Around the World

Switzerland

FATAL ACCIDENT DURING A BICYCLE RACE: CRIMINAL LIABILITY

(Aargau High Court Decision SST.2017.123 dated 20 November 2017 and Federal Supreme Court Decisions 6B_261 /2017, 6B_283/2018 and 6B_284/2018 dated 28 January 2019)

Criminal liability; Cycling; Fatal accidents; Negligence; Sporting events; Switzerland

Facts

In a bicycle road race (the "Etappe Heavy" of the Gippinger Radsporttage), two cyclists of the leading group touched while one of them overtook the other. The cyclist who was overtaken fell, and behind him, three more cyclists crashed. While three of them were lucky and "only" suffered injuries, the fourth collided with a tree at the side of the road and suffered a traumatic brain injury, which led to his death caused by central regulatory failure a few hours later.

The cyclist who had overtaken one of his colleagues (the accused) was taken into investigative custody for seven days. After an extensive investigation, the prosecutor of the Canton of Aargau indicted the accused for negligent homicide and multiple negligent physical injury.

The details of the tragic occurrence were, in the course of the investigation and the later court proceedings, established as follows:

- All five cyclists involved were experienced, well-trained and ambitioned athletes, some of them former professionals. The accused had participated in more than 300 races during his career.
- The race had progressed considerably; the occurrence took place on lap 5 of 6.
- At the time of the occurrence, the leading group was descending a hill at a speed of approximately 70km/h.
- The accused overtook three cyclists of the leading group without any problems and was planning to overtake the fourth as well. The distance between him and the fourth cyclist was no more than 50cm.
- For some reason, which could not be established and could be found on the side of either cyclist, the shoulders of the two cyclists touched, and the rider to be overtaken fell. The three riders behind him all crashed as well, partially because of collisions with the bicycle of the cyclist who had fallen first, partially because of attempted evasion manoeuvres.

The district court of Zurzach, the court of first instance, followed the prosecutor's indictment and found the accused guilty of negligent homicide and multiple negligent physical injury, sentencing him to 12 months' imprisonment suspended on probation for two years and to a fine of CHF 2,000. Furthermore, it granted damage and satisfaction claims of several claimants (the injured cyclists and family members of the cyclist who had died) of approximately CHF 380,000 in total and to bear the court costs.

The accused appealed this decision to the High Court (*Obergericht*) of the Canton of Aargau, the court of second instance.

Held by the court of second instance

The Aargau High Court analysed the facts in detail and concluded that the overtaking manoeuvre by the accused and the contact between the two cyclists, which was provoked by the small distance between them, was at least co-causal for the tragic occurrence. It dismissed the argument by the accused pursuant to which the bicycle of the cyclist who was overtaken might have suffered a technical defect.

It then concluded that the rules of the Swiss Act of Road Traffic were not applicable, as the race had been conducted on roads that were temporarily closed for any traffic but the race. In addition, there were no regulations or guidelines by the Union Cycliste Internationale or any unwritten customary law for bicycle road races that would govern overtaking manoeuvres. Hence, the general rule of *neminem laedere* applied. Based on the fact that the race was a challenging competition, however, the court concluded that the ambitious participants had accepted an increased risk of being injured.

The High Court qualified the overtaking manoeuvre as not having gone beyond what was acceptable for the race and road situation at hand, namely considering that the conditions were good (dry road, unproblematic road surface, good visibility, no difficult turns ahead) and that the cyclists had already passed said descent four times before and were familiar with the local situation. Moreover, the fact that cyclists frequently ride in the slipstream of others even in descents and therefore accept very small distances between each other which disallow them to react timely in case of any happenings led the court to assume that racers cannot and do not want to exclude the risk of collisions with other riders which might even bear grave consequences.

Based on this, the High Court concluded that the accused had not crossed the boundaries of the risk typical of and inherent to bicycle races in a manner that would make him criminally liable. The risk of falling, which is inherent to an overtaking manoeuvre as the one at hand, is typical for this kind of sport, and realised in the tragic occurrence that took place in the situation to be judged. For this reason, it set the judgment by the court of first instance aside and acquitted the accused.

As to the civil claims, the court did not pass a judgment. It held that the acquittal in the criminal matter did not automatically exclude a civil liability and made use of the possibility to refer the matter to civil litigation.

Finally, the High Court awarded the formerly accused a satisfaction payment from the state for CHF 1,400 for the seven days he spent in investigative custody.

The prosecutor as well as the parties who had filed civil claims appealed this decision to the Federal Supreme Court, the third and last instance.

Held by the Federal Supreme Court

The Federal Supreme Court confirmed that the fact-finding by the court of second instance had taken place in a correct manner, without breach of any procedural rules and in a non-arbitrary manner.

Further, the Federal Supreme Court analysed whether the accused could and should have known, at the time of the overtaking manoeuvre, based on the circumstances and his abilities and knowledge, that he would endanger the other cyclist's integrity, and whether he had exceeded the risk he was allowed to take, considering the characteristics of the specific sports in question. However, it did not find that this was the case. It stressed that cycling did indeed involve a risk of grave injuries or death, namely when riding in the slipstream of others. In addition, it confirmed the previous instance's findings that held that the rules of the Swiss Act of Road Traffic were not applicable on a closed road during a bicycle race and that the regulations of the applicable sports federation did not forbid riding as the accused did. Even analysing the case based on the general principles of risk allocation, the Federal Supreme Court confirmed the appealed judgment.

Discussion

As tragic as the death of this cyclist certainly is, the decisions by the Aargau High Court and the Federal Supreme Court seem just in the light of the result of the investigation.

The Federal Supreme Court's practice regarding the criminal liability for occurrences in sports is clear (see namely FSC decision 134 IV 26 (= 6B_298/2007), which the authors of this contribution discussed in [2008] I.S.L.R., issue 1, pp.11–12). See also their contribution in [2008] I.S.L.R., issue 3, pp.48–50 on another case in which this principle was applied: the competent court has to refrain from holding an athlete having harmed another athlete criminally liable if this harm is the consequence of the realisation of a risk which is inherent to and typical of the kind of sport in question. This includes any harm based on "normal" competition behaviour. However, the more blatantly an athlete breaches rules that were established in order to protect other athletes, the less this may be qualified as the realisation of a risk which is inherent to and typical of the kind or sport in question, and the more a criminal sanction may be taken into account.

Assuming that the overtaking manoeuvre took place as established during the investigation, and assuming that it could not be established who caused the touching of shoulders of the two cyclists, it would seem unfair to state that the formerly accused's actions went beyond normal competition behaviour. The touching of shoulders was not qualified as intentional and could have been caused by either of the cyclists, the accused's risk to fall was just as big as the risk that the cyclist he overtook would crash, and the risk for both does not seem to have been bigger than in other situations during this and other races. The lecture of the judgment leaves the impression that the overtaking manoeuvre was tight but still a situation that occurs regularly and remains harmless most times and causes problems in a small percentage of the cases only. The court could not establish any facts that would allow it to come to the conclusion that the risk which is inherent to and typical of bicycle road races was increased by the behaviour of the accused. Hence, it was the logical consequence to acquit him.

As to the referral of the civil claim to the civil courts, the authors would like to draw the attention of the readers to their contribution in [2018] I.S.L.R., issue 3, pp.48–50 in which they explained this phenomenon of Swiss law.

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