

THE UNITED STATES PLAINTIFF AND APPELLEE, VS. SANTIAGO PINEDA, DEFENDANT AND APPELLANT.

G.R. No. 12858. January 22, 1918

Ponente: MALCOLM, J.

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MALCOLM, J.:

This appeal requires a construction and an application, for the first time, of the penal provisions of the Pharmacy Law.

Santiago Pineda, the defendant, is a registered pharmacist of long standing and the owner of a drug store located at Nos. 442, 444, Calle Santo Cristo, city of Manila. One Feliciano Santos, having some sick horses, presented a copy of a prescription obtained from Dr. Richardson, and which on other occasions Santos had given to his horses with good results, at Pineda's drug store for filling. The prescription read—"clorato de potasa—120 gramos —en seis papelitos de 20 gramos, para caballo." Under the supervision of Pineda, the prescription was prepared and returned to Santos in the form of six papers marked, "Botica Pineda—Clorato potasa—120.00—en seis papeles —para caballo—Sto. Cristo 442, 444, Binondo, Manila." Santos, under the belief that he had purchased the potassium chlorate which he had asked for, put two of the packages in water and gave the doses to two of his sick horses. Another package was mixed with water for another horse, but was not used. The two horses, to which had been given the preparation, died shortly afterwards. Santos, thereupon, took the three remaining packages to the Bureau of Science for examination. Drs. Peña and Darjuan, of the Bureau of Science, on analysis found that the packages contained not potassium chlorate but barium chlorate. At the instance of Santos, the two chemists also went to the drug store of the defendant and bought potassium chlorate, which when analyzed was found to be barium chlorate. (Barium chlorate, it should be noted, is a poison; potassium chlorate is not.) Dr. Buencamino, a veterinarian, performed an autopsy on the horses, and found that death was the result of poisoning.

Four assignments of error are made. The first is that the lower court erred in admitting the testimony of the chemist Peña and Darjuan as to their purchase of potassium chlorate at the drug store of the accused, which substance proved on analysis to be barium chlorate. What appellant is here relying on is the maxim *res inter alios acta*. As a general rule, the evidence of other offenses committed by a defendant is inadmissible. But appellant has confused this maxim and this rule with certain exceptions thereto. The effort is not to convict the accused of a second offense Nor is there an attempt to draw the mind away from the point at issue and thus to prejudice defendant's case. The purpose is to ascertain defendant's knowledge and intent, and to fix his negligence. If the defendant has on more than one occasion performed similar acts, accident in good faith is possibly excluded, negligence is intensified, and fraudulent intent may even be established. It has been said that there is no better evidence of negligence than the frequency of accidents. (See 10 R. C. L., pp. 938, 940.) The United States Supreme Court has held that:

"On the trial of a criminal case where the question relates to the tendency of certain testimony to throw light upon a particular fact, or to explain the conduct of a particular person, there is a certain discretion on the part of the trial judge which a court of errors will not interfere with, unless it manifestly appear that the testimony has no,

legitimate bearing upon the question at issue, and is calculated to prejudice the accused.

"Whenever the necessity arises for a resort to circumstantial evidence, either from the nature of the inquiry or the failure of direct proof, objections to the testimony on the ground of irrelevancy are not favored.

"Evidence is admissible in a criminal action which tends to show motive, although it tends to prove the commission of another offense by the defendant." (Moore vs. U. S. [1853], 150 U. S., 57.)

The second assignment of error is that the lower court erred in finding that the substance sold by the accused to Feliciano Santos on the 22d of June, 1916, was barium chlorate and not potassium chlorate. The proof demonstrates the contrary.

The third and fourth assignments of error are that the lower court erred in finding that the accused has been proved guilty beyond a reasonable doubt of an infraction of Act No. 597, section 17, as amended. The third assignment contains the points we should consider, including, we may remark, a somewhat difficult question concerning which the briefs have given little assistance.

The Pharmacy Law was first enacted as Act No. 597, was later amended by Act Nos. 1921, 2236, and 2382, and is now found as Chapter 30 of the Administrative Code. The law provides for a board of pharmaceutical examiners, and the examination and registration of pharmacists, and finally contains sundry provisions relative to the practice of pharmacy. High qualifications for applicants for the pharmaceutical examination are established. The program of subjects for the examination is wide. Responsibility for the quality of drugs is fixed by section 17 of the Pharmacy Law, as amended (now Administrative Code [1917], section 751), in the following term:

"Every pharmacist shall be responsible for the quality of all drugs, chemicals, medicines, and poisons he may sell or keep for sale; and it shall be unlawful for any person whomsoever to manufacture, prepare, sell, or administer any prescription, drug, chemical, medicine, or poison under any fraudulent name, direction, or pretense, or to adulterate any drug, chemical, medicine, or poison so used, sold, or offered for sale. Any drug, chemical, medicine, or poison shall be held to be adulterated or deteriorated within the meaning of this section if it differs from the standard of quality or purity given in the United States Pharmacopoeia."

