

THE UNITED STATES, PLAINTIFF AND APPELLEE, VS. POLICARPIO TAYONGTONG, DEFENDANT AND APPELLANT.*G.R. No. 6897. February 15, 1912*

Ponente: MORELAND, J.

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The defendant in this case was convicted of the crime of homicide by negligence (*homicidio por imprudencia temeraria*). He appealed, basing his whole case here upon the proposition that the evidence does not warrant the conviction.

It appears that on the 19th day of January, 1911, one Severino Resume was engaged in painting telephone poles located along the highway between Jaro and Iloilo. On that day he was killed by being run over by an automobile driven by the defendant. The highway at the point where Severino met his death was straight, of considerable width, and in good condition. The telephone pole upon which Severino was at work at the time of the accident was outside of the beaten portion of the highway and located about 2 feet into the grass at the side. Between it and the edge of the road was a pathway used by people traveling on foot. The machine which caused the death of the deceased is a large passenger automobile, seating 35 passengers, and having upon each side and extending about 2 feet out beyond the wheels a rack or other contrivance for the carrying of parcels, baggage, and freight. It is used solely for the purpose of carrying passengers back and forth between Iloilo and Jaro.

The accident happened at about 10 o'clock in the morning. The automobile was then engaged in making its third trip from Iloilo to Jaro, and was loaded to its fullest capacity. There were several people who claim to have witnessed the accident. One of them, the principal witness for the prosecution, and its only witness who saw the occurrence, named Pablo Tayson, is alleged to have been standing within a few feet of the deceased, talking with him, at the time he was run down. Another person, who was near by at the time of the accident, was Basilio Severaldo, who was engaged in the same work as the deceased but, just prior to the passage of the automobile, had gone away from the locality where the accident occurred and saw nothing of what happened. Two other persons, who have been produced as witnesses for the defendant, allege that they were present and saw the whole occurrence.

Pablo Tayson, who, as we have said, is the only witness for the prosecution testifying directly to the facts and substantially the only witness upon whom the prosecution relies for a conviction, testified that at the time of the accident he and the deceased were located on the left-hand side of the highway going from Iloilo to Jaro; that he was standing a few feet from the deceased who was also on the same side of the highway; that the deceased was standing up painting the side of the telephone pole toward Jaro; that the telephone pole was, therefore, between the deceased and Iloilo, the direction from which the automobile was coming; that the road on that day was very dusty and the automobile, as he saw it coming from Iloilo toward him and the deceased, was raising a cloud of dust which was drifting to the side of the road upon which he and the deceased were located. This witness further asserted that he saw the automobile when it was within about 1,200 feet of the place where he stood; that it was coming at a rate of speed variously termed by him "very fast" and "at full speed;" that, on observing the machine

as it approached, he saw that the driver, the accused, was turning the steering wheel first in one direction and then in the other, as if uncertain what course he was going to pursue; that the machine, as a consequence, was darting first to one side of the road and then to the other, thus zigzagging back and forth across the traveled portion of the highway; that just before reaching the place where deceased was painting the telephone pole it crossed to the side of the road opposite to him and then suddenly started back across the road, striking the deceased as he stood painting; that by the impact the deceased was thrown upon the ground somewhat toward the front of the machine, which was going so fast that, although the accused was not within the reach of its wheels, nevertheless, the "suction," as the witness called it, created by the swift passage of the machine drew the deceased under its wheels where he was run over and crushed.

From the testimony of this witness it does not appear that the deceased moved or stirred in any way until he was hit by the automobile.

The accused testified, and produced several witnesses to support his testimony, that at the time of the accident he was driving the machine, which was loaded to its fullest capacity with passengers and baggage, at about 10 to 15 miles an hour; that he was driving in or near the center of the road; that there was no person in the highway and no vehicle or other obstruction which required him to leave the center of the road and pass to either side; that the machine was under full control and was going steadily and smoothly without deviating to the right or to the left; that on approaching the place where the witness Pablo Tayson stood he saw him turn his back toward the road and place his cap over his face in such a way as to cover his nose, mouth and eyes, evidently to protect them from the cloud of dust which was rolling from behind the machine over toward the side of the road on which he was; that the deceased, as the machine approached, probably seeing the cloud of dust which it was raising and which would inevitably drift in his direction, and observing his companion, Pablo Tayson, under the necessity of protecting himself from the dust in the manner described, just before the machine reached a point opposite him, started to cross the road to the other side, evidently to escape the dust; that he misjudged the distance and started too late; that in attempting to cross he placed himself squarely in front of the machine; that his movement was so sudden and unexpected and, when he reached the road, he was so close to the machine that it was impossible to stop it in time to avert the catastrophe; that he did everything that was possible to be done to avoid the accident; that he put on both brakes as hard as possible and turned the machine as much as could be done under the circumstances; that in proof thereof he shows that only the front wheel of the machine passed over the body of the deceased, it having been turned by him sufficiently so that the hind wheel missed him, and that the machine was stopped a very few feet beyond the point where the accident occurred. The accused testified, and his evidence in this regard is uncontradicted, that he was thoroughly qualified as a driver, having served his apprenticeship on this very road and this very machine before being employed.

