

THE UNITED STATES, PLAINTIFF AND APPELLEE, VS. SEGUNDO BARIAS, DEFENDANT AND APPELLANT.

G.R. No. 7567. November 12, 1912

Ponente: CARSON, J.

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CARSON, J.:

This is an appeal from a sentence imposed by the Honorable A. S. Crossfield judge of the Court of First Instance of Manila, for homicide resulting f reckless negligence. The information charges:

"That on or about November 2, 1911, in the city of Manila, Philippine the said Segundo Barias was a motorman on street car No. 9, run 7, the Pasay-Cervantes lines of the Manila Electric Railroad and Light Company, a corporation duly organized and doing business in the city of Manila, Philippine Islands; as such motorman he was controlling and operating street car along Rizal Avenue, formerly Calle Cervantes, of this city, such motorman of said street car he was under obligation to run the same with due care and diligence to avoid any accident that might occur to vehicles and pedestrians who were traveling on said Rizal Avenue; said accused, at said time and place, did willfully, with reckless imprudence inexcusable negligence and in violation of the regulations promulgated to that effect, control and operate said street car, without heeding the pedestrians crossing Rizal Avenue from one side to the other, thus knocking down and causing by his carelessness and imprudent negligence that said street car No. 9, operated and controlled by said accused, as hereinbefore stated, should knock down and pass over the body and head of one Fermina Jose, a girl 2 years old, who at said time and place was crossing the said Rizal Avenue, the body of said girl being dragged along the street-car track on said Rizal Avenue for a long distance, thus crushing and destroying her head and causing her sudden death as a result of the injury received; that if the acts executed by the accused had been done with malice, he would be guilty of the serious crime of homicide."

The defendant was a motorman for the Manila Electric Railroad and Light Company. At about 6 o'clock on the morning of November 2, 1911, he was driving his car along Rizal Avenue and stopped it near the intersection of that street with Calle Requesen to take on some passengers. When the car stopped, the defendant looked backward, presumably to note whether all the passengers were aboard, and then started his car. At that moment Fermina Jose, a child about 3 years old, walked or ran in front of the car. She was knocked down and dragged some little distance underneath the car, and was left dead upon the track. The motorman proceeded with his car to the end of the track, some distance from the place of the accident, and apparently knew nothing of it until return, when he was informed of what had happened.

There is no substantial dispute as to the facts. It is true that one testified that the defendant started the car without turning his head, a while he was still looking backwards and that this testimony was dire contradicted by that of another witness. But we do not deem it necessary to make an express finding as to the precise direction in which the defendant's head was turned at the moment when he started his car. It is sufficient for the purpose of our decision to hold, as we do, the evidence clearly discloses that he started his car from a standstill without looking over the track immediately in front of the car to satisfy himself that it was clear. He did not see the child until after he had car over it, and after he had returned to the place where it was found dead, and we think we are justified in

saying that wherever he was looking at the moment when he started his car, he was not looking at the track immediately in front of the car, and that he had not satisfied himself that this portion of the track was clear immediately before putting the motion.

The trial court found the defendant guilty of *imprudencia temeraria* (reckless negligence) as charged in the information, and sentenced him one year and one month of imprisonment in Bilibid Prison, and to pay the costs of the action.

The sole question raised by this appeal is whether the evidence shows such carelessness or want of ordinary care on the part of the defendant as to amount to reckless negligence (*imprudencia temeraria*).

Judge Cooley in his work on Torts (3d ed., 1324) defines negligence to be: "The failure to observe, for the protection of the interests of another person, that degree of care, precaution and vigilance which the circumstances justly demand, whereby such other person suffers injury."

In the case of *U. S. vs. Nava*, (1 Phil. Rep., 580), we held that negligence consists of the failure to take such precautions or advance measures in the performance of an act as the most common prudence would suggest whereby injury is caused to persons or to property."

Silvela says in his "*Derecho Penal*" in speaking of reckless imprudence (*imprudencia temeraria*):

"The word 'negligencia' used in the code, and the term 'imprudencia' with which this punishable act is defined, express this idea in such manner that it is not necessary to enlarge upon it. He who has done everything on his part to prevent his actions from causing damage to another, although he has not succeeded in doing so, notwithstanding his efforts, is the victim of an accident, and cannot be considered responsible for the same." (Vol. 2, p. 127 [153].)

