

THE UNITED STATES, PLAINTIFF AND APPELLEE, VS. ENRIQUE CLEMENTE, DEFENDANT AND APPELLANT.

G.R. No. 8142. January 25, 1913

Ponente: MORELAND, J.

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MORELAND, J.:

The defendant was brought to trial in the Court of First Instance in the city of Manila upon an information as follows:

"That on or about the 17th day of June, 1912, in the city of Manila, Philippine Islands, the said Enrique Clemente, at the time being and acting as motorman of a street car No. 111 upon the line Pasay-Cervantes of the Manila Electric Railroad and Light Company, a corporation duly organized and doing business in the city of Manila, Philippine Islands, and then and there directing and operating said street car, as the motorman thereof, upon and along Dakota Street in said city, and then and there being under the obligation as such motorman of said street car to conduct and direct the same with due care and caution, in order to avoid any accident which might occur to the vehicles and pedestrians who were passing upon and over said Dakota Street, said accused at said time and place voluntarily and illegally, with reckless imprudence and with inexcusable negligence and in violation of the ordinance pertaining to the matter, conducted and directed said street car, without paying any attention to the pedestrians who were crossing said street from one side to the other, in such a manner that by reason of his lack of care and reckless negligence he directed and conducted street car No. 111 against and over the body and head of Juan Garcia, a child 3 years of age, who was then and there passing across the said Dakota Street, dragging the body of said child over said street-car track for a considerable distance, fracturing and destroying its skull and causing instant death. That if said acts thus performed by the accused had been done with malice or intentionally he would be guilty of the grave crime of homicide,"

The finding of the court upon the trial is as follows:

"I am unable to conclude from the evidence that the defendant was recklessly negligent in operating the car, as contemplated by the section of the code upon which the complaint is based, but I am satisfied that he was careless and negligent in the performance of his duty and violated the regulations in relation to the running of street cars as laid down by the ordinance of the city, and that homicide resulted from his carelessness and negligence.

* * * * *

"I find the defendant, Enrique Clemente, not guilty as charged in the complaint of homicide through reckless negligence or rather through fearful negligence, but find him guilty of a violation of the regulations through imprudence and negligence, which resulted in the death of the child as alleged in the complaint, and sentence him to five months of arresto mayor, and to pay the costs of the action."

The appellant in this case makes two contentions: First, that the trial court had no right to find as a fact that the defendant had violated an ordinance of the city of Manila, for the reason that said ordinance was not introduced in evidence and there was no proof of its existence, a court of general jurisdiction having no power or authority to

take judicial notice of the existence of a municipal ordinance or of the contents of an ordinance admittedly existing. Second, that even though the right of the court be conceded to take judicial notice of the existence or contents of a municipal ordinance, still in this case there was no evidence to support the finding that such ordinance had been violated.

The rule of law laid down by the appellant in his first contention, if applicable at all to the Philippine Islands, a question which we do not now decide, is based upon the ground that courts of general jurisdiction are not required to enforce municipal ordinances, and therefore there exists no reason why they should take judicial notice of them. The legal proposition at the base of the doctrine contended for by the appellant is, that courts will take judicial notice only of those laws which they are required by law to enforce. This rule, even if applicable in this country, does not apply in this case for the reason that, under article 568 of the Penal Code, paragraph 2, courts of general jurisdiction are required, in a manner of speaking, to enforce municipal ordinances, their violation being an integral and essential part of the crime defined in that paragraph. The paragraph referred to reads as follows:

"Any person who, while violating any regulation, shall, by any act of imprudence or negligence not amounting to reckless imprudence, commit an offense, shall suffer the penalty of arresto mayor in its medium and maximum degree."

For the proper enforcement of this paragraph, knowledge of municipal ordinances on the part of the court is necessary, as they become a part of the general law which the courts are called upon to administer in this class of cases. In order, therefore, to enforce and administer the law as the duties of his office require, it is essential that a court of general jurisdiction know the municipal ordinances of the Islands. Being required to know the municipal ordinances, they are at liberty to take judicial notice of them. If they err in finding the existence of an ordinance when one really does not exist, or if they make a mistake as to the nature of an ordinance or its provisions, the judgment is subject to correction in the same manner as when they have erroneously assumed the existence of a law, or the provisions of a law the existence of which is conceded.