The same section of the Pharmacy Law also contains the following penal provision: "Any person violating the provisions of this Act shall, upon conviction, be punished by a fine of not more than five hundred dollars." The Administrative Code, section 2676, changes the penalty somewhat by providing that:

"Any person engaging in the practice of pharmacy in the Philippine Islands contrary to any provision of the Pharmacy Law or violating any provisions of said law for which no specific penalty is provided shall, for each offense, be punished by a fine not to exceed two hundred pesos, or by imprisonment for not more than ninety days, or both, in the discretion of the court."

These are the provisions of law, pursuant to which prosecution has been initiated and which it is now incumbent upon us to construe.

Turning to the law, certain points therein as bearing on our present facts must be admitted. Thus, defendant is a pharmacist. As a pharmacist, he is made responsible for the quality of all drugs and poisons which he sells. And finally it is provided that it shall be unlawful for him to 'sell any drug or poison under any "fraudulent name." It is the one word "fraudulent" which has given the court trouble. What did the Legislature intend to convey by this restrictive adjective?

Were we to adhere to the technical definition of fraud, which appellant vigorously insists upon, it would be difficult, if not impossible, to convict any druggist of a violation of the law. The prosecution would have to prove

to a reasonable degree of certainty that the druggist made a material representation; that it was false; that when he made it he knew that it was false or made it recklessly without any knowledge of its truth and as a positive assertion; that he made it with the intention that it should be acted, upon by the purchaser; that the purchaser acted in reliance upon it, and that the purchaser thereby suffered injury. Such a construction with a literal following of well-known principles on the subject of fraud would strip the law of at least much of its force. It would leave the innocent purchaser of drugs, who must blindly trust in the good faith and vigilance of the pharmacist, at the mercy of any unscrupulous vendor. We should not, therefore, without good reason so devitalize the law.

The profession of pharmacy, it has been said again and again, is one demanding care and skill. The responsibility of the druggist to use care has been variously qualified as "ordinary care," "care of a specially high degree," "the highest degree of care known to practical men." Even under the first conservative expression, "ordinary care" with reference to the business of a druggist, the Supreme Court of Connecticut has said must be held to signify "the highest practicable degree of prudence, thoughtfulness, and vigilance, and the most exact and reliable safeguards consistent with the reasonable conduct of the business, in order that human life may not constantly be exposed to the danger flowing from the substitution of deadly poisons for harmless medicine." (*Tombari vs. Connors* [1912], 85 Conn., 235. See also *Willson vs. Faxon, Williams & Faxon* [1913], 208 N. Y., 108; *Knoefel vs. Atkins* [1907], 81 N. E., 600.) The "skill" required of a druggist is denominated as "high" or "ample." (*Peters vs. Jackson* [1902], 50 W. Va., 644; 57 L. R. A., 428.) In other words, the care required must be commensurate with the danger involved, and the skill employed must correspond with the superior knowledge of the business which the law demands.

Under one conception, and it should not be forgotten that 'the cases we consider are civil in nature, the question of negligence or ignorance is irrelevant. The druggist is responsible as an absolute guarantor of what he sells. In a decision which stands alone, the Supreme Court of Kentucky said:

"As applicable to the owners of drug stores, or persons engaged in vending drugs and medicines by retail, the legal maxim should be reversed. Instead of caveat emptor, it should be caveat venditor. That is to say, let him be certain that he does not sell to a purchaser or send to a patient one drug for another, as arsenic for calomel, cantharides for or mixed with snakeroot and Peruvian bark, or even one innocent drug, calculated to produce a certain effect, in place of another sent for and designed to produce a different effect. If he does these things, he cannot escape civil responsibility, upon the alleged pretexts that it was an accidental or an innocent mistake; that he had been very careful and particular, and had used extraordinary care and diligence in preparing or compounding the medicines as required, etc. Such excuses will not avail him." (*Fleet vs. Hollenkemp* [1852], 56 Am. Dec, 563.)