"*Temerario* is, in our opinion, one who omits, with regard to hi which are liable to cause injury to another, that care and diligenc that attention, which can be required of the least careful, attentive, diligent. If a moment's attention and reflection would have shown a per that the act which he was about to perform was liable to have the harmful consequence which it had, such person acted with temerity and m be guilty of '*imprudencia temeraria*.' It may be that in practice has been given a greater scope and acts of imprudence which did not show carelessness as carried to such a high degree, might have been punished '*imprudencia temeraria*;' but in our opinion, the proper meaning word does not authorize another interpretation." (Id., p. 133 [161].)

Groizard, commenting upon "*imprudencia temeraria*" on page 389, volume 8, of work on the Penal Code, says:

"Prudence is that cardinal virtue which teaches us to discern and dist the good from the bad, in order to adopt or to flee from it. It also means good judgment, temperance, and moderation in one's actions. '*Temerario*' is one who exposes. himself to danger or rushes into it without reflection and without examining the same. Consequently, he w from lack of good judgment, temperance, or moderation in his actions, exposes himself without reflection and examination to the danger of committing a crime, must be held responsible under the provision of law aforementioned."

Negligence is want of the care required by the circumstances. It is a r or comparative, not an absolute, term and its application depends up the situation of the parties and the degree of care and vigilance which the circumstances reasonably require. Where the danger is great, a high degree of care is necessary, and the failure to observe it is a want of ordinary care under the circumstances. (*Ahern vs. Oregon Telephone* 24 Oreg., 276, 294; 35Pac, 549,)

Ordinary care, if the danger is great, may rise to the grade of a very exact and unchangeable attention. (*Parry Mfg. Co. vs. Eaton*, 41 App., 81, 1908; 83 N. E., 510.)

In the case of *U. S. vs. Reyes* (1 Phil. Rep., 375-377), we held that: "The diligence with which the law requires the

individual at all times his conduct varies with the nature of the situation in which he is placed with the importance of the act which he is to perform."

The question to be determined then, is whether, under all the circumstance and having in mind the situation of the defendant when he put his car motion and ran it over the child, he was guilty of a failure to take such precautions or advance measures as common prudence would suggest.

The evidence shows that the thoroughfare on which the incident occurred was a public street in a densely populated section of the city. The ho was six in the morning, or about the time when the residents of such st begin to move about. Under such conditions a motorman of an electric street car was clearly charged with a high degree of diligence in the performance of his duties. He was bound to know and to recognize that any negligence on his part in observing the track over which he was running his car might result in fatal accidents. He had no right to as that the track before his car was clear. It was his duty to satisfy him that fact by keeping a sharp lookout, and to do everything in his power avoid the danger which is necessarily incident to the operation of he street cars on public thoroughfares in populous sections of the city.

Did he exercise the degree of diligence required of him? We think this q must be answered in the negative. We do not go so far as to say that having brought his car to a standstill it was his bounden duty to his eyes directed to the front. Indeed, in the absence of some regulation his employers, we can well understand that, at times, it might be highly proper and prudent for him to glance back before again setting his car motion, to satisfy himself that he understood correctly a signal to go forward or that all the passengers had safely alighted or gotten on board. But we do insist that before setting his car again in motion, it was his to satisfy himself that the track was clear, and, for that purpose, to l and to see the track just in front of his car. This the defendant did not do, and the result of his negligence was the death of the child.

