

**Joseph Vs. State of Kerala**

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**Court :** Kerala

**Decided On :** Sep-08-1989

**Reported in :** 1990ACJ385; 1990CriLJ56

**Judge :** K.G. Balakrishnan, J.

**Acts :** Cochin Public Canals and Backwaters Navigation Act - Sections 10, 11 and 11A; ;[Indian Penal Code \(IPC\), 1860](#) - Sections 34, 280, 302, 304A and 323; ;Code of Criminal Procedure (CrPC) , 1974 - Sections 468(2), 469(1) and 473; ;[Constitution of India](#) - Article 21

**Appeal No. :** Criminal Appeal Nos. 326 and 334 of 1988

**Appellant :** Joseph

**Respondent :** State of Kerala

**Advocate for Def. :** Aysha Youseff, Public Prosecutor

**Advocate for Pet/Ap. :** M.K. Damodaran and; Joseph Kattikkaran, Advs.

**Disposition :** Appeal allowed

**Judgement :**

**K.G. Balakrishnan, J.**

1. These two appeals arise from a common judgment in Sessions Case No. 33 of 1987 on the file of the IV Addl. Sessions Judge. Ernakulam. The 1st accused who has been convicted under Section 304-A, I.P.C. is the appellant in Crl. Appeal No. 326 of 1988 and the 2nd accused who has been convicted for the offence punishable under Section 10 of the Cochin Public Canals and Backwaters Navigation Act (Act 1 of 1092 ME) is the appellant in Crl. Appeal No. 334/88. These two appellants were tried along with 6 others who were found not guilty and acquitted.

2. On 19-3-1980 the annual festival was celebrated in Kannamali Church. People from various parts of the State gathered to attend the festival. Kannamali is a place flanked by Arabian Sea and Vembanad lake and in order to reach that place from Perumbadappu one has to cross the Vembanad lake. Several boats were used for ferrying passengers from Perumbadappu to Kannamali. The 1st accused was the owner of a boat by name 'St. Xavier'. The 2nd accused is the 'Sirang' of the boat. The other accused, who were tried along with these accused are the members of the crew of that boat. This boat had a capacity to carry 80 passengers. According to the prosecution from 13-9-1978 this boat had no valid licence or permit to use it as a navigable vessel. On the date of the festival in Kannamali Church this boat was used for ferrying passengers. The prosecution allegation is that the accused persons in order to make money at any cost conducted ferry service between Kannamali and Perumbadappu and carried passengers more than the permitted capacity and thereby endangered lives of many people. The ill-fated journey of the boat started at about 2 p.m. on 19-3-80 Kannamali jetty with packed capacity of 300 passengers and it sailed for about half-an-hour and then water seeped in through the various holes at the bottom and the passengers cried out in panic and some of them jumped into the lake and some others climbed on the top of the boat and at about 2.45 p.m. the boat capsized. According to the prosecution nearly 30 persons lost their lives and several others sustained injuries.

3. On 19-3-1980 at about 4 p.m. PW 110 recorded the statement of PW 1 and registered a case. Originally Crime No. 20 of 1982 was registered under Sections 280 and 304-A, I.P.C. The appellant in Crl. Appeal No. 334 of 1988 was the lone

accused at that stage. Investigation in the case was taken over by the Dy. S. P., Crime Detachment. Several witnesses were questioned by the investigating officer and ultimately on 10-3-86 the final charge-sheet was filed incorporating offences under Sections 302, 323 read with Section 34, I.P.C. and the offence under Sections 10. 11 and 11(A) of the Cochin Public Canals and Backwaters Navigation Act.

4. On the side of the prosecution PWs 1 to 118 were examined. On the side of the defence DWs 1 to 23 were examined MOs 1 to 44 were also exhibited in the case. The main case of the prosecution was that the boat owned by the 1st accused was not in a fit condition to use it as a navigable vessel and by carrying 300 passengers in the boat the 1st accused was rash and negligent. The court below accepted the prosecution case and held that the 1st accused ventured to offer the boat service, which was 28 years old and did not have the fitness certificate or licence for 11/2 years and in that way found guilty of offence punishable under Section 304-A, I.P.C. This finding of the learned Sessions Judge is challenged by the counsel for the 1st accused.

5. The learned counsel for the 2nd accused contended that the conviction and sentence is not sustainable as the final charge was filed after a period of 6 years and this is clearly against the provisions contained in Section 468(2)(c) of the Cr. P.C.

