or reference, within such period and in such amount as shall be determined in the judgement or order.” The section refers also to the procedure in case of default of payment, the power of the prosecutor to recover costs as a civil debt and the mode of recovery. “Case law established the principle that expenses incurred ‘in genere’ where not to be included.” (The Police –vs- Joseph Grech, 6th June 2002).

Case law

1. The nature of the offences under section 225 of the Criminal Code has been explained in various judgements.

In re ‘The Police –vs- Louis Portelli’ referring to an architect (professional) the court stated that:

“ghall- kostituzzjoni tar- reat involontarju negligenti – konsistenti generikament f’nuqqas ta’ hsieb, traskuragni, jew nuqqas ta’ hila fl- arti jew professjoni, jew specifikament f’ nuqqas ta’ tharis tar- regolamenti li tkun segwita b’ mezz ta’ kawzalita’ minn evert dannus involontarju; u ghall- accertament tal- htija minhabba kondotta negligenti ghandu jsir il- confront tal- kondotta effettivament adoperata ma’ dik ta’ ‘bonus pater familias’” (4th February 1961, Court of Criminal Appeal).

2. In re ‘The Police –vs- Richard Grech’ Decided on March 21st, 1996 the same Court after referring to the above mentioned judgement quoted the Italian Jurist Francesco Antolesei (Manuale di Diritto Penale, Parte Generali p. 322 – 323):

“biex wiehed jifhem l- essenza vera tal- kolpa wiehed irid izomm f’ mohhu li fil- hajja socjali spiss jinholqu sitwazzjonijiet li fihom attivita’ diretta ghal xi fini partikolari tista’ taghti lok ghal konsegwenzi dannuzi lil- terzi. L- esperjenza komuni jew l- esperjenza teknika cioe l- esperjenza komuni ghall- bnedmin kollha jew dik l- esperjenza ta’ kategorija ta’ nies li jesplitaw attivita’ partikolari tghalliem li f’ dawn il- kazijiet wiehed ghandu

juza certi prekawzjonijiet bil- ghan li jevita li l- interessi ta' l- ohrajn jigu pregudikati.”

The case concerned the administration of dangerous drugs.

3. Connecting Antolisei (see above) in re ‘The Police –vs- Tarcisio Fenech’ (26th March 1998) the Court of Criminal Appeal stated that:

‘l- artikolu 255 tal- Kodici Kriminali taghna jirreferi ghar-regoli ta’ kondotta derivata mill- esperjenza komuni jew teknika bil- kliem “nuqqas ta’ hsieb”, “traskuragni” u “nuqqas ta’ hila fl- arti u l- professjoni” fil- waqt li dawk ir-regoli ta’ kondotta statutorjament stabbiliti huma individwati bil- kliem “nuqqas ta’ tharis ta’ regolamenti”. Hu appena necessarju jinghad li b’ nuqqas ta’ tharis ta’ regolamenti l- legislatur mhux qed jirreferi biss ghall legislazzjoni sussidjarja (li tigi fis- sehh permezz ta’ avvizi legali, notifikazzjonijiet tal- Gvern, ordnijiet etc.) izda ghall-kull forma ta’ kondotta statutorjament stabbilita, u ghalhekk qed jirreferi ukoll ghal dawk ir- regolamenti pronunzjati minn enti privata (per ez. l- regolamenti imfassla minn sid ta’ fabbrika biex jipprevjeni hsara ghal kull min jahdem jew jidhol f’ dik il- fabbrika).

(vide also ‘The Police vs Alexander Azzopardi’ 26th February, 2001; ‘The Police vs Remigio Sacco’, 16th March 1999; ‘The Police vs Saviour Mifsud’, 27th February 2006, all delivered by the Court of Criminal Appeal (Inferior Jurisdiction).

