

ANASTACIO VIANA, PETITIONER, VS. ALEJO AL-LAGADAN AND FILOMENA PIGA, RESPONDENTS.

G.R. No. 8967. May 31, 1956

Ponente: CONCEPCION, J.

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CONCEPCION, J.:

Petitioner Anastacio Viana owned the fishing sailboat "Magkapatid", which, in the night of September 3, 1948, sunk in the waters between the province of Bataan and the island of Corregidor, as a consequence of a collision with the USS "Tingles", a vessel of the U.S. Navy. Inasmuch as Alejandro Al-Lagadan, a member of the crew of the "Magkapatid", disappeared with the craft, his parents, respondent Alejo Al-Lagadan and Filomena Piga, filed the corresponding claim for compensation under Act No. 3428. After appropriate proceedings, a Referee of the Workmen's Compensation Commission rendered a decision, dated February 23, 1953:

"1. Ordering Mr. Anastacio Viana to pay the above-named claimants through the Workmen's Compensation Commission, Manila, the sum of P1,560 in lump sum with interest at 6 per cent from September 3, 1948 until fully paid; and

"To pay the sum of P16 to the Workmen's Compensation Commission as costs."

Said decision was, on petition for review filed by Viana, affirmed by the Workmen's Compensation Commissioner, on or about October 22, 1954, "with additional fee of P5.00". Said Commissioner, having subsequently denied a reconsideration of this action, Viana has brought the matter to us, for review by certiorari, upon the ground that this case does not fall within the purview of Act No. 3428, because the gross income of his business for the year 1947 was allegedly less than P10,000, and because Alejandro Al-Lagadan was, at the time of his death, his (petitioner's) industrial partner, not his employee.

The first ground is untenable, petitioner not having invoked it before the rendition of the Referee's decision on February 23, 1953. The objection to the application of Act No. 3428, upon said ground, was made for the first time when petitioner sought a review of said decision by the Workmen's Compensation Commissioner. The non-applicability of said Act to employers whose gross income does not reach P20,000 is, however, a matter of defense, which cannot be availed of unless pleaded in the employer's answer to the claim for compensation filed by the employee or his heirs. Petitioner herein having failed to do so, said defense may not now be entertained (*Rolan vs. Perez*, 63 Phil., 80, 85-86).

As regards the second ground, petitioner maintains, contrary to the finding of the Referee and said Commissioner, that the deceased was his industrial partner, not employee. In this connection, it is alleged in paragraph (6) of the petition:

"That the practice observed then and now in engaging the services of crewmen of sailboats plying between Mindoro and Manila is on a partnership basis, to wit: that the owner of the vessel, on one hand receives one-half of the earnings of the sailboat after deducting the expenses for the maintenance of the crew, the other half is divided pro rata among the members of the crew, the 'patron' or captain receiving four parts, the 'piloto'

or next in command three parts, the wheelsman or 'timonel' 1 1/2 parts and the rest of the members of the crew one part each, as per Annex 'B' hereof."

It appears that, before rendering' his aforementioned decision, the Referee requested Mr. Manuel O. Morente, an attorney of the Workmen's Compensation Commission, "to look into and inquire and determine the method of and the basis of engaging the services of crewmen for sailboats (batel) of twenty (20) tons or more plying between Manila and Mariveles and moored along Manila North Harbor", and that, thereafter, said Atty. Morente reported:

"The basis of engaging the services of crewmen of a batel is determined in accordance with the contract executed between the owner and the patron. The contract commonly followed is on a share basis after deducting all the expenses incurred on the voyage. One half goes to the owner of the batel and the other half goes to the patron and the members of the crew and divided among themselves on a share basis also in accordance with their agreement with the patron getting the lion's share. The hiring of the crew is done by the patron himself. Usually, when a patron enters into a contract with the owner of the batel, he has a crew ready with him." (Italics supplied.)

In sustaining the Referee's finding to the effect that the deceased was an employee of Viaña, the Workmen's Compensation Commissioner said:

"The trial referee found that there was an employer-employee relation between the respondent and the deceased, Alejandro Al-Lagadan, and the share which the deceased received at the end of each trip was in the nature of 'wages' which is defined under section 39 of the Compensation Act. This is so because such share could be reckoned in terms of money. In other words, there existed the relation of employer and employee between the respondent and Alejandro .Al-Lagadan at the time of the latter's death.

