

YU CON, PLAINTIFF AND APPELLEE, VS. GLICERIO IPIL, NARCISO LAURON, AND JUSTO SOLAMO, DEFENDANTS AND APPELLANTS.*G. R. No. 10195. December 29, 1916*

Ponente: ARAULLO, J.

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The purpose of the action brought in these proceedings is to enable the plaintiff to recover from the defendants jointly and severally the sum of P450, which had been delivered by the plaintiff to the first and third of the above-named defendants, master and supercargo, respectively, of a banca named Maria belonging to the second defendant, to be carried, together with various merchandise belonging to the plaintiff, from the port of Cebu to the town of Catmon of the Province of Cebu. By virtue of the contract executed between the said second defendant and the plaintiff, the money and merchandise were to be transported by the said craft between the points above-named in consideration of the payment of a certain sum for each voyage. The money disappeared from said craft during the night of October 18, 1911, while it was anchored in the port of Cebu and ready to sail for its destination, Catmon, and was not afterwards found. The plaintiff based his action on the charge that the disappearance of said sum was due to the abandonment, negligence, or voluntary breach, on the part of the defendants, of the duty they had in respect to the safe-keeping of the aforementioned sum.

The defendants, besides denying the allegations of the complaint, pleaded in special defense that the plaintiff, at his own expense and under his exclusive responsibility, chartered the said banca, the property of the defendant Lauron, for the fixed period of three days, at the price of P10 per diem, and that, through the misfortune, negligence, or abandonment of the plaintiff himself, the loss complained of occurred, while said banca was at anchor in the port of Cebu, and was caused by theft committed by unknown thieves. They further alleged that said defendant Lauron, the owner of the banca merely placed this craft at the disposal of the plaintiff for the price and period agreed upon, and did not go with the banca on its voyage from Catmon to Cebu. As a counterclaim, the defendants also asked that the plaintiff be ordered to pay the freight agreed upon, which had not yet been paid, amounting to P80, plus the sum of P70, as an indemnity for the losses and damages caused them by the attachment of the banca, issued at the instance of the plaintiff upon filing his complaint. They also prayed for the additional sum of P100, for the deterioration of the said banca, and also that of P200 for other deterioration suffered by the same since November, 1911, and which had not been paid for. Finally, the defendants asked to be absolved from the complaint.

Before commencing the hearing of this case, the defendants made a verbal motion asking that the plaintiff be declared in default, with respect to the counterclaim filed by them in their answer. On the same date, the plaintiff presented his answer to said counterclaim, denying each and all of the allegations thereof and of the defendants' special defense. The aforementioned motion was over-ruled by the court, and the defendants excepted.

At the termination of the trial, the court, in view of the evidence adduced, held that there was no room to doubt that the sole cause of the disappearance of the money from the said banca was the negligence of the master and the supercargo, the defendants Ipil and Solamo, respectively, and that the defendant Narciso Lauron was

responsible for that negligence, as owner of the banca, pursuant to articles 586, 587, and 618 of the Code of Commerce, the plaintiff therefore being entitled to recover the amount lost. Judgment was rendered on April 20, 1914, in favor of the plaintiff and against the defendants jointly and severally for the sum of P450, with interest thereon at the rate of 6 per cent per annum from the date of filing of the complaint, October 24, 1911, with costs. The plaintiff was absolved from the defendant's counterclaim. From this judgment the defendants excepted and at the same time moved for a new trial. Their motion was denied, to which ruling they also excepted, and, through the proper bill of exceptions, entered an appeal to this Supreme Court. In their brief they allege that the trial court erred:

1. In applying articles 586, 587, and 618 of the Code of Commerce in favor of the plaintiff;
2. In overruling the motion for default presented by the defendants and in sentencing the defendants jointly and severally to pay the plaintiff the amount mentioned in the judgment; and
3. In absolving the plaintiff from the defendants' counterclaim.