Under the other conception, in which proof of negligence is considered as material, where a customer calls upon a druggist for a harmless remedy, delivery of a poisonous drug by mistake by the druggist is prima facie negligence, placing the burden on him to show that the mistake was under the circumstances consistent with the exercise of due care. (See *Knoefel vs. Atkins*, supra.) The druggist cannot, for example in filling a prescription calling for potassium chlorate give instead to the customer barium chlorate, a poison, place this poison in a package labeled "potassium chlorate," and expect to escape responsibility on a plea of mistake. His mistake, under the most favorable aspect for himself, was negligence. So in a case where a druggist filled an order for calomel tablets with morphine and placed the morphine in a box labeled calomel, it was said:

"It is not suggested, nor can we apprehend that it is in any wise probable, that the act of furnishing the wrong drug in this case was willful. If it was furnished by the clerk, it was undoubtedly a mistake and unintentional. However, it was a mistake of the gravest kind, and of the most disastrous effect. We cannot say that one holding himself out as competent to handle such drugs, and who does so, having rightful access to them, and relied upon by those

dealing with him to exercise that high degree of caution and care called for by the peculiarly dangerous nature of this business, can be heard to say that his mistakes by which he furnishes a customer the most deadly of drugs for those comparatively harmless is not, in and of itself, gross negligence, and that of an aggravated form." (Smith's Admr. vs. Middleton [1902], 56 L. R. A., 484.)

The rule of caveat emptor cannot apply to the purchase and sale of drugs. The vendor and the vendee do not stand at arms length as in ordinary transactions. An imperative duty is on the druggist to take precautions to prevent death or serious injury to anyone who relies on his absolute honesty and peculiar learning. The nature of drugs is such that examination would not avail the purchaser anything. It would be idle mockery for the customer to make an examination of a compound of which he can know nothing. Consequently, it must be that the druggist warrants that he will deliver the drug called for.

In civil cases, the druggist is made liable for any injury approximately resulting from his negligence. If B negligently sells poison under the guise of a beneficial drug to A, he is liable for the injury done to A. In a case, which has repeatedly been termed the leading case on the subject and which has been followed by the United States Supreme Court, it was said, "Pharmacists or apothecaries who compound or sell medicines, if they carelessly label a poison as a harmless medicine, and send it so labeled into the market, are liable to all persons who, without fault on their part, are injured by using it as such medicine, in consequence of the false label; the rule being that the liability in such a case arises not out of any contract or direct privity between the wrong-doer and the person injured, but out of the duty which the law imposes on him to avoid acts in their nature dangerous to the lives of others." (Nat. Savings Bank vs. Ward [1879], 100 U.S., 195, following Thomas vs. Winchester [1852], 2 Seld. [N. Y.] 397.) In reality, for the druggist, mistake is negligence and care is no defense. Throughout the criminal law, run the same rigorous rules. For example, apothecaries or apothecary clerks, who are guilty of negligence in the sale of medicine when death ensues in consequence, have been held guilty of manslaughter. (See Tessymond's Case [1828], 1 Lewin, C. C., 169.)

Bearing these general principles in mind, and remembering particularly the care and skill which are expected of druggists, that in some jurisdictions they are liable even for their mistake and in others have the burden placed upon them to establish that they were not negligent, it cannot be that the Philippine Legislature intended to use the word "fraudulent" in all its strictness. A plea of accident and mistake cannot excuse for they cannot take place unless there be wanton and criminal carelessness and neglect. How the misfortune occurs is unimportant, if under all the circumstances the fact of occurrence is attributable to the druggist as a legal fault. Rather considering the responsibility for the quality of drugs which the law imposes on druggists and the position of the word "fraudulent" in juxtaposition to "name," what is made unlawful is the giving of a false name to the drug asked for. This view is borne out by the Spanish translation, which we are permitted to consult to explain the English text. In the Spanish "supuesto" is used, and this word is certainly not synonymous with "fraudulent." The usual badges of fraud, falsity, deception, and injury must be present—but not scienter.

In view of the tremendous and imminent danger to the public from the careless sale of poisons and medicines, we do not deem it too rigid a rule to hold that the law penalizes any druggist who shall sell one drug for another whether it be through negligence or mistake.

The judgment of the lower court, sentencing the defendant to pay a fine of P100, with subsidiary imprisonment in case of insolvency, and to pay the costs, is affirmed with the costs of this instance against the appellant, without prejudice to any civil action which may be instituted. So ordered.

Arellano, C. J., Torres, Johnson, Carson, Araullo, and Street, JJ., concur.

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