6. The first question that would arise for consideration is whether the charge against the 1st accused under Section 304-A, I.P.C. is sustainable. It is not disputed that the boat 'St. Xavier' owned by the 1st accused capsized on 19-3-80 at about 2.43 p.m. It is also not very much in dispute that the boat was overloaded with passengers and there were 300 passengers as against the permitted capacity of 80 passengers. The immediate cause for sinking of the boat is attributed to various factors. Several witnesses were examined to prove this fact. Many of the passengers who had travelled in the boat at the fateful time were also examined in this case. Some of the witnesses deposed that as soon as they entered the boat they found that water had entered the deck portion of the boat. Some would say that they saw water inside the boat as it sailed some distance. The evidence of

some of these witnesses appears to be highly exaggerated.

7. DW 7 is a person having 37 years experience in boat building. He had occasion to see and repair the boat 'St. Xavier'. He deposed that the boat 'St. Xavier' is having a diesel engine and the same is fitted in the keel portion of the boat on a set-foundation and the deck portion is about 4 ft. above the keel. He also deposed that if water enters through the keel portion to a height of 9 inches the engine of the boat would not work. DW 3 is an Engineer having experience in ship technology. He deposed that water would first enter the keel portion and cause stoppage of the machine. In the instant case, the evidence of some of the witnesses is to the effect that the engine of the boat was working and the boat was sailing till it capsized at the place of incident. The defence suggestion is that the passengers in the boat shouted and became panic and in that confused situation some passengers even climbed on the top deck of the boat and this unruly situation led to the capsizing of the boat.

8. On the prosecution side there is no tangible evidence to show the immediate cause of this boat tragedy. PW 77 submitted Ext. p. 51 report after inspecting the boat on 94-80. By the time PW 77 inspected the boat many of the planks and other materials were removed from the boat. The major portion of the boat was still immersed in water. Ext. p. 51 report does not give any indication as to how the boat capsized. It appears that the boat was never taken out of the water and dry docked to ascertain whether the planks of the basement of the boat had given way so as to enter water. There was also no inspection by the experts to ascertain the defects if any of the machines used in the boat.

9. The only material question to be considered is whether in the absence of proper evidence in this case can it be assumed that the 1st accused, who was the owner of the boat, was rash and negligent in allowing this boat for navigation purposes. The learned counsel for the 1st accused contended that an offence under Section 304-A, I.P.C. would be sustainable if it is proved that the accused was responsible for the death of the victims and that there were no supervening circumstances or persons who accelerated or aided the death.

10. To impose a criminal liability under Section 304-A, I.P.C., it is necessary that the death should have been a direct and proximate result of the rash and negligent act of the accused. It is not enough that the prosecution succeeded in proving that the (accused was rash and negligent, Section 304-A runs thus :

'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 learned Sessions Judge found the 1st accused guilty on the basis of the fact that he had no valid licence to operate the ferry and that he must have known that the boat was leaky and not fit for ferrying passengers. The court below observed that, 'the 1st accused was venturing a hazardous and wanton act probably with the knowledge that some water which might find entry into the boat as in the previous trip could be bailed out .... even such a wanton act is covered by Section 304-A.'

12. The evidence in this case shows that the 1st accused was not present at the time when the boat started sailing from Kannamali. The incident happened at about 2.45 p.m. The evidence in this case shows that the 1st accused was present in the boat jetty at about 9.30 a.m. and thereafter he left the place. It is not proved that it was under his direct supervision that the boat sailed from Kannamali and he gave instruction to take so many passengers. It is also not proved in this case that the defect of the boat alone was the reason for this catastrophe. Therefore the mere negligence if any of the 1st accused is not sufficient to hold that he is guilty of offence punishable under Section 304-A, I.P.C.

13. In a case of similar nature the Supreme Court held that the accused cannot be held guilty of offence under Section 304-A, I.P.C. See Mohd. Rangawalla v. Maharashtra State. AIR 1965 SC 1616 : (1965 (2) CrL LJ 550). That is a case where the appellant therein was found guilty of offence under Section 304-A, I.P.C. The appellant was one of the partners of a factory which manufactures paints and varnish. The appellant had no licence to manufacture wet paints. However, an employee of the factory in the process of manufacturing wet paints poured turpentine to a barrel which contained melted rosin. As the turpentine was