Relative to the second contention of the appellant, namely, that there is no evidence to sustain the finding that the ordinance was violated, we are of the opinion that it is not well founded. It appears from the record that a number of witnesses declare that the street car was running "very fast." Others state, including the accused, that the street car was running with the lever set at "nine points." It is shown by the testimony of other witnesses that a street car under the propulsion of a current indicated by the lever being placed at nine points would be going about 23 miles an hour.

It appears from the evidence, also, that post No. 961 and post No. 962 are 36.8 meters apart. The street car struck the child near post No. 961. Although the motorman knew that he had run over a child and, as he claims, did everything in his power to stop the car, he was unable to do so until he reached a point opposite to post No. 962. In other words the Car was running at such speed that it required a distance of 36.8 meters in which to stop it.

These facts are sufficient to sustain the finding that the ordinance was violated, it providing that "it shall be unlawful for any street car to run at a greater speed than 12 miles per hour within the corporate limits of said city."

We are of the opinion that the court below erred in not finding the defendant guilty of homicide committed by reckless negligence. The evidence seems to us to be overwhelmingly against him.

The witness Mr. Tello, testifying for the Government, said in substance:

"I was standing at this point [indicating the point on the plan marked 'white post' and numbered 962]; 961 should be a white post and I was standing at No. 962, which is a black post. When the street car No. 111 was at a distance of one post and one-half from post No. 961, the post to stop at, when at a distance of a post and one-half from this stopping post, I saw the street car No. 111 running at its maximum speed of nine points;

then the boy being at a distance of about 2 meters from the white post, there is the point where the street car ran over the child, dragging the child to a distance of 15 or 20 meters and from that point the street car left the child unconscious and went on running still for a distance of about 20 meters, leaving the rear part of the street car in front of post No. 962. And then I went around in front of the street car to see what the motorman was doing and what he had done, because I did not see any smoke from the trolley, and besides I saw that the reverse lever was in its place and he stopped the car only with the aid of the brake.

"The child belonged to Señora Arsenia. She was in the Chinese tienda and when she saw this street car coming at a distance of a post and one-half from the stopping post she held up her hands to stop the car. She was at that time standing in front of the tienda at this place [indicating on the plan the point marked '947']. At that time the street car was at a distance of less than a post and a half from the stopping post. When I first saw the mother of the child motioning for the street car to stop, the street car was 3 meters before post 960 [indicating the point on the plan]. The child at that time was about to cross the street-car track coming from this house [indicating the point on the plan marked No. 938]. The street at that time was very clear, there was nothing in the street, no obstacles on the track. The motorman did not stop the car when the mother of the child made motions to the car to stop. The car stopped opposite post No. 962. This was after the child was struck. I did not notice whether this motorman made any effort to stop the car while this woman was motioning to him to stop the car. When I first saw the mother of this child motioning to the motorman to stop the car, the child was about a meter and a half from the street-car track."

On cross-examination this witness testified in part:

"When the car finally stopped, it had passed me at post No. 962. When the car stopped I walked around in front of it to see what the motorman had done to stop the car, and I saw that the reverse lever was in place and that he used only the brake to stop the car."

Mrs. Chaves, mother of the child, another witness for the prosecution, testified in substance:

"I was buying some crude oil at that time at the Chinese tienda, and after I bought it when I turned around I saw that my child was about to cross the street-car track and then I saw this street-car coming and running fast; then I held up both hands and told the motorman to stop, but he did not do so. After running a certain distance he stopped, but my child was already hacked to pieces.