The accused denies absolutely that portion of the story told by Pablo Tayson in which he alleges that the accused was driving at a high rate of speed; that he was zigzagging from one side of the road to the other; and that he struck the deceased while he stood painting the telephone pole.

We are satisfied that the evidence is not sufficient to convict. On the contrary, we believe that, under all of the facts and circumstances of the case, the fair preponderance of the evidence indicates that the deceased met his death in substantially the manner described by the accused. In the first place, the testimony of Pablo Tayson is affected by an attack made upon his credibility during the progress of the trial. It was shown that, on the preliminary investigation had by the justice of the peace, this witness testified, precisely as the accused asserted in his evidence, that just as the machine was arriving at a point in the highway opposite him, he, desiring to avoid the unpleasantness of the dust, turned his back toward the road and covered his face with his cap, thereby excluding the dust from his mouth, eyes, and nostrils. That he so testified on the preliminary investigation, according to the

record thereof, is admitted. In his testimony on the trial of this case he stated, at first, that he turned his right side to the road and placed his hand over the side of his face, leaving his eyes uncovered, so that he was able to see and did see the deceased at the time he was run down. Upon cross-examination he changed this testimony to the extent of saying that he covered the right side of his face with his cap instead of his hand, maintaining, however, that he did not cover his eyes and that he was able to see the deceased and all that transpired. When confronted with the evidence which he gave on the preliminary examination, he sought to explain the difference between his two declarations by stating that the testimony before the justice of the peace, which was reduced to writing and signed by him, was in a different language from that which he was able to speak and that it was not translated so that he knew what he was signing.

In the second place, the testimony of this witness is unreasonable. It is improbable that a machine as large as the one in question, going at the rate of speed described by Pablo Tayson, could zigzag from one side of the highway to the other in the manner described by the witness. It is still more improbable that this machine could have dodged from the right-hand side of the road to the left and, in some unknown manner, picked the deceased out from behind the telephone pole, dragged him into the highway and there run over him. It is not clear how an automobile can run over a man when it is admitted that he is on the opposite side of a telephone post from the machine which runs him down, with only a portion of his body extending beyond it. Even if the machine had started toward him in the manner described he would undoubtedly have seen it quickly enough to have passed around the other side of the post and save himself from being touched. This is especially evident when we observe that it is admitted that the deceased stood facing the automobile all the time and could see it plainly and its every movement. It is difficult to believe that a machine of the size of the one in question, driven at the high rate of speed alleged by the witness, could have turned suddenly, darted toward the ditch, and struck the deceased while located partly on the opposite side of a post from the machine without having collided with the post or gone into the ditch, it being remembered that the post was not more than 6 feet from the ditch.

From the description given of the machine it appears, as we have already seen, that there were certain portions of the body of the machine extending over and beyond the wheels, which were used as receptacles for the baggage and bundles of passengers. This projection, under the theory of the prosecution, would necessarily have been the portion of the machine to hit the deceased for the reason that no other part of the machine could have come in contact with him without the projection referred to striking the telephone pole. If this projection is that which struck the deceased first, then he would have been thrown into the ditch away from the machine and not into the highway under the machine. This is what would necessarily have happened when we remember that at the time the deceased was struck the machine was going at full speed toward the ditch. It was apparently to avoid the contradiction of his previous testimony inherent in this necessary result that the witness testified that the force which prevented the deceased from going into the ditch and drew him under the machine was the "suction" created by its rapid passage along the highway.

It is the undisputed evidence of the case that that portion of the machine which struck the deceased first was the mudguard over the left wheel. This fact alone shows the impossibility of the machine having hit the deceased while standing at the post, as it is admitted that no part of the automobile collided with the post. If the deceased had been at the post, as described by Tayson, the guard could not possibly have struck him without the extended portions above described having struck the post itself.

On the other hand, the story told by the accused and supported by some of the passengers who saw the accident is entirely reasonable, accords with common sense and ordinary experience. It was clearly told, in a manner frank and straightforward, was free from contradictions and needs no explanation or excuses.

