10-29-1942

Fuentes v. Ling

Roger J. Traynor

[Crim. No. 4443. In Bank. Oct. 8, 1942.]

THE PEOPLE, Respondent, v. LESLIE B. GIRETH, Appellant.

[1] **Homicide—Appeal—Review.**—In a prosecution for murder by defendant of his paramour, a judgment upon a plea of guilty imposing the death penalty was affirmed where it was supported by defendant's voluntary statement to the authorities shortly after his arrest and by his testimony before the grand jury, and where an alienist testified as to his sanity.

APPEAL (automatically taken under Pen. Code, § 1239) from a judgment of the Superior Court of Alameda County. Lincoln S. Church, Judge. Affirmed.

Prosecution for murder. Judgment on plea of guilty affirmed.

Leslie B. Gireth in pro. per., for Appellant.

Earl Warren, Attorney General, and David K. Lener, Deputy Attorney General, for Respondent.

THE COURT.—This is an automatic appeal from a judgment of conviction of first-degree murder imposing the death penalty on the defendant. (See § 1239, Pen. Code.)

[1] Examination of the record discloses that on July 16, 1942, the defendant, a married man, shot and killed a young woman whom he had been meeting clandestinely. The victim was shot as she slept in a motor-court cabin shared with the defendant in Alameda County. Defendant left the scene of the homicide and by telephone notified the authorities of the crime. He was taken into custody shortly thereafter and freely admitted the shooting. Accordingly, he was indicted for murder. At all times he has refused the assistance of counsel. Upon his arraignment he pleaded guilty. After hearing evidence addressed to the degree of the crime, the court determined it to be of the first degree and imposed the death penalty.

The voluntary statement of the defendant to the authorities shortly after his arrest and his testimony before the grand jury when it was investigating the crime, support the judgment. An alienist testified as to defendant's sanity.

The judgment is affirmed.

[1] See 13 **Cal.Jur.** 740.

McK. Dig. Reference: [1] Homicide, § 249.

[S. F. No. 16720. In Bank. Oct. 29, 1942.]

ROBERT FUENTES, Respondent, v. LEE LING, Appellant.

[1] **Automobiles—Regulation—Pedestrian Traffic.**—Inasmuch as the Vehicle Code (§§ 458, 560–564) regulates pedestrian traffic to the exclusion of local ordinances, an ordinance purporting to regulate such traffic is invalid, and its violation does not constitute negligence *per se*.

[2] **Id.—Contributory Negligence—Persons Crossing Streets—Between Crosswalks: Appeal—Conclusiveness of Findings—Persons Crossing Streets.**—Vehicle Code, § 562, does not prohibit a pedestrian from crossing a street outside of a crosswalk. And a finding against contributory negligence will not be disturbed on appeal where it appeared that a pedestrian crossed a well lighted business street in the middle of a block, and proceeded on his way after having observed an automobile approaching from a distance of 200 feet, with nothing to obstruct his or the driver's view.

[3] **Id.—Appeal—Conclusiveness of Findings—Negligence of Defendant.**—In an action for injuries sustained by a pedestrian struck by an automobile, a finding of negligence of the driver will not be disturbed on appeal where, although he stopped his car within five feet after the collision, the trial court might have concluded that he was negligent in not observing the pedestrian on a well lighted street.

[4] **Id.—Contributory Negligence—Persons on Foot—Intoxication.**—Although a pedestrian struck by an automobile has taken intoxicants, it does not necessarily follow that his judgment or motor coordination is so affected as to make him guilty of contributory negligence.

[1] See 2 **Cal.Jur. Ten-year Supp.** 29; 5 **Am.Jur.** 528.

McK. Dig. References: [1] Automobiles, § 5; [2] Automobiles, §§ 129, 371(4); [3] Automobiles, § 369(4); [4] Automobiles, § 125.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. John J. Van Nostrand, Judge. Affirmed.

Action for damages for injuries sustained by pedestrian struck by an automobile. Judgment for plaintiff affirmed.