"When I first saw the child coming across the street I was coming out of the Chinese tienda. I was on the right side of Calle Dakota going south and the child was on the left side from the place where I was and tried to cross the street-car track. When I first saw the child coming across the street toward the street-car track, I did not do anything to the child at all; my attention was called wholly to the street car that was coming. When I first raised my hands, the street car was about a post and a half from where I was. The street at that time was clear; there were no people there, but there were several people in the barber shop near there. It was not dark; it was light; it was 6.10. The motorman did not make any effort to stop the car when I motioned him to do so. My child was already dead when he stopped the car. The car was going fast at that time; it was going about nine, that is the speed. I am referring to the speed of the street car. The child Was named Juan and would have been 3 years old next month."

Mr. de Jesus, testifying for the Government, said in substance:

"I was at the window of the house where the child was living when the accident happened. I was at the window at that time and the mother of the child went to the Chinese tienda to buy something there, and when I saw the street car it was in front of the white post and then I saw the mother making motions to stop the car, then I saw that the street car was coming and was near the child, and I also held up my hand to stop the car, but it kept running on until it struck the child.

"The motorman stopped the car after it struck the child. I did not notice him turn the brake because I did not

pay any attention to that. The car was coming fast. The car had already passed the white post when the woman held up her hands. I refer to the white post near the electric light, just in front of the light itself. That is the post that is reached by the street car before reaching my house, which is No. 938. When she motioned to the motorman to stop the car the boy was already near the track. At that particular moment the street car was about from here to the wall outside" [indicating a distance of about 30 or 35 feet],

Mrs. Reyes, a witness for the Government, testified in substance as follows:

"I was coming from Calle Cementerio and when I arrived at a distance of 3 or 4 meters from the house where the boy was living I saw the mother of the boy making signals for the car to stop and I saw the child at a distance of about 1 yard from the track, then I turned around to ask for help so that the boy should be taken away from that place and when I turned back again neither the street car nor the child was in that place; the child was dragged.

"When I first saw the child approaching the street-car track the car was at a distance of about 35 meters, more or less. I did not see the motorman do anything while the woman was signaling him to stop. The car was going very fast, I could not say how fast. I did not hear the motorman give any warning of his approach; I did not hear any bell rung. The car stopped at the next stopping post after it struck the child. I do not know what is the number of the post."

Mr. Velasco, testifying for the Government, said in substance:

"I was at the door of the barber shop when the accident happened. At the time when the mother of the child made the signals for the street car to stop it was at a distance of about one post from the child, and the child was walking across the street toward the mother. Although the mother made signals for the street car to stop, it did not stop and at that time the distance of the street car was about the distance of from here to the wall in the other room [indicating a distance of about 50 feet], but the street car was coming so fast that the child was caught and struck while it was inside the track. The distance from here to the wall to which I refer was the distance from the street car to the child when the child was inside the rails, and on account of the speed of the street car the boy did not succeed in crossing the track but was struck by the car. According to what I saw the car was going at full speed. When I first saw the mother motion to the motorman to stop the car, he did not do anything, he did not even turn the reverse or turn the brake, and after the child was dead the car stopped, after it had passed one more post, and the motorman got down and looked at the child, and I heard one conductor say—I believe it was the conductor of this motorman, 'I gave the stop signal and he did not stop'. When the motorman arrived in front of the black post he rang the bell once. That black post is about as far as from here to that first post or a little farther than that from the Chino's tienda" [indicating a distance of about 125 feet].

This witness on cross-examination gave the following very significant and interesting testimony:

"Q. Wasn't there time for you to stop that child or pull it off the track?-A. There was time for me to snatch the child from that place, but I never believed he was going to be struck by the car, I believed the motorman had time to stop the car. I was looking at the child and he had his eyes too, and there was time for him to stop the car before the car got to where the child was. I did not go there and get the child because I never thought that he would let the car strike the child."

On redirect examination this witness said:

"The motorman did not do anything; he did not turn the reverse nor apply the brake. He stopped the car after it got near the other post. He began to stop the car after the child was dead."

In reply to questions put by the court, the witness said:

"It was after the child had been run over and its body left on the track before he made any effort to stop the car. After the child was left dead on the track, then he tried to stop the car."