In the case of *Smith vs. St. Paul City Ry. Go.*, (32 Minn., p supreme court of Minnesota, in discussing the diligence required of street railway companies in the conduct of their business observed that: "The defendant was a carrier of passengers for hire, owning and controlling the tracks and cars operated thereon. It is therefore subject to the rule applicable to passenger carriers. (*Thompson's Carriers*, 442; *Barrett Third Ave. R. Co.*, 1 Sweeny, 568; 8 Abb. Pr. (N. S.), 205.) As respect hazards and dangers incident to the business or employment, the law enjoins upon such carrier the highest degree of care consistent with its undertaking, and it is responsible for the slightest negligence. (*Wilson vs. Northern Pacific R. Co.*, 26 Minn., 278; *Warren vs. Fitchburg R. C* 233; 43 Am. Dec. 354, 356, notes and cases.) * * * The severe rule which enjoins upon the carrier such extraordinary care and diligence, intended, for reasons of public policy, to secure the safe carriage of passengers, in so far as human skill and foresight can affect such result case just cited was a civil case, and the doctrine therein announced ha especial reference to the care which should be exercised in securing the safety of passengers. But we hold that the reasons of public policy which impose upon street car companies and their employees the duty of exercise the utmost degree of diligence in securing the safety of passengers, apply with equal force to the duty of avoiding the infliction of injuries upon pedestrians and others on the public streets and thoroughfares over which these companies are authorized to run their cars. And while, in a crime case, the courts will require proof of the guilt of the company or its employees beyond a reasonable doubt, nevertheless the care or diligence required of the company and its employees is the same in both cases, and the only question to be determined is whether the proof shows beyond a reasonable doubt that the failure to exercise such care or diligence was cause of the accident, and that the defendant was guilty thereof.

Counsel for the defendant insist that the accident might have happened despite the exercise of the utmost care by the defendant, and they have introduced photographs into the record for the purpose of proving that while the motorman was standing in his proper place on the front platform of the car, a child might have walked up

immediately in front of the without coming within the line of his vision. Examining the photographs think that this contention may have some foundation in fact; but only to extent, that standing erect, at the position he would ordinarily assume the car is in motion, the eye of the average motorman might just mi seeing the top of the head of a child, about three years old, standing o walking close up to the front of the car. But it is also very evident inclining the head and shoulders forward very slightly, and glancing in of the car, a person in the position of a motorman could not fail to s a child on the track immediately in front of his car; and we hold that the manifest duty of a motorman, who is about to start his car on a public thoroughfare in a thickly-settled district, to satisfy himself that track is clear immediately in front of his car, and to incline his body slightly forward, if that be necessary, in order to bring the whole track within his line of vision. Of course, this may not be, and usually is not necessary when the car is in motion, but we think that it is required by the dict the most ordinary prudence in starting from a standstill.

We are not unmindful of our remarks in the case of U. S. vs. Bacho Phil. Rep., 577), to which our attention is directed by counsel for appellant. In that case we said that:

"* * * In the general experience of mankind, accidents apparently unavoidable and often inexplicable are unfortunately too frequent to permit us to conclude that some one must be criminally liable for negligence every case where an accident occurs. It is the duty of the prosecution each case to prove by competent evidence not only the existence of criminal negligence, but that the accused was guilty thereof."

Nor do we overlook the ruling in the case of U. S. vs. Barnes Rep., 93), to which our attention is also invited, wherein we held that defendant was not guilty of reckless negligence, where it appeared that killed Another by the discharge of his gun under such circumstances that he might have been held guilty of criminally reckless negligence had he knowledge at that moment that another person was in such position as to be in danger if the gun should be discharged. In this latter case the defendant had no reason to anticipate that the person who was injured was in the line of fire, or that there was any probability that he or anyone else would place himself in the line of fire. In the case at bar however, it was, as we have seen, the manifest duty of the motorman to take reasonable precautions in starting his car to see that in doing so not endangering the life of any pedestrian, old or young; and to this it was further his duty to guard against the reasonable possibility that one might be on the track immediately in front of the car. We think that the evidence showing, as it does, that the child was killed at the moment when the car was set in motion, we are justified in holding that, had the motorman seen the child, he could have avoided the accident; the accident was not, therefore, "unavoidable or inexplicable," and it appearing that motorman, by the exercise of ordinary diligence, might have seen the c before he set the car m motion, his failure to satisfy himself that the was clear before doing so was reckless negligence, of which he was prop convicted in the court below.

We think, however, that the penalty should be reduced to that of six months and one day of prision correctional. Modified by substituting for so much thereof as imposes the penalty of one year and one month of imprisonment, the penalty of six months and one day of prision correctional, the judgment of the lower court convicting and sentence appellant is affirmed, with the costs of both instances against him. So ordered.

Arellano, C. J.,, Torres and Mapa, JJ., concur.

Johnson, J., concurs in the result

Trent, J., dissents.

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