poured the mixture began to froth and in order to keep down the froth the whole thing had to be stirred up but no stirring was done as the assistant was not there. The result was that froth overflowed out of the barrel and because of the heat, varnish and turpentine, which were stored at a short distance caught fire. Seven men who were working in a loft which is reached by a ladder sustained serious burn injuries and died. The appellant was convicted under Section 304-A., I.P.C. The Supreme Court Held that Section 304-A., I.P.C. would be attracted only when the death is caused by rash and negligent act and that the death must be the direct result of the rash and negligent act of the accused. The Supreme Court also held that the direct and proximate cause of the fire breaking out with the consequence that seven persons were burnt to death was due to the negligence of the employee and the appellant who allowed turpentine and varnish to store at a distant place was only an indirect factor in the breaking out of fire. Similarly, in the present case it is not proved that the 1st accused was present at the scene of Occurrence and that he invited the passengers to the boat and undertook the hazardous journey. Therefore, the conviction of the 1st accused under Section 304-A., I.P.C. is not sustainable.

14. For yet another reason the conviction of the 1st accused under Section 304-A. is challenged. So also in Crl. Appeal No. 334 of 1988 the conviction is challenged on the basis that the final report was filed beyond the period of limitation. The incident in this case happened on 19-3-80. The final report was filed by the investigating office on 19-3-86. Under Section 468(2)(c) of the Cr. P.C. no Court shall take cognizance of an offence after the expiry of 3 years if the offence is punishable with imprisonment for a term exceeding one year but not exceeding three years. Here the appellant was found guilty of offence punishable under Section 304-A., I.P.C. and the offence is punishable with imprisonment for a period of 2 years. The offence punishable under Section 10 of Cochin Public Canals and Backwaters Navigation Act is an offence punishable with fine not exceeding to Rs. 500.00. Of these two offences, the offence punishable under Section 304-A., I.P.C. is more serious and taking into consideration of the gravity of these offences as per Section 468(2)(c) of the Cr. P.C. the final report should have been filed within a period of three years. In the present case the final report was filed after a period of 6 years, and therefore, the court below was not justified in taking

cognizance of the offence. The Supreme Court in *State of Punjab V. Sarwan Singh*. (1981)3 SCC 34 (1981 CrLJ 722) held that (para 37)

'The object of the Criminal, Procedure Code in putting a bar of limitation on prosecutions were clearly to prevent the parties from filing cases after a long time as a result of which material evidence may disappear and also to prevent abuse of the process of the court by filing vexatious and belated prosecutions long after the date of the offence. The object which the statutes seek to subserve is clearly in consonance with the concept of fairness of trial as enshrined in Article 21 of the [Constitution of India](#). It is, therefore, of the utmost importance that any prosecution, whether by the State or a private complainant must abide by the letter of law or take the risk of the prosecution failing on the ground of limitation.

In the instant case as the charge-sheet clearly mentions that the offence was committed on August 22, 1972, the bar of limitation contained in Section 468(2)(c) clearly applies and the prosecution, therefore, is clearly barred by limitations. Even assuming that so far as the offender is concerned, the commission of the offence come to the knowledge of the officer concerned, it would be so according to the charge-sheet on January 5, 1973, the date when the audit report was made, even if this extreme position be accepted the prosecution would still be barred by limitation under Section 469(1)(b) of the Code of Criminal Procedure. 1973.

The prosecution against the respondent being barred by limitation the conviction as also the sentence of the respondent as also the entire proceedings culminating in the conviction of the respondent therein were non est'.

The Madras High Court also in *Kathamuthu v. Balammal*. 1987 CrLJ 360 held that the court is not competent to take cognizance of the offence barred under Section 468, Cr. P.C. Unless delay is condoned under Section 473 of the Code.

15. In the instant case the prosecution has no case that application was filed under Section 473 of the Cr. P.C for the extension of period of limitation and that the court granted such prayer. On the other hand the plea placed by the learned Public Prosecutor is that in the final report the offence punishable under Section 302. IPC was also included and therefore the provisions under Section 468(2)(c)

of the Cr. P.C. has no application. Even if the offence punishable under Section 302, I.P.C. was included in the final charge-sheet it is open to the accused to raise the plea of limitation in respect of the offence for which they are convicted. So, in the case of conviction the 1st accused has been found guilty of a more severe offence than the offence committed by the 2nd accused and Section 468(2)(c) is the relevant section applicable. As it is proved that the final report was not filed within a period of 3 years and as there was no condonation of delay as contemplated under Section 473 of the Cr. P.C., the whole proceedings which culminated in the conviction of the appellants herein have become non est.

16. Therefore, both the appeals are allowed and the appellants are acquitted of the charges framed against them.

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