Snook & Snook & Chase and Snook & Chase for Appellant.

Leon A. Blum for Respondent.

TRAYNOR, J.—This action was brought by plaintiff to recover damages for personal injuries that he incurred when struck by an automobile operated by defendant. The accident occurred at about 7 o'clock on the evening of December 30, 1938, on Third Street between Kirkwood and LaSalle Avenues in San Francisco. Third Street, an arterial boulevard extending north and south, is a main highway between San Francisco and points south. It is approximately eighty feet wide and is marked by white lines dividing six lanes of traffic. Between Kirkwood and LaSalle Avenues, the frontage of Third Street is occupied by stores, apartments, flats, and a public garage and constitutes a business district as that term is used in traffic laws. When the accident occurred it was a clear night and the street was well lighted by street lights and Christmas light streamers strung throughout the block. Plaintiff, clad in a dark suit, was crossing Third Street at right angles from east to west in the middle of the block when he was knocked down by the automobile that defendant was driving south on the west side of Third Street in the second lane of traffic. There is no pedestrian crosswalk in the middle of the block where plaintiff attempted to cross and where the accident occurred. There are such crosswalks marked by white lines at the intersections of Third Street. Plaintiff testified that he was more than halfway across the street when he first saw defendant's car approaching from a distance of approximately 200 feet, and that he thought that he could cross in safety before defendant's car traveled the distance of 200 feet or reached the middle of the block, although the car was traveling at a "fast" speed. A traffic officer's report described plaintiff at the time of the accident as "under the influence of intoxicants," and hospital records described plaintiff as having a strong alcoholic breath, but plaintiff testified that he was not drunk and had taken no intoxicants on the day of the accident. Defendant and his son, who was riding with him in the front seat, testified that they did not see plaintiff before the impact although they were both observing the highway. They, as well as other occupants of the automobile, estimated its speed as between 18 and 20 miles per hour. Witnesses for the plaintiff testified that the automobile was traveling at a rate of 40 to 45 miles per hour. Defendant brought his car to an almost immediate stop after the right front part of the car struck plaintiff. Plaintiff fell to the pavement with his head near the west curb and his feet under the running board of the car at about five feet north of the car's front bumper. There were no skid marks on the pavement.

After a trial without a jury, the court made findings in favor of plaintiff and entered judgment for him in the amount of $4,373 and costs. Defendant has appealed from the judgment on the ground that plaintiff was guilty of contributory negligence as a matter of law and that the evidence was insufficient to support the findings and judgment.

[1] The contention that plaintiff was guilty of contributory negligence as a matter of law rests on the violation of section 10 of article 3 of Ordinance 7691, New Series, of San Francisco, which provides: "When within the central traffic district or a business district no pedestrian shall cross a roadway other than by a crosswalk." Plaintiff admittedly violated the ordinance. It has recently been held, however, that the Vehicle Code (§§ 458, 560-564) regulates the use of public roadways by pedestrians to the exclusion of local ordinances. (*Pipoly* v. *Benson*, 20 Cal.2d 366 [125 P.2d 482]. The San Francisco ordinance is indistinguishable from the Los Angeles ordinance held invalid in the Pipoly case. It follows therefore that plaintiff's violation of the ordinance did not constitute contributory negligence *per se*.

[2] Defendant contends that plaintiff's conduct was also a violation of the Vehicle Code and therefore constituted contributory negligence as a matter of law. Section 562 of the Vehicle Code provides: "(a) Every pedestrian crossing a roadway at any point other than within a marked crosswalk or within an unmarked crosswalk at an intersection shall yield the right of way to all vehicles upon the roadway." It does not prohibit a pedestrian from crossing outside of a crosswalk, however. (*Genola* v. *Barnett*, 14 Cal.2d 217 [93 P.2d 109].)