We have read with detention the opinion upon which the judgment of conviction is based. In spite of careful

study, we are unable to discover anything therein that alters our views in relation to the merits. As between the two theories, the one of the prosecution and the other of the defense, we cannot have, under the evidence and record, any hesitation in choosing. The evidence presented by the prosecution itself, and it is upon that evidence alone that the conviction must stand, every other fact in the record being conspicuously in exculpation of the accused, shows the deceased standing upon the east side of a telephone pole facing an automobile coming toward him from the west, about half of his body extending beyond the pole toward the highway on his left. On his right was the highway drainage ditch. The pole was outside of the traveled portion of the highway so far that a footpath lay between it and said traveled portion. The automobile was coming toward him at a high rate of speed, to judge from the evidence of this witness, at least 40 miles an hour, possibly more. The machine was not proceeding in a straight line but it was going from one side of the road to the other. Just before arriving opposite the deceased it darted to the right-hand side of the road and then, turning, it started toward the left-hand side directly at the deceased. All of these things the deceased saw, yet he did not move or attempt to save himself in any way. On the contrary, he stood still and permitted the machine to strike him upon his left side. Having collided with him, the machine turned back toward the center of the highway, carrying the deceased with it, depositing him within the traveled portion of the highway, where it ran over him. On the other hand, the evidence of the defendant shows that he was driving the machine at a moderate rate of speed within the usually traveled portion of the highway, guiding it in a substantially straight line and handling it in the usual and ordinary manner. The machine, one of extraordinary size and capable of carrying 35 passengers with their baggage and effects, was incapable of running at the rate of speed described by the prosecution. Arriving at a point in the highway just in front of the deceased, the latter, to avoid the cloud of dust which was drifting to his side of the road, started to cross the road to the other side. He miscalculated the time and distance and as a result was struck by the automobile and run over. His action in starting across the road was so sudden and unexpected and, when he reached the road, he was so close to the automobile, that it was impossible to stop the machine in time to save him. The body was picked up within the traveled portion of the highway.

Which of these two stories is the most reasonable? We have no hesitation in answering. The story of the prosecution presents so many things that are unreasonable and incredible and for which there exists in the record no explanation whatever, and concerning which no reasonable explanation can be given, that it must necessarily be rejected. Even if, going at such a high rate of speed, the accused could have driven the automobile from one side of the road to the other as alleged, what could possibly be his reason for so doing? It was market day at Jaro; this was his third trip; the machine was loaded to its utmost capacity, both with passengers and with baggage; he was doubtless running according to a schedule and would have no time to waste in going from one side of the road to the other; no reason is suggested and none can be supplied why a driver should handle his machine in the manner described by the only witness for the prosecution who saw the whole occurrence. Instead of keeping to the traveled portion of the highway, which was admittedly in fine condition, why should the accused go outside of it, across a footpath used by pedestrians, and skim alongside of the telephone poles located on that side? What object could he have had in thus exposing himself, his passengers, and his machine to the risks and dangers of plunging into the drainage ditch or driving against the telephone poles or of meeting the other disasters and dangers which might be encountered outside of the usually traveled portion of the highway? No explanation of such extraordinary conduct is given in the record and none can be conceived. He was not engaged in taking a party of hilarious companions on a "joy" ride, nor in giving an exhibition of his skill in handling an automobile of that size and class. It does not appear that he was drunk or foolish. He was engaged in a business enterprise, employed by a business man for business purposes. What could possibly have been his purpose when, on arriving at a point in front of the deceased, he turned his automobile across the road and started squarely toward the telephone pole and the deceased? That he saw the deceased and that the deceased saw him is admitted. What spirit or purpose could have animated him in driving his automobile outside of the highway directly toward not only a

telephone post but the drainage ditch itself in order to run down an unoffending person? What motive can be assigned by the prosecution, when it asserts that the accused did this unaccountable thing? What purpose does the prosecution allege the accused sought to subserve when, by this conduct, he placed the safety of his passengers and of his machine, as well as of himself, at stake in thus driving directly toward a place of great danger? Above all, why did the deceased stand still, instead of stepping around behind the post, and permit himself to be crushed to death by the machine which he clearly saw bearing down upon him? These unreasonable and unaccountable things must be satisfactorily explained by the prosecution when it is confronted by the statement of the accused, supported by a number of disinterested witnesses, that none of those things ever occurred. We have already pointed out that, giving the story as told by the prosecution credence, it would have been little short of an impossibility for the body of the deceased to have found itself in the traveled portion of the highway after the accident. He would inevitably have been driven further away from the highway and toward the ditch by the blow from the machine going in the direction in which it was alleged by the prosecution to have been going.

Turning to the story of the event as given by the defendant and his witnesses, we meet nothing that requires explanation. There can, therefore, be no hesitation on our part in accepting the truth of the story told by the defendant.

Although we have held in a recent case (*U. S. vs. Reyes*, 10 Off. Gaz., 1045), a criminal action for homicide by imprudencia, temeraria, that contributory negligence on the part of the person killed is no defense, provided the driver of the automobile himself was negligent and that negligence was the proximate cause of the death, nevertheless, that doctrine does not in any way inveigh against the proposition which we here assert that, where death is due to the negligence of the decedent himself and not to the negligence of the driver of the automobile, the latter cannot be held for homicide. In this case the death of the deceased was due entirely to his own negligence. There is not sufficient reliable proof in the record to establish negligence on the part of the accused. There being no negligence, he is not responsible, no matter what the result of the accident may have been.

The judgment of conviction is reversed and the accused acquitted.

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

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