Evidence

1. On the 16th October 2001 at about 11.15 a.m. accused David Rigglesford and his brother Alan Rigglesford hired from 'Oh Yeah', sports club at the Tunny Net, Lido in Ghadira limits of Mellieha two jet skis for thirty minutes, starting from 11.40 a.m. The jet skis were handed to them by Daniel Cachia an employee of the sports club. Daniel Cachia was warned by Mr. Richard Aquilina appointed to hear witness on oath that he had the right not to answer any questions. According to the witness accused signed in his presence a copy of a form exhibited by the prosecution (Vol 3 – p. 395); A copy was not handed to accused. (copy attached to Architect Aquilina's report (Vol2 – p 152):-

Please read carefully before operating

- (1) Pay attention to the instructions that will be given on how to use the Jet Ski, speed boat and other crafts.
- (2) Exit and enter the bay by slowly (less than 10 m.p.h. / 15 k.p.h.). Driving down the middle only apply full power when you are 300 meters (1000 feet) outside the bay. Always keep 300 meters away from the shore until it is time to come back in.
- (3) When coming back to the shore keep your thumb on the red switch. Press it when the instructor yells stop.
- (4) The fine for over speeding is \$ 800.00
- (5) Clients are to keep 200meters from other crafts.
- (6) No racing is allowed.
- (7) Keep a good lookout for swimmers, divers and other boats at all times. Before turning always look around. Remember the craft has no brakes.

(8) All damage caused to the craft will be paid by the client.

(9) Excess time will be charged at Lm 1.00 per minute.

(10) Clients are to use the craft within the area indicated.

(11) Craft will be taken off clients if these instructions are not followed. No refund will be given.

(12) Please remember that people have lost their lives when using these crafts incorrectly.

2. Accused had never used a jet ski.

Witness was case examined. Accused had his glasses on tied to his arms. He was told to stay inside the bay. A map had been stuck to the wall in the club's office where accused signed the form. Witness pointed out 'the point of the bay' and

'I told him to stay away from the boat three hundred meters'

The boat was in the middle of the bay.

"There were other boats tied up."

Later, questioned, weather he pointed out the boat he answered "Yes, I am not sure, no"

3. According to Architect and Civil Engineer Richard the light blue boat was very near to the isolated danger mark on the reef in the middle of the bay. The boat belonged to the deceased, Christian Curmi.

4. Court expert Captain Rueben Lanfranco who prepared a detailed report confirmed later before the Court where he explained the position of the Mellieha

Buoy (Zubrun) 'This is an isolated Danger Mark, permanent, used to indicate that there is a reef about two meters under the sea. The reef is about a hundred meters in diameter. The buoy is about 500 meters away from 'l-eqreb art'.

5. About the speed boat the expert stated that it was anchored about seven feet below the water, a ten meters away from the Mellieha Buoy. There was no evidence that the death of Curmi occurred while he was on the speed board or around it.

"The speed Boat (belonging to the deceased) was quite close to the reef. And slightly beyond that boat was a float which... Was the same float which the deceased had attached to him (self) or... to his harpoon.

6. Nature of the float:

"was identified as what one normally refers to as a life guard float... it is not a diver's float, a diver's float is more round and it normally raise(s) a flag... that is normally used to identify that a diver is at sea. It is used (so that) oncoming vessels... proceed with caution. In this particular case this was not a diving float but it was a normal (one)... a life guard float, which would normally be used to assist a life guard at sea in carrying out a rescue...

a diver... should use a diving float which is different in shape, a life guard float is not meant to be used for diving purposes. In this particular incident, on seeing this float, one would not immediately identify the fact that a diver is in the water(s)... on site there was a life guard float..."

7. Three items were recovered from the waters, a face mask, a weight belt about six kilo grams in weight and a harpoon.

The expert associated the weight of the belt to a diver, keeping "to the bottom as much as possible, so it was obvious that the victim was trying to retrieve an octopus form the reef, form the vicinity of the reef and tried to keep

himself close to the bottom as much as possible” (Vol 1, p 54-56)

“The jet ski was travelling from outside the bay towards the inner side of the bay” It is a fibre class structure but ‘the submerged part underneath the water is aluminium, but on the stern side only.’ No witness “gave an indication as to speed... (or) to anything in particular.”