The evidence shows that the plaintiff Yu Con, a merchant and a resident of the town of San Nicolas, of the city of Cebu, engaged in the sale of cloth and domestic articles and having a share in a shop, or small store, situated in the town of Catmon, of said province, had several times chartered from the defendant Narciso Lauron, a banca named Maria belonging to the latter, of which Glicerio Ipil was master and Justo Solamo, supercargo, for the transportation of certain merchandise and some money to and from the said town and the port of Cebu, that, on or about the 17th of October, 1911, the plaintiff chartered the said banca from the defendant Lauron for the transportation of various merchandise from the port of Cebu to Catmon, at the price of P45 for the round trip, which merchandise was loaded on board the said craft which was then at anchor in front of one of the graded fills of the wharf of said port; that in the afternoon of the following day, he delivered, to the other two defendants, Ipil, and Solamo, master and supercargo, respectively, of the afore-named banca, the sum of P450, which was in a trunk belonging to the plaintiff and was taken charge of by said two defendants, who received this money from the plaintiff, for the purpose of its delivery to the latter's shop in Catmon for the purchase of corn in this town; that while the money was still in said trunk aboard the vessel, on the night of the said 18th of October, the time scheduled for the departure of the Maria from the port of Cebu, said master and said supercargo transferred the P450 from the plaintiff's trunk, where it was, to theirs, which was in a stateroom of the banca, from which stateroom both the trunk and the money disappeared during that same night, and that the investigations, made to ascertain their whereabouts, produced no result.

The facts are also admitted by the aforementioned master and supercargo, two of the defendants, that they received from the plaintiff said P450, which sum was in the latter's own trunk which was placed outside the stateroom of the banca, for the reason, as they said, that there was no room for it inside the stateroom; that these defendants therefore transferred said money to their trunk, which was inside the stateroom, and that this trunk and the P450 therein contained disappeared from the boat during the night of that same day; that said sum had not been found or returned to the plaintiff; that the plaintiff, being on the banca, in the afternoon of that day, when his trunk containing the P450 was carried aboard, and seeing that said two defendants, who had the key of the trunk, had removed said sum to their trunk inside the stateroom, charged them to take special care of the money; that the master Ipil assured the plaintiff that there was no danger of the money being lost; and that, finally, during the night in question, both the master and the supercargo and four cabin-boys were aboard the banca.

It was likewise proven by the affidavits made by the master Ipil, the supercargo Solamo, and the cabin-boys of said vessel, Juan Quiamco and Gabriel Basang, before the provincial fiscal of Cebu on the day following the commission of the theft, which affidavits were presented at the trial as Exhibits A, 3, 4, and 5, and by the

testimony given at the trial by the defendants Ipil and Solamo, that both said cabin-boys and the other two, Simeon Solamo, and Eulalio Quiamco, knew of the existence of the money in the trunk inside the stateroom and witnessed its removal to said trunk from the plaintiff's; that the last two cabin-boys above-named, in company with the master and the supercargo, conveyed the plaintiff's trunk, in which the money was previously contained, from the plaintiff's shop to the banca; and that no person not belonging to the vessel knew that the money was in the trunk inside said state-room.

According to the testimony of the master Ipil himself he slept outside the stateroom that night, but a cabin-boy named Gabriel slept inside. The latter, however, was not presented by the defendants to be examined in regard to this point, nor does it appear that he testified in respect thereto in his affidavit, Exhibit 5, before referred to, pre-sented by the defendants' own counsel. The master Ipil and the supercargo Solamo also testified that they left the cabin-boy Simeon Solamo on guard that night; but this af-firmation was not corroborated by Solamo at the trial, for he was not introduced as a witness, and only his affidavit, Exhibit 2, taken before the fiscal of Cebu on the day fol-lowing the commission of the crime, was presented by the defendants. This affidavit, which should have been ad-mitted and not rejected, as was done by the court and excepted to by the defendants, shows that Simeon Solamo stated that he was not designated to do guard duty that night, but that on the morning of the said 19th of October, that is, the next day, all agreed that affiant should say that he was on guard, though it was not true that he was.

Finally, said two defendants, the master and the super-cargo, gave no satisfactory explanation in regard to the disappearance of the trunk and the money therein con-tained, from the stateroom in which the trunk was, nor as to who stole or might have stolen it. The master of the banca, merely testified that they, he and the supercargo, did not know who the robbers were, for, when the robbery was committed, they were sound asleep, as they were tired, and that he believed that the guard Simeon also fell asleep because he, too, was tired. The second defendant gave the same testimony. Both of them testified that the small window of the stateroom had been broken, and the first of them, i. e., the master, stated that all the window-blinds had been removed from the windows, as well as part of the partition in which they were, and that the trunk in which the money was contained could have been passed through said small window, because, as this witness him-self had verified, the Chinaman's trunk, which differed but a little from the one stolen, could be passed through the same opening. The chief pilot of the harbor of Cebu, Placido Sepeda, who officially visited the said banca, also stated that the small wooden window of the stateroom was broken, and that he believed that in breaking it much noise must have been produced. However, no evidence whatever was offered by counsel for the defendants to prove that it might have been possible to remove the trunk from the stateroom through the opening made by the breaking of the small window, neither was the size of the trunk proven, in relation to the Chinaman's to which the defendant master referred in his testimony, so that it might be verified whether the statement made by the latter was true, viz., that it might have been possible to remove from the stateroom through said opening the trunk in which the P450 were contained, which sum, the same as the trunk, its container, had not been found, in spite of the investiga-tion made for the purpose. Furthermore, it was not proven, nor is there any circumstantial evidence to show, that the robbery in question was committed by persons not be-longing to the craft.