"We. believe that the trial referee did not err in finding the deceased an employee of the respondent. We cite the following cases which illustrate the point at issue:

The officers and crews of whaling and other fishing vessels who are to receive certain proportions of produce of the voyage in lieu of wages; (Rice vs. Austin, 17 Mass. 206; 2Y & C. 61); Captains of. merchant ships who,, instead of wages, receive shares in the profits of the adventure; (4 Maule & C. 240); or who take vessels under an agreement to pay certain charges and receive a share of the earnings; (Tagard vs. Loring, 16 Mass. 336, 8 Am. Dec. 140; Winsor vs. Cutts, 7 Greenl. Me. 261) have generally been held not to be partners with the respondent, and the like. Running a steamboat on shares does not make the owners partners in respect to the vessel (The Daniel Koine, 35 Fed. 785); so of an agreement between two parties to farm on shares; (Hooloway vs. Brinkley, 42 Ga. 226); A seaman who is to receive pay in proportion to the amount of fish caught is not a partner; (Holdren vs. French, 68 Me. 241); sharing profits in lieu of wages is not a partnership. There is no true contribution; (Crawford vs. Austin, 34 Md. 49; Whitehill vs, Shickle, 43 Mo. 538; Sankey vs. Iron Works, 44 Ga. 228.)" (Italics supplied.)

In other words, in the opinion of the Referee, as well as of said Commissioner, the mere fact that Alejandro's share in the understanding "could be reckoned in terms of money", sufficed to characterize him as an employee of Viaña. We do not share this view. Neither can we accept, however, petitioner's theory to the effect that the deceased was his partner, not an employee, simply because he (the deceased) shared in the profits, not in the losses. In determining the existence of employer-employee relationship, the following elements are generally considered, namely: (1) the selection and engagement of the employee; (2) the payment of wages; (3) the power of dismissal; and (4) the power to control the employees' conduct— although the latter is the most important element (35 Am. Jur. 445). Assuming that the share received by the deceased could partake of the nature of wages—on which we need not, and do not, express our view—and that the second element, therefore, exists in the case at bar, the record does not contain any specific data regarding the third and fourth elements.

With respect to the first element, the facts before us are insufficient to warrant a reasonable conclusion, one way

or the other. On the one hand, Atty. Morente said, in his aforementioned report, that "the contract commonly followed is on a share basis. * * * The hiring of a crew is done by the patron himself. Usually, when a patron enters into a contract with the owner of the batel, he has a crew ready with him". This statement suggests that the members of the crew are chosen by the patron, seemingly, upon his sole responsibility and authority. It is noteworthy, however, that said report referred to a practice commonly and "usually" observed in a given place. The record is silent on whether such practice had been followed in the case under consideration. More important still, the language used in said report may be construed as intimating, not only, that the "patron" selects and engages the crew, but, also, that the members thereof are subject to his control and may be dismissed by him. To put it differently, the literal import of said report is open to the conclusion that the crew has a contractual relation, not with the owner of the vessel, but with the patron, and that the latter, not the former, is either their employer or their partner.

Upon the other hand, the very allegations of the petition show otherwise, for petitioner explicitly averred there in that the deceased Alejandro Al-Lagadan was his "industrial partner". This implies that a contract of partnership existed between them and that, accordingly, if the crew was selected and engaged by the "patron", the latter did so merely as agent or representative of petitioner here in. Again, if petitioner were a partner of the crew members, then neither the former nor the patron could control or dismiss the latter.

In the interest of justice and equity, and considering that a decision on the merits of the issue before us may establish an important precedent, it would be better to remand the case to the Workmen's Compensation Commission for further evidence and findings on the following questions: (1) who selected the crew of the "Magkapatid" and engaged their services; (2) if selected and engaged by the "patron", did the latter act in his own name and for his own account, or on behalf and for the account of Viaña; (3) could Viana have refused to accept any of the crew members chosen and engaged by the "patron"; (4) did petitioner have authority to determine the time when, the place where and/or the manner or conditions in or under which the crew would work; and (5) who could dismiss its members.

Wherefore, let the case be remanded to the Workmen's Compensation Commission, for further proceedings in conformity with this decision, without special pronouncement as to costs. So ordered.

Paras, C. J., Bengzon, Padilla, Mototemayor, Reyes, A., Bautista Angelo, Reyes, J. B. L., and Endencia, JJ., concur.

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