N. E. Rasmussen, patrolman, testified, in substance, as follows:

"I have ridden on car No. 111 of the Manila Electric Rail-road and Light Company; the car was going at a speed of nine points when we timed it on the Luneta just after the car came off Bagumbayan, from post No. 2268 to post 2281, a distance of about 250 meters, and it was going at the speed of 23 miles an hour. It took the car half a minute to run that distance, 250 meters; about that."

O. C. Hall, secret-service agent, testified as follows:

"I assisted in the timing test of car No. 111 of the Manila Electric Railroad and Light Company on June 19, 1912; I got the motorcycle of the secret-service department, which has a speedometer on it and started from the corner of Bagumbayan and the Luneta, and after the car got around the corner there Mr. Rasmussen gave me the signal, and also I could see the lever from where I was right alongside of the car; I don't know what the time was, I didn't take the time, only what I got from Mr. Rasmussen, but the speedometer on the machine I had showed that the car was going 25 miles an hour while it was on nine points."

A number of witnesses were sworn for the defense. While their testimony tends in some degree to exculpate the accused, it is not in our judgment sufficient to do so. It has nothing of the directness and force of the evidence introduced by the prosecution. It does not meet the proof that Calle Dakota is for a long distance either way from the scene of the accident entirely straight; that the motorman was able to see the child in the street for a long distance; that, although he could not but have seen the child within the limits of the highway, with the possibility, if not probability, that it might place itself upon the track, nevertheless he continued the car at full speed, driving it with the maximum force of the current, without attempting to reduce it to such control that, if the child should chance to go upon the track, he could protect it by stopping the car immediately.

It is the duty of any person driving a vehicle in the public thoroughfares to reduce the same to control, ready to be stopped at any moment, if he sees a child below the years of understanding in such place that it can, by any reasonable chance, place itself in a dangerous position with respect to the vehicle. In such case the vehicle must be under such control that, if the child, by some sudden or unexpected movement, places itself in the way of the vehicle, it can be stopped in time to avert injury. No one is able to determine what a child of that age will do, and it is incumbent upon the driver of a vehicle, on seeing such child in the street, to take such care that, no matter what, within reasonable limits, the child may do, it will nevertheless be safe.

This defendant, so far as the great preponderance of the evidence is concerned, took no adequate precautions to prevent the accident which occurred. It is undoubted that he saw the child in the street, very probably making its way toward the street-car track; yet he continued the car at its maximum speed, without regard to what the child might do. Such conduct cannot be permitted. Vehicles cannot be driven in the public streets in such a way as to endanger the life of a child below the thinking age who may have strayed upon the streets in search of its mother, or who may be there for any other reason. Having no judgment of its own, the drivers of vehicles must substitute their judgment for its; not having the intelligence to direct itself, men who drive cars or vehicles must exercise their intelligence. It may be true, as defendant claims, that the child by a sudden dart placed itself in front of the car, but that is no excuse for the defendant. He should have anticipated that very thing and should have acted accordingly.

We are convinced, under this evidence, that the defendant should have been convicted of the crime of homicide caused by his reckless negligence, as charged in the complaint. Of our authority to convict him here and now of that crime, although he has once been acquitted of it, we do not doubt. (*Trono vs. The United States*, 199 U. S., 521[1]; *Kepner vs. The United States*, 195 U. S., 100.[2]) The crime of which the accused was convicted in the court below is included in the crime of homicide by reckless negligence, as charged and proved in this case.

The Penal Code recognizes and distinguishes three classes of negligence in connection with homicide or other crimes: First, reckless negligence, which consists in every act of improvidence (lack of foresight), thoughtlessness, carelessness, negligence, unskillfulness and imprudence, executed or done without taking those precautions or measures which the most common prudence would require. For example, discharging a firearm from the window of one's house and killing a neighbor who just at the moment had leaned over the balcony in front of the house. Leaving a loaded firearm on a chair or other place within the reach of small children then in the house—one of whom picks it up for the purpose of playing with it, and is killed by its discharge. The facts in both of these cases constitute homicide by reckless negligence, because death was produced by failure to exercise the most ordinary and common care. (Viada, Vol. 111, p. 629.)

