

Safety Investigation and Just Culture versus Criminal Law

A case under Portuguese law

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Summary:

1. Brief description of the accident.
2. The criminal inquiry was initiated which ended up with the accusation of 7 people: PIC, Director of the Flight School, Head of Training, Safety and Compliance Manager, President of the Portuguese CAA and 2 other CAA Directors.
3. The accusation replicated numerous facts and statements present in the Report of the Portuguese Safety Investigation Authority (GPIAAF).
4. Criminal instruction phase was initiated and ended up with the decision that the GPIAAF Official Report could not be used as an evidence (i.e. forbidden proof). Decision later upheld by the Court of Appeal.
5. Outcome: Only the Flight Instructor was indicted, remaining 6 people not indicted.
6. Legal reasons for GPIAAF report not having been accepted as evidence.
7. Final considerations: To foster and strengthen Just Culture We must not limit ourselves to Regulation (EU) No 376/2014, but go further.

Accident description

On 2 August 2017, a Cessna C152 operated by a flight school, took off from Cascais aerodrome bound to Évora performing an IFR instruments flight training, with a filled FPL LPCS/LPEV.

The flight crew comprised a Flight Instructor acting as PM and a Student Pilot as PF..

Five minutes after T/O, more precisely at 3:46 PM the aircraft experienced an unrecoverable engine failure. At that time, the flight was crossing to the left bank of Tagus River, heading south.

Immediately after engine shutdown the student pilot, following pilot Instructor's instructions glided the plane whilst the pilot instructor did try for several times to restart the engine.

At 3.51 PM after assessing the situation the pilot instructor decided to perform an emergency landing on the sandy beach.

At 500ft during the final gliding profile the pilot instructor took over the flight controls and landed the aircraft (suffering substantial damage), continued rolling in the sand.

Four people were injured: two fatal injuries and the other two sustained minor injuries. The instructor and student pilot were not injured.

JUST CULTURE & JUDICIARY
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SIA's Final Report - Findings

The Flight instructor's actions were not performed in accordance to the applicable emergency procedures and checklists.

The instructor pilot's actions and post-event statements indicated that his knowledge and understanding of the emergency were inadequate

The instructor pilot (PIC) poor performance was consistent with the lack of proper preparation for the emergency.

The preparation and usage of the operator's Emergency procedures and Checklist were inadequate for use under conditions of stress.

Lack or poor operator's risk assessment on the working areas lead the crew to underestimate the life-vest usage.

The crew did not use or carry inflatable life vests devices on the aircraft.

SIA's Final Report - Human Factors and Analysis Considerations

In the basis for the emergency management failure and procedures adherence is clearly the lack of instructor preparation, having the ATO a key role by not setting up the necessary barriers to avoid the accident.

Omitted checklist item / omitted step in procedure / failed to prioritise tasks.

Loss of situational awareness / channelised attention (start engine several times).

The operator training department did not supervise instructor's actions.

Failure to provide training to the instructor to perform the ditching operation as provided in the ATO ESOP.

The training department, which is responsible for SOPs, checklists and supervision of tasks performed by instructors and students, failed to observe the inconsistencies that existed on the emergency checklists.

Later on, SIA's Final Report issues Safety Recommendations to the CAA pointing to the need for greater supervision of the flight school.

Phases of the Criminal Procedure

Inquiry

Mandatory phase

**Directed by a
Public Prosecutor**

**Inquiry final order:
accusation/non-accusation**

Instruction

Optional phase

**Directed by a
Investigating Judge**

**Instruction final order:
indictment/non-indictment**

Trial

Mandatory phase

**Directed by a
Trial Judge**

**court ruling:
conviction/acquittal**

**Instruction final order and Court ruling can be
appealed**

Phases of the Criminal Procedure

Inquiry

The public prosecutor closed the inquiry by charging seven people

1. Flight Instructor
2. FS Accountable Manager
3. FS Head of Training
4. FS Safety and Compliance Manager
5. Portuguese CAA Chairman
6. CAA Licensing and Examination Director
7. CAA Flight Operations Director

Instruction

Some of the accused requested instruction phase to be commenced

The final order of the Instruction was not to indict 6 of the defendants

Trial

case waiting for trial date to be set

Important basis for this decision: The SIA accident final report is classified prohibited evidence

Not to indict order was subject of an appeal

The Court of Appeal dismissed the appeal

Criminal Procedure - Inquiry

Relevant points:

The SIA Final Report was included in the inquiry as a document to prove the facts contained therein.

Some of the references to statements by frontline professionals present in the SIA Final Report were included in the accusation against them.

Excerpts from the safety recommendations and subsequent responses were included/used as facts in the accusation.

A relevant part of the accusation facts was only/mainly supported by the SIA final report.