8. “with the amount of injury... the jet ski was not travelling at an exceedingly high speed” (ibid p 66)

9. Deceased was wearing a wet suit jacket with hood and he had no oxygen tanks.

The court does not agree with the expert’s conclusions based on scanty evidence available just after the happening. Other evidence was tendered before the Court. E.g. The speed was calculated by AIC Richard Aquilina, available to Lanfranco.

10. Witness Mel Galea who is a diver and has a shop near the sports club states that they (ahna) keep watch on snorkelers. He carried out a rescue operation but Curmi was already dead. The blue boat was near the buoy (zubrun) and was visible to the naked eye. (ibid p. 73) He did not see it leave but it was usually used by the deceased’s brother.

11. Samuel Patrick Sciberras who assisted Galea stated that the body was about five and a half meters below the surface of the water.

12. Alan Rigglesford witness for the prosecution, accused’s brother, testified that they were asked whether they had any skiing experience. His answer was in the negative. The owner simply said that there were three rules...

“number one that we must at all times be three hundred meters away from each shore line, number two that the jet skis must be three hundred meters away from each other

to avoid collision, and number three, that we were to go no further than the blue beacon situated in the centre of the bay.”

There was a pole “and he indicated that there was a blue boat... situated near the blue beacon.”

13. The blue boat was indicated “as a point of reference.” He filled a form similar to his brother’s, he glanced at the rules. He was not shown a map of the bay. (vol 1, p. 97-105)

14. Professor Marie Therese Camilleri testified that there was fracture of the skull, “but the immediate cause of death was drowning”;

“the injuries to the head were not so grievous as to cause death... what probably happened is that he got a blow, he lost consciousness and he just fell to the bottom and drowned. Had he been pulled out of the water immediately, probably he would not have died.” (Vol. 1, p. 115-116)

15. Dr. Mario Scerri stated that deceased was hit on the ‘occipito fronto parietali’ of his head. The injury indicated that the jet ski came from behind and caused a ‘zbrixxjatura’ while Curmi was partially submerged.

Defendant’s Evidence

1. Accused chose to take the witness stand. He mentions the form he had to sign. He was instructed

“that if we damage the jet ski we would have to pay or else if we keep them longer we would have to pay. And general information about ourselves.”

Some time later he was given the instructions, he put on his glasses.

“when he (Daniel Cahcia) pointed at the beacon he... also referred to a small wooden boat, which was

close to the beacon... but... at no point did he inform us that this boat was neither his nor...”

2. His counsel asked him:

“and why did he use this blue boat?”

He answered...

“I do not know”

Q. Now, why did he mention the blue boat, in the conversation?

A. Because this was the point in the bay where we were not allowed to pass.

Rigglesford asked about his experience in jet skiing, later he stated that:

“we were allowed to use the... jet skis in a free manoeuvre as long as we kept three hundred meters from each other.”

They were informed that the perimeter area was three hundred meters from the bay edge... not to go past the beacon and the blue boat. He was neither shown a map nor informed about other matters. Not even the reef was indicated. He was not told to stay away from the beacon. The boat was empty and there “was no sign of activity on the boat.”

3. When I got out into the perimeter area, because I did not use a jet ski before, I had to familiarise myself with the jet ski... so I went out of the bay to the right a little... looking with the beacon in front of me technically... but to the left of my central point of vision. When I turned to see where my brother was and he was on the far side of the bay from where I was so I decided this was a safe area for me to... try and see how the jet ski would work. I first turned clockwise, (a) couple of times... and then anti clockwise... at slow speeds to see, sort of, how fast it

would feel before you get control of the jet ski... until that I looked out to find where my brother was.. he was still on the other side of the bay from where I was... so I decided to head out towards the beacon as this would keep us far apart from each other... as I approached the beacon.....so I approached the beacon... I did a slow, sorry, a long turn manoeuvre, to start heading back towards the sandy shore... in the centre of the bay... I started accelerating, I thought I must look for my brother, so I looked to my left, looked in front of me, looked to my right, and as I looked back in front of me again, around there to five meter in front of me, I thought I saw something submerged in the water... it was a dark silhouette and as I passed over the area, I immediately released the accelerator... and turn(ed) the handle bars to the side. At which point I ended ninety degrees to the path I have been taking... and the beacon was now on the left hand side... and the area that I had passed over was also at left hand side.