It is therefore beyond all doubt that the loss or disap-pearance, on the night aforementioned, of the P450, the property of the plaintiff, which, were in the possession of the defendants, the master and the supercargo of the banca, Maria, occurred through the manifest fault and negligence of said defendants, for, not only did they fail to take the necessary precautions in order that the stateroom containing the trunk in which they kept the money should be properly guarded by members of the crew and put in such condition that it would be impossible to steal the trunk from it or that persons not belonging to the vessel might force an entrance into the stateroom from the outside, but also they did not expressly station some person inside the stateroom for the guarding and safe-keeping

of the trunk, for it was not proven that the cabin-boy Gabriel slept there, as the master of the vessel, Ipil, stated, nor that the other cabin-boy, Simeon Solamo, was on guard that night, for the latter contradicted the statements made by the two defendants on this point. On the contrary, it was proven by the master's own statement that all the people on the vessel, including himself and the supercargo Solamo, slept soundly that night; which fact cannot, in any manner, serve them as an excuse, nor can it be accepted as an explanation of the statement that they were not aware of what was then occurring on board, if the trunk was actually stolen by outsiders and removed through the small window of the stateroom, a detail which also was not proven, but, on the contrary, increases their liability, because it is very strange that none of them, who were six and were around or near the stateroom, should have heard the noise which the robbers must have made in breaking its window. All of these circumstances, together with that of its having been impossible to know who took the trunk and the money and the failure to recover the one or the other, make the conduct of the two defendants and of the other members of the crew of the banca, eminently suspicious and prevent our holding that the disappearance or loss of the money was due to a fortuitous event, to force majeure, or that it was an occurrence which could not have been foreseen, or which, if foreseen, was inevitable.

It is unquestionable that the defendants Glicerio Ipil and Justo Solamo were the carriers of the said P450 belonging to the plaintiff, and that they received this sum from the latter for the purpose of delivering it to the store of the town of Catmon, to which it had been consigned. Under such circumstances, said defendants were the depositaries of the money.

Manresa, in his Commentaries on the Civil Code (Vol. 10, p. 773), in treating of the provisions of the said code concerning transportation by sea and by land of both persons and things, says:

"Liability of carriers.—In order that a thing may be transported, it must be delivered to the carrier, as the Code says. From the time it is delivered to the carrier or shipper until it is received by the consignee, the carrier has it in his possession, as a necessary condition for its transportation, and is obliged to preserve and guard it; wherefore it is but natural and logical that he should be responsible for it.

"The Code discovers in the relation of all these elements the factors which go to make up the conception of a trust, and, taking into account that the delivery of the thing on the part of the shipper is unavoidable, if the transportation is to take place, esteems that, at least in certain respects, such trusts are necessary."

The said two defendants being the depositaries of the sum in question, and they having failed to exercise for its safe-keeping the diligence required by the nature of the obligation assumed by them and by the circumstances of the time and the place, it is evident that, in pursuance of the provisions of articles 1601 and 1602, in their relation to articles 1783 and 1784, and as prescribed in article 1770, of the Civil Code, they are liable for its loss or misplacement and must restore it to the plaintiff, together with the corresponding interest thereon as an indemnity for the losses and damages caused him through the loss of the said sum.

With respect to the other defendant, Narciso Lauron, as he was the owner of the vessel in which the loss or misplacement of the P450 occurred, of which vessel, as aforesaid, Glicerio Ipil was master and Justo Solamo, supercargo, both of whom were appointed to, or chosen for, the positions they held, by the defendant himself, and, as the aforementioned sum was delivered to the said master, Ipil, and the merchandise to be transported by means of said vessel from the port of Cebu to the town of Catmon was laden by virtue of a contract executed by and between the plaintiff and the owner of the vessel, Narciso Lauron, it behooves us to examine whether the latter, also, should be held to be liable, as requested by the plaintiff in his complaint.