The SIA investigator responsible for investigating the accident was appointed by the prosecutor as expert. The appointment was challenged and the investigator was dismissed by the Investigating Judge.

Criminal procedure - Instruction

Relevant points:

The defendants challenged the legality of the SIA final report as criminal evidence.

This challenge is controversial because:

Criminal law is a competence of Member States, i.e. EU Treaties and Regulations do not apply in the domestic criminal domain

That's why Reg. 376/2014, art. 16, nº. 6 states: «Without prejudice to applicable national criminal law, Member States shall refrain from instituting proceedings in respect of unpremeditated or inadvertent infringements of the law which come to their attention only because they have been reported pursuant to Articles 4 and 5»

In Portugal, the rule of law provides that: «*Evidence that is not prohibited by law is admissible*» (Article 125, Portuguese Code of Criminal Procedure - CCP)

Subsequently, art. 126 of the Portuguese CCP establishes that evidence obtained through torture, coercion, damage to the physical or moral integrity of people is null and void and cannot be used, including evidence obtained through deceptive means.

Criminal Procedure - Instruction

Defendants' arguments:

Legal framework and opening statements on the SIA's final report were not taken in due consideration:

«In accordance with Annex 13 to the International Civil Aviation Convention (Chicago 1944), EU Regulation 996/2010 ... and article 11, nº. 3 of Decree-Law 318/99 ..., it is not the purpose of any safety investigation process and associated investigation report to apportion blame or liability» (legal rule replicated in Reg. (EU) 996/2010, 16.1)

«IMPORTANT NOTE: The only aim of this report is to collect lessons which may help to prevent future accidents. Its use for other purposes may lead to incorrect conclusions»

«In accordance with Article 17.3 of European Regulation (EU) 996/2010 ..., on the investigation and prevention of accidents and incidents in civil aviation, a safety recommendation shall in no case create a presumption of blame or liability for an accident, a serious incident or an incident» (the same rule is contained in article 27, nº. 2 of Decree-Law 318/99)

...

Criminal Procedure - Instruction

Defendants' arguments:

Moreover, SIA investigators informed the interviewed professionals that their collaboration could not be used against them.

Furthermore, the professionals involved have a legal duty to cooperate with the SIA Investigation and must provide complete and truthful information (articles 14, 1, o), 2 and 17, 5 DL 318/99).

The admissibility of incrimination with statements made under a legal obligation to collaborate leads to the imposition of self-incrimination.

The incrimination of defendants based on statements made under the informed condition that they cannot be used to the detriment of the declarant constitutes evidence obtained by misleading means.

«Note.— Information contained in the records listed above, which includes information given voluntarily by persons interviewed during the investigation of an accident or incident, could be utilized inappropriately for subsequent disciplinary, civil, administrative and criminal proceedings. If such information is distributed, it may, in the future, no longer be openly disclosed to investigators. Lack of access to such information would impede the investigation process and seriously affect flight safety» (in Annex 13, 5.12.1, Note)

...

Criminal Procedure - Instruction

Defendants' arguments:

Self-incrimination is permitted but its legal value in criminal procedures is subject to compliance with a set of rules:

- The judicial authority must confirm that the accused confessed freely, fully and unconditionally (344º do CCP).
- The statements of the defendants (faithfully reproduced and signed) to be valid as evidence must have been made before a judicial authority with the assistance of a lawyer (357º, 1, b) do CCP).
- None of these core rules of law were observed in the use of the SIA final report as incriminating evidence and, unquestionably, the statements made under misleading pretexts led to a legally unacceptable self-incrimination.

Criminal Procedure - Instruction

Judges' final order of the Instruction:

- Encloses the decision that the SIA final report was considered prohibited evidence.
- The contents of the SIA final report can't be used as incriminatory evidence in the criminal procedure due to violation of the prohibition of self-incrimination collected using collaboration imposed on the defendant.
- Judges' decision has an extensive reasoning appealing to Portuguese constitutional law, criminal law and international and, as well, EU aviation law

Criminal procedure - Appeal

- The Court of Appeal received the appeal and decided to fully confirm the investigating judge's decision, i.e. (i) the SIA's final report is illegal evidence, (ii) the indictment of one of the defendants and the dismissal of the 6 other individuals in question.

Closing Remarks:

Our case highlights Just Culture as a principle and rule of law especially conceived to promote conciliation and balance between the protection of different and potentially conflicting rights

It is always worth highlighting that the protection of life, physical and mental integrity of people and property is also achieved by strengthening civil aviation safety

Approach that, as the presented case shows, allows the use of the principles and rules of domestic law to emphasize and reinforce the Aviation Just Culture in all areas of law (including areas where EU legislation does not apply)

Finally, this court's decision reinforced the safety of civil aviation in Portugal by increasing the confidence of aviation professionals in safety investigations