Q. Did you feel anything?

A. I did not feel anything at that point, as I looked down into the water... I could see nothing... so I decided to slowly do a circle manoeuvre back round to the path

Asked to explain the word 'shadow'

"It looked like the head and shoulders... of a diver, but it was... because if it was a dark wet suit, it was very hard to actually be sure that I had seen..."

"The buoy had two dead dark octopus on it, and this to me confirmed the possibilities of seeing somebody under the water when I was using the jet ski..."

"As I arrived to the shore, I said, I think, I might have hit a diver..."

He returned to the shore and raised the alarm

“The person (Daniel Cachia) who took my jet ski went back to the area. What made him think there was a dicer, must have been the same as me, the octopus on the buoy.”

4. The cross examination is mainly a repetition. The horse power of the jet ski was not explained.

Captain Jeffrey Curmi's Report

1. At the request of defence counsel for the accused the court appointed Captain Jeffrey Curmi, a Salvage Diving officer to establish the weight of the diver's belt, to establish whether the deceased was a certified diver, to establish the equipment of the diver on the 16th October 2001.

The report submitted is divided in two parts

“Part 1 intends to build a clear picture on... (free diving – use of own breath – hold in order to descend) in order to understand better the techniques and equipment used by the diver concerned. Part two intends to directly answer the questions raised.”

2. The main points of the report

(1) Mr. Christian Curmi was diving in depths varying from 5 to 8 meters which is considered as shallow depth. Taking into consideration the depth and a complete 3 – 5mm wetsuit, 3 – 5mm wetsuit, the weight belt was not too heavy.”

(2) “A free – diver does not require any qualifications to free – dive” Curmi was a qualified scuba diver.

(3) With the exception of the marker – buoy, the equipment used by the diver was correct.

(4) “the marker buoy used by Mr. Curmi on the day of the accident was not an internationally recognised marker for divers. It was a life guard float and had no flags

or stamped markings to show diving activity. The only markings stamped on the life guard marker where “Balía” and a warning in small letters “use only in flat water and under supervision”. This warning was also written in French, Italian and German. These stamped markings were neither designed to be visible from long distances nor intended to show the presence of the diver.”

“It is always recommended that a proper diving marker – buoy is used... Being a qualified diver (PAD 1) Mr. Curmi should have known what proper diving marker – buoys are recommended. The life – guard float does not show any diving activity.”

“Local fishermen tend to mark their nets by means of anything that floats, having different shapes and colours. A proper diving marker buoy is very important in order to distinguish between diving activities and other markings.”

3. “the line attached to the life guard was as recommended... it is designed to float and easily break by means of a sudden pull. The other end of this line was attached to a ‘ganc’, the latter also acting as a small weight to stop the float from being dragged by the wind. This is a good practice, as long as the free – diver stays with close proximity of the marker – buoy. The line was 14.5 meters long. This implies that if Mr. Curmi was holding the “ganc” in his hand, the maximum distance between the diver and the float would have been 14.5 meters; which is very reasonable.”¹

4. The scene of the crime officers PS 171 Karl Glanville and P602 Jonathan Attard submitted their report dated 10th November 2001

Conclusions

1. Having examined the evidence, in detail, the court does not agree with the conclusions submitted by Captain

¹ “If the line was much longer, the distance between the diver and the float would have been longer and therefore jeopardizing safety.”

Rueben Lanfranco referring to the responsibility for what happened. At the moment as already stated he had scanty evidence at his disposal, other evidence was tendered before the Court. The expert mentions lack of evidence and submits that the deceased was solely responsible for his death because he was not using an internationally recognisable diver's buoy in a place full of buoys and other signals. Defence requested the Court to examine the civil proceedings related to the case and to appoint an expert, principally to assess deceased responsibility as a diver. Curmi submitted that with the exception of the marker's buoy, the equipment was used by the diver was correct.