Moreover the statute provides that "The provisions of this section shall not relieve the driver of a vehicle from the duty to exercise due care for the safety of any pedestrian upon a roadway." It cannot be said that as a matter of law a pedestrian who crosses a well lighted business street in the middle of a block is guilty of violating the statute or of negligence proximately contributing to his injury when he proceeds on his way after having observed an automobile approaching from a distance of 200 feet, with nothing to obstruct his view or that of the driver. (See *Quinn* v. *Rosenfeld,* 15 Cal.2d 486 [102 P.2d 317]; *Genola* v. *Barnett, supra; Mitrovitch* v. *Graves,* 25 Cal.App.2d 649 [78 P.2d 227]; *Varner* v. *Skov,* 20 Cal.App.2d 232 [67 P.2d 123]; *White* v. *Davis,* 103 Cal.App. 531 [284 P. 1086].) Section 563 of the Vehicle Code prohibits pedestrians from crossing except in a crosswalk between adjacent intersections where traffic is controlled by a traffic control signal device or by police officers. There is no evidence, nor is it contended that the traffic was so controlled at the intersections of Third Street and Kirkwood or LaSalle Avenues.

The questions of negligence and contributory negligence were for the trial court to determine (*Quinn* v. *Rosenfeld, supra*; *Genola* v. *Barnett, supra*; *Mitrovitch* v. *Graves, supra*; *White* v. *Davis, supra*), and its findings when supported by the evidence will not be disturbed on appeal. **[3]** The evidence as to the negligence of defendant was conflicting. The ability of defendant to stop his automobile within five feet after the collision suggests the improbability of excessive speed, but even if the court accepted the defendant's version in that regard it might have concluded that defendant was negligent in not observing plaintiff on a well lighted street. **[4]** The evidence as to plaintiff's intoxication was also conflicting, but even if the court believed that plaintiff had taken intoxicants it does not necessarily follow that his judgment or motor coordination were so affected as to make him guilty of contributory negligence.

The judgment is affirmed.

Gibson, C. J., Shenk, J., Curtis, J., Edmonds, J., Carter, J., and Schauer, J. pro tem., concurred.

[L. A. No. 17749. In Bank. Oct. 29, 1942.]

E. E. JOHNSTON et al., Appellants, v. OLIVE LANDUCCI, Respondent.

[1] **Vendor and Purchaser — Assignment — Rights Between Purchaser and Assignee — Prohibition of Assignment Without Consent.**—In a contract for the sale of real property a prohibition of an assignment of the rights of the vendee without the consent of the vendor is for the benefit of the vendor only and in no way affects the validity of an assignment without consent as between the assignor and the assignee.

[2] **Id.—Assignment—"Subject to Approval" of Vendor—Construction.**—Where a contract for the sale of real property provides that an assignment thereof is "subject to the approval" of the vendor and also prohibits an assignment by the vendee without the consent of the vendor, the words "subject to the approval" are intended to refer back to the provision against assignment and to call the assignee's attention to the possible refusal of consent. Under this interpretation the "subject to approval" clause has the same legal effect as the provision against assignment.

[3] **Contracts—Interpretation—Functions of Courts.**—Where the construction given an instrument by the trial court appears to be consistent with the true intent of the parties as shown by the evidence, another interpretation will not be substituted on appeal although such other interpretation might, without consideration of the evidence, seem equally tenable.

[4] **Vendor and Purchaser—Assignment—Construction.**—Although a contract of sale of land prohibited an assignment without the vendor's consent, and the vendee, without such consent, executed an assignment "subject to the approval" of the vendor, a construction of the assignment as valid as between the vendee and his assignee was consistent with their intent, where the lawyer preparing it testified that nothing was said by either party about securing the vendor's consent, where the assignor did not agree to obtain the vendor's approval, and where immediately upon the completion of the deal the assignee delivered to the assignor his note and an assignment of his interest in other lands, and subsequently both parties treated the assignment as a completed transaction.

[1] See 27 **R.C.L.** 564.

McK. Dig. References: [1] Vendor and Purchaser, § 218; [2, 4] Vendor and Purchaser, § 215; [3] Contracts, § 161; [5] Contracts, § 150.