Said vessel was engaged in the transportation of merchandise by sea and made voyages to and from the port of Cebu to Catmon, and had been equipped and victualled for this purpose by its owner, Narciso Lauron, with whom,

as aforesaid, the plaintiff contracted for the transportation of the merchandise which was to be carried, on the date hereinabove mentioned, from the port of Cebu to the town of Catmon.

For legal purposes, that is, for the determination of the nature and effect of the relations created between the plaintiff, as owner of the merchandise laden on said craft and of the money that was delivered to the master, Ipil, and the defendant Lauron, as owner of the craft, the latter was a vessel, according to the meaning and construction given to the word vessel in the Mercantile Code, in treating of maritime commerce, under Title 1, Book 3.

"The word vessel serves, to designate every kind of craft by whatever particular or technical name it may now be known or which nautical advancements may give it in the future." (Commentaries on the Code of Commerce, in the General Review of Legislation and Jurisprudence, founded by D. Jose Reus y Garcia, Vol. 2, p. 136.)

According to the Dictionary of Legislation and Jurisprudence by Escriche, a vessel is any kind of craft, considering solely the hull.

Blanco, the commentator on mercantile law, in referring to the grammatical meaning of the words "ship" and "vessels," says, in his work aforesaid, that these terms designate every kind of craft, large or small, whether belonging to the merchant marine or to the navy. And referring to their juridical meaning, he adds: "This does not differ essentially from the grammatical meaning; the words 'ship' and 'vessel' also designate every craft, large or small, so long as it be not an accessory of another, such as the small boat of a vessel, of greater or less tonnage. This definition comprises both the craft intended for ocean or for coastwise navigation, as well as the floating docks, mud lighters, dredges, dumpscows or any other floating apparatus used in the service of an industry or in that of maritime commerce. * * *" (Vol. 1, p. 389.)

According to the foregoing definitions, then, we hold that the banca called Maria, chartered, by the plaintiff Yu Con from the defendant Narciso Lauron, was a "vessel", pursuant to the meaning this word has in mercantile law, that is, in accordance with the provisions of the Code of Commerce in force.

Glicerio Ipil, the master of the said banca, Maria, must also be considered as its captain, in the legal acceptance of this word.

The same Code of Commerce in force in these Islands compares, in its article 609, masters with captains. It is to be noted that in the Code of Commerce of Spain the denomination of *arraeces* is not included in said article as equivalent to that of masters, as it is in the Code of these Islands.

Commenting on said article, the aforementioned General Review of Legislation and Jurisprudence says:

"The name of captain or master is given, according to the kind of vessel, to the person in charge of it.

"The first denomination is applied to those who govern vessels that navigate the high seas or ships of large dimensions and importance, although they be engaged in the coastwise trade.

"Masters are those who command smaller ships engaged exclusively in the coastwise trade.

"For the purposes of maritime commerce, the words 'captain' and 'master' have the same meaning; both being the chiefs or commanders of ships." (Vol. 2, p. 168.)

Article 587 of the Code of Commerce in force provides:

"The agent shall be civilly liable for the indemnities in favor of third persons which arise from the conduct of the captain in the care of the goods which the vessel carried; but he may exempt himself therefrom by abandoning the vessel with all her equipments and the freight he may have earned during the trip."

Article 618 of the same Code also prescribes:

"The captain shall be civilly liable to the agent and the latter to the third persons who may have made contracts with the former—

"1. For all the damages suffered by the vessel and its cargo by reason of want of skill or negligence on his part, If a misdemeanor or crime has been committed he shall be liable in accordance with the Penal Code.

"2. For all the thefts committed by the crew, reserving his right of action against the guilty parties."

The Code of Commerce previous to the one now in force, to wit, that of 1829, in its article 624, provided that the agent or shipowner should not be liable for any excesses which, during the navigation, might be committed by the captain and crew, and that, for the reason of such excesses, it was only proper to bring action against the persons and property of those found guilty.

Estasen, in his work on the Institutes of Mercantile Law (Vol. 4, p. 280), makes the following remarks, in referring to the exposition of reasons presented by the Code Commission which prepared and presented for approval the Code of Commerce now in force, in which exposition of reasons were set forth the fundamental differences between the provisions contained in both codes, with respect to the subject-matter now under discussion. He says:

"Another very important innovation introduced by the Code is that relative to the liability for misdemeanors and crimes committed by the captain or by members of the crew. This is a matter of the greatest importance on which a variety of opinions has been expressed by different juris-consults.