“The lifeline attached to the life - guard float as recommended... It is designed to float and easily break by means of a sudden pull. The other end of this line was attached to a ‘ganc’, the latter also acting as a small weight to stop the float from being dragged by the wind. This is a good practice, as long as the free – diver stays with close proximity of the marker – buoy. The line was 14.5 meters long. This implies that if Mr. Curmi was holding the “ganc” in his hand, the maximum distance between the diver and the float would have been 14.5 meters; which is very reasonable.”

2. Accused who was on his first visit to Malta and who was using a jet ski for the first time signed a form stating ‘inter alia’ that

“Clients are to keep 200 meters from other crafts”

And

“Keep a good lookout for swimmers, divers and other boats at all times. Before turning always look around. Remember the craft has no brakes.”

3. Defendant who had never ‘tried any sea sports’ stated that he was not informed about the working of the jet ski. At the same time he states that he was asked

whether he knew how to manage the jet ski. He was not given or shown a map of the bay.

In such a situation defendant, had first and foremost to behave with extreme care.

4. Defendant attention was certainly drawn to the blue boat, belonging to deceased in an area, frequented by divers and visible from the shore.

He was asked by his counsel:

“So he (Cachia) referred to a blue boat, did he?”

Answer: “Yes he did.”

Question: “And why did he use this blue boat?”

Answer: “I do not know.”

Defender further on testified that:

“As I arrived to the shore, I said, I might have hit a diver... I saw something below the water.”

Asked why he used the word diver he answered he had seen an octopus on the buoy.

5. Defendant signed a form that he was to keep off (200 meters) from other craft and to pay attention to swimmers and divers. But from the evidence he tendered he was only interested in keeping the distance between himself and his brother. He was not keeping a proper look out for anything else.

“apart from when we were in the prohibited area, we were allowed to use the jet skis in a free manoeuvre as long as we left three hundred meters from each other.”

The words: ‘in a free manoeuvre’, in this case indicates recklessness.

6. Defendant entered the area near the blue boat. He was accelerating his speed. He hit Curmi, whose head was partly above the water, at the back of the skull. Curmi lost consciousness and drowned. Only immediate help would have saved him. The body was recovered later.

Defendant suddenly saw a diver before him but it was too late to take evasive action. It was a fraction of a second. (see A&CE Aquilina's report). Defendant was also in the prohibited area in relation to his speed.

Defence submissions are somewhat ambiguous.

"Above all, looking out and foreseeing the tragic accident would have been impossible for any person."

"There was no reason why the defendant should not have approached the said boat."

"No 200 meters from other craft was mentioned."

The main blame for the death of Curmi has to be borne by defendant who acted, imprudently, carelessly, unskillfully, and in violation of the rules he had signed to observe. The Court regards his behaviour as 'reckless'. Defendant did not know how to use a jet ski, knew nothing about the place where he was jet skiing, drew close to a boat at high speed and in a prohibited area, with full knowledge that there was a diver nearby. He did not keep a proper lookout. When he saw the diver it was too late for him to take evasive action. This conduct was the main cause of the death of Christian Curmi. (Cause and effect – vide case note above quoted)

The Court therefore, finds accused guilty as charged.

Having seen section 225 of Chapter 9 of the Laws of Malta and section 28A of the said chapter decides to apply the said mentioned section since accused has a clear conduct sheet.

Condemns accused to two years imprisonment which sentence shall not take effect unless, during a period of two years starting from today, the offender commits another offence punishable with imprisonment. The Court is explaining to the offender in ordinary language his liability under article 28B of Chapter 9 if during the operational period he commits an offence punishable with imprisonment. The court condemns accused to pay the expenses due to Captain Curmi within one month who was appointed during the proceedings in conformity with section 533(1) of the Criminal Code, In default such amount shall be converted to forty-five days imprisonment in terms of section 533(2) and the prosecutor shall be entitled to recover the said costs as a civil debt as laid down in the Code of Organisation and Civil Procedure in terms of sections 533(3)(4) of the Criminal Code.

< Final Judgement >

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