The second class is that in which the act is performed with simple negligence or imprudence, i. e., with negligence less than reckless negligence, but at the same time in violation of some ordinance or other rule enacted by some competent body for the public good. An illustration: The superintendent of a jail, in a moment of benevolence and by mere tolerance, permits a prisoner to go out of the jail, who, abusing the confidence and tolerance of the superintendent, escapes. In such case, the superintendent has violated the rules and regulations of jails which prohibit him from permitting a prisoner to leave the jail. The escape of the prisoner, brought about by the superintendent's infraction of the rules, makes him guilty of the crime of infidelity in the custody of prisoners committed by simple imprudence with infraction of the rules relating to prisons. (Id.)

Finally, the Code recognizes as the third class that in which the negligence can neither be called reckless, because it is impossible to foresee the evil produced, nor negligence with a violation of rules, because in reality no rules are violated. It is called simple imprudence or negligence, and is punished as a misdemeanor in paragraph 3 of article 605 (Spanish) of the Penal Code. An example of this class is presented in a case where the driver of a cart, passing along the street at the speed prescribed by the ordinance and leading his team by a strap attached to the bridle or head, in a moment of distraction, on turning a corner, does not see that there is a child asleep in the gutter on the side of the team opposite to him; by reason whereof the child is run over by the cart and killed. The act cannot be denominated purely accidental, because, if he had been paying strict attention to his duty, he would have seen the child and very likely would have been able to avoid the accident. Nor can it be called reckless negligence, because he was not able to foresee the extremely unusual occurrence of a child being asleep in a gutter. Neither was there a violation of an ordinance, because he was driving his vehicle entirely in conformity therewith. Such act is qualified, then, as simple imprudence or negligence, punishable as a misdemeanor. (Id.)

From these observations, it is apparent that, under the Penal Code, the crime of which the accused was convicted by the trial court is a lesser offense of the crime of homicide committed by reckless negligence of which the accused was acquitted. That being the case, an appeal to this court from a conviction of the lower offense places upon us the duty, and therefore the necessity, of revising the whole case and of taking such action in the premises as law and justice require. (Trono vs. The United States, 199 U. S., 521; Kepner vs. United States, 195 U. S., 100.)

We are aware that the crime of homicide through an act of simple negligence which violates an ordinance or regulation is not necessarily included in the crime of homicide through reckless negligence. The latter crime might possibly be committed without the violation of an ordinance or regulation. In that event it would not include the crime of homicide through an act of simple negligence which violates an ordinance or regulation. The courts have not yet gone so far as to hold that, where there is an acquittal of the greater crime and a conviction of a lesser crime not included in the greater and not charged in the information, an appeal from a conviction of the lesser crime opens the way to a conviction of the greater crime in the appellate court if the evidence is there found sufficient; nor has there been such holding in a case where two crimes, neither one, included in the other, and from

their nature having no legal relation to each other, were charged in the same information, and an acquittal was had as to the higher and a conviction as to the lower.

In the case at bar, however, we have both the higher and the lower degrees of the same crime charged in the information. We have, also, a case in which the commission of the homicide was accompanied by a violation of the ordinance, and in which, therefore, the crime of homicide through an act of negligence which violates an ordinance was included in the crime of homicide by an act of reckless negligence. This is a case where, as a matter of fact, the one was included in the other. Under the authorities, therefore, an appeal from a conviction of the lower grade opens the whole case for reconsideration by this court upon all the evidence, and requires us in the performance of our duty to pronounce such a judgment in the premises as in conscience we ought.

The judgment of the court below is reversed, and the accused is hereby convicted of the crime of homicide committed through reckless negligence, and is hereby sentenced to one year and one day of prision correccional with the accessories provided by law, with costs.

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

Trent, J., dissents.

[1] 11 Phil. Rep., 726.[2] 11 Phil. Rep., 669.

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