"The old code declares the captain civilly liable for all damage sustained by the vessel or its cargo through lack of skill or care on his part, through violations of the law, or through unlawful acts committed by the crew. As re-gards the agent or shipowner, it declares in unmistakable terms that he shall in no wise be liable for any excesses which, during the navigation, may be committed by the captain and the crew.

"Upon an examination, in the light of the principles of modern law, of the standing legal doctrine on the non-liability of the shipowner for the unlawful acts, that is, the crimes or quasi crimes, committed by the captain and the crew, it is observed that it cannot be maintained in the absolute and categorical terms in which it is formulated.

"It is well and good that the shipowner be not held crim-inally liable for such crimes or quasi crimes; but he cannot be excused from liability for the damage and harm which, in consequence of those acts, may be suffered by the third parties who contracted with the captain, in his double capacity of agent and subordinate of the shipowner him-self. In maritime commerce, the shippers and passengers in making contracts with the captain do so through the confidence they have in the shipowner who appointed him; they presume that the owner made a most careful investi-gation before appointing him, and, above all, they them-selves are unable to make such an investigation, and even though they should do so, they could not obtain complete security, inasmuch as the shipowner can, whenever he sees fit, appoint another captain instead.

"The shipowner is in the same case with respect to the members of the crew, for, though he does not appoint di-rectly, yet, expressly or tacitly, he contributes to their-appointment.

"On the other hand, if the shipowner derives profits from the results of the choice of the captain and the crew, when the choice turns out successful, it is also just that he should suffer the consequences of an unsuccessful appoint-ment, by application of the rule of natural law contained in the Partidas, viz., that he who enjoys the benefits derived from a thing must likewise suffer the losses that ensue therefrom.

"Moreover, the Penal Code contains a general principle that resolves the question under consideration, for it de-clares that such persons as undertake and carry on any industry shall be civilly liable, in default of those

who may be criminally liable, for the misdemeanors and crimes committed by their subordinates in the discharge of their duties.

"The Code of Commerce in force omits the declaration of non-liability contained in the old code, and clearly makes the shipowner liable civilly for the loss suffered by those who contracted with the captain, in consequence of the misdemeanors and crimes committed by the latter or by the members of the crew."

It is therefore evident that, in accordance with the pro-visions of the Code of Commerce in force, which are applicable to the instant case, the defendant Narciso Lauron, as the proprietor and owner of the craft of which Glicerio Ipil was the master and in which, through the fault and negli-gence of the latter and of the supercargo Justo Solamo, there occurred the loss, theft, or robbery of the P450 that be-longed to the plaintiff and were delivered to said master and supercargo, a theft which, on the other hand, as shown by the evidence, does not appear to have been com-mitted by a person not belonging to the craft, should, for said loss or theft, be held civilly liable to the plaintiff, who executed with said defendant Lauron the contract for the transportation of the merchandise and money aforemen-tioned between the port of Cebu and the town of Catmon, by means of the said craft.

Therefore, the trial court did not err in so holding in the judgment appealed from.

The plaintiff having filed his answer to the cross-com-plaint as soon as the defendant presented their motion for a declaration of the plaintiff's default in connection with said cross-complaint, and it being optional with the court to make in such cases the declaration of default, as pro-vided in section 129 of the Code of Civil Procedure, the said court did not incur the second error assigned by the appellants in their brief.

Lastly, as the banca Maria did not make the trip she should have made from the port of Cebu to the town of Catmon, on the occasion in question, through causes charge-able, as has been seen, to the captain and the supercargo of said banca, to wit, because of the loss, theft or robbery of the P450 belonging to the plaintiff, and as a contract was made for the transportation of the said sum and the merchandise from one of said points to the other, for the round trip, and not through payment by the plaintiff of the wages due the crew for each day, as alleged by the defend-ants, for the proofs presented by the latter in regard to this point were insufficient, as the trial court so held, neither did the latter incur error in overruling the cross-complaint formulated by the defendants in their answer against the plaintiff.

Therefore, and for all the reasons above set forth, we affirm the judgment appealed from, with the costs of this instance against the appellants. So ordered.

Torres, Carson, Moreland, and Trent, JJ., concur.

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