

VICENTE BANTOTO, ET AL., PLAINTIFFS-APPELLEES, VS. SALVADOR BOBIS, ET AL., DEFENDANTS, CRISPIN VALLEJO, DEFENDANT-APPELLANT.

G. R. No. L-18966. November 22, 1966

Ponente: REYES, J.B.L., J.

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REYES, J.B.L., J.:

Crispin Vallejo appeals from a decision rendered in Civil Case No. 5422 of the Court of First Instance of Occidental Negros, sentencing him to pay to Vicente Bantoto and Florita Lanceta, parents of the late Damiana Bantoto, civil indemnity in the sum of P3,000.00, plus P1,000.00 exemplary damages and the further sum of P500.00 attorneys' fees, without pronouncement as to costs.

The basic facts are not controverted. Appellant Crispin Vallejo was the registered owner of a "jeepney" named "Jovil 11", with plate TPU-20948, that was operated by him in Bacolod City through driver Salvador Bobis. On 24 October 1948, through the driver's negligence, the "jeepney" struck a 3-year old girl, Damiana Bantoto, a daughter of appellees, inflicting serious injuries that led to her death a few days later. The City Fiscal of Bacolod filed an information charging Bobis with homicide through reckless imprudence, to which Bobis pleaded guilty. He was, accordingly, sentenced to 2 months and 1 day of arresto mayor and to indemnify the deceased girl's heirs (appellees herein) in the sum of P3,000.00.

By amended complaint of 8 October 1959, appellees Vicente Bantoto and Florita Lanceta, for themselves and their other children, instituted the present action against Salvador Bobis, Juan Maceda (later absolved) and Crispin Vallejo in the court of first instance, pleading the foregoing facts and seeking to have the three defendants declared solidarily responsible for damages, consisting of the civil indemnity required of the driver Bobis in the judgment of conviction, plus moral and exemplary damages and attorneys' fees and costs.

Vallejo moved to dismiss on the ground of failure to state a cause of action against him, for the reason that the amended complaint did not aver that the driver, Bobis, was insolvent. The court overruled the motion to dismiss, and on 20 February 1960 Vallejo answered the complaint, setting up denials and affirmative defenses, specifically averring that the brothers and sisters of the deceased were not real parties in interest; that the complaint stated no cause of action against Vallejo; that his liability was only subsidiary; that the action was barred by prior judgment; and that the liability had been satisfied. Bobis was declared in default.

At the trial, the court of origin (overruling Vallejo's objections) admitted as Exhibit "A" for plaintiffs the writ of execution against the driver, Salvador Bobis, issued in the criminal case, and as Exhibit "B" the sheriff's return nulla bona. Vallejo presented no evidence. Wherefore, the court absolved defendant Maceda and rendered judgment against Crispin Vallejo in the terms described at the start of this opinion.

Vallejo appealed directly to this Supreme Court, assigning three errors:

"I-The trial Court erred in not dismissing the complaint for lack of a cause of action.

II-The trial Court erred in admitting as evidence Exhibits "A" and "B" of the appellees.

III-The trial Court erred in condemning the defendant-appellant to pay to the appellees the sum of P3,000.00 as indemnity, P1,000.00 as moral damages, P1,000.00 as exemplary damages, and P500.00 as attorney's fee."

The first alleged error, predicated upon the lack of allegation in the complaint that driver Bobis was insolvent, is without merit. The master's liability, under the Revised Penal Code, for the crimes committed by his servants and employees in the discharge of their duties, is not predicated upon the insolvency of the latter. Article 103 of the Penal Code prescribes that:

"ART. 103. Subsidiary civil liability of other persons. - The subsidiary liability established in the next preceding article shall also apply to employees, teachers, persons, and corporations engaged in any kind of industry for felonies committed by their servants, pupils, workmen, apprentices, or employees in the discharge of their duties."

The insolvency of the servant or employee is nowhere mentioned in said article as a condition precedent. In truth, such insolvency is required only when the liability of the master is being made effective by execution levy, but not for the rendition of judgment against the master. The subsidiary character of the employer's responsibility merely imports that the latter's property is not to be seized without first exhausting that of the servant. And by analogy to a regular guarantor (who is the prototype of persons subsidiarily responsible), the master may not demand prior exhaustion of the servant's (principal obligor's) properties if he can not "point out to the creditor available property of the debtor within Philippine territory, sufficient to cover the amount of the debt" (Cf. Civil Code, Article 1060). This rule is logical, for as between the offended party (as creditor) and the culprit's master or employer, it is the latter who is in a better position to determine the resources and solvency of the servant or employee.

Appellant invokes the following passage in our decision in *Marquez vs. Castillo*, 68 Phil. 571:

"The subsidiary liability of the master, according to the provisions of Article 103 of the Revised Penal Code, arises and takes place only when the servant, subordinate, or employee commits a punishable criminal act while in the actual performance of his ordinary duties and service, and he is insolvent thereby rendering him incapable, of satisfying by himself his own civil liability."

The underlined passage is, however, mere obiter because the part immediately preceding the quotation shows that the ratio decidendi of the case was that the accident involved, unlike in the case at bar, did not occur in the performance of the driver's assigned duties.

"It should be noted that in said stipulation, there is a provision appearing in paragraph 3 thereof, which reads as follows:

'That the defendant Bernardo Castillo was not riding in the car at the time of the accident, and he did not know that his car was taken by the chauffeur Mariano Capulong.'

"This fact decides the question because it clearly shows that the accident did not occur in the course of the performance of the duties or service for which said chauffeur Mariano Capulong had been hired. The defendant did not hire him to do as he pleased, using the defendant's car as if it were his own. His duties and service were confined to driving his master's car as the latter ordered him, and the accident did not take place under said circumstances."

As to the second error assigned, the same is non-prejudicial, if at all committed. Supposing, in gratia argumenti, that Exhibits "A" and "B", the execution and the sheriff's return, in the criminal case were not admissible at the trial of the case against the master, they would certainly be material and admissible when issuance of a writ of

execution of the appealed judgment is demanded. It is well to note here that this Court has ruled that in the absence of collusion the judgment convicting and sentencing the servant to pay indemnity is conclusive in an action to enforce the subsidiary liability of the master or employer (*Martinez vs. Barredo*, 81 Phil. 1). Anyway, since Bobis, the driver, was also a defendant, the writ of execution issued in the criminal case to enforce the civil indemnity, and its return without satisfaction, are not irrelevant evidence in the action against him and his employer.

Anent the third error, we agree with appellant that, as the case was predicated upon the sentence of conviction in the criminal case, the award of exemplary damages was improper. No such damages were imposed on the driver, and the master, as person subsidiarily liable, can not incur greater civil liability than his convicted employee, any more than a guarantor can be held responsible for more than the principal debtor (Cf. Civil Code, Article 2064).

But we do not agree that the award of attorneys' fees should be disallowed. Appellant had reason to know that his driver could not pay the P3,000.00 indemnity imposed in the criminal case, because if he could, or if he had money or leviabale property worth that much, Bobis would be operating his own jeepney instead of another's. In fact, Article 2208, paragraph 9, authorizes the award of counsel fees "in a separate civil action to recover the civil liability arising from a crime".

As in awarding only P500.00 attorneys' fees the court below could envisage only the services of counsel up to the date of its judgment, and it could not know then that the decision would be appealed, we are of the opinion that counsel fees should now be at least doubled.

FOR THE FOREGOING REASONS, the decision under appeal is modified by eliminating the award of P1,000.00 exemplary damages and doubling the award for counsel fees, with the result that appellant shall pay the indemnity of P3,000.00, with interest at 6% from the filing of the complaint, plus P1,000.00 attorneys' fees. In all other respects, said decision is affirmed. No costs.

Concepcion, C.J., Barrera, Dizon, Regala, Makalintal, Bengzon, J. P., Zaldivar, Sanchez and Ruiz Castro, JJ., concur.

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