

[G.R. No. 1126. April 28, 1903]

THE UNITED STATES, COMPLAINANT AND APPELLEE, VS. HERMOGENES MUYOT, DEFENDANT AND APPELLANT.

D E C I S I O N

WILLARD, J.:

The defendant was employed in August or September, 1901, by Don Gertmimo Jose as collector. His duty was to collect the accounts connected with the launch *D. Vicente*. He was discharged the last of July or the first of August, 1902, and a criminal complaint was filed against him for *estafa*. It charged that he had collected ninety-four different accounts, amounting to 1,043 pesos, from the debtors of Don Geronimo Jose and had not paid over the money. These accounts ran from July 16, 1901, to July 22, 1902.

1. That these accounts were delivered to the defendant to collect and that he had not paid the amount thereof to his employer, may be considered as proved. But, with the exception of one item of 40 pesos, there is no evidence that the debtors of Don Geronimo Jose had ever paid these bills.

The testimony of Don Geronimo Jose and of Don Francisco Gonzales, to the effect that they had made investigations and found that the defendant was a defaulter, is not sufficient to establish the essential fact that the defendant had actually received this money from the said debtors.

It is claimed by the Solicitor-General that the failure of the defendant to return the accounts or the money, or to explain this failure, is sufficient to convict him. As the defendant is not required to testify against himself, his failure to explain why he had not returned either the accounts or the money, and his silence on this point when charged with the crime, are not sufficient evidence to show that the debtors had actually paid the money to him. This should have been proved by the debtors themselves. There is no presumption that, when an

account has been delivered for collection, it is paid to the person sent to collect it.

After it had been claimed by Don Geronimo Jose that the defendant was a defaulter to the amount of 1,043 pesos, his mother attempted to settle the matter. An instrument was drawn up by a clerk of Don Geronimo to be signed by the defendant. It acknowledged that he had embezzled the above sum. It was read in the presence of the defendant and his mother. The defendant said nothing during the interview. The document was never signed, the mother and Don Geronimo not being able to agree upon its terms.

It is said that the silence of the defendant on this occasion was a confession of his guilt. We can not so hold. By General Orders, No. 58, section 15, paragraph 3, the refusal or neglect, of a defendant to testify can not in any manner prejudice him. A person charged with a crime is not called upon to make any explanation or denial, except to plead guilty or not guilty. He can remain silent as well before the trial as during it, and his silence can not be considered as a confession of guilt. Any other rule would lead to the result that, every time anything was said in the presence of a prisoner indicating his guilt, he would be trailed upon to deny it, whether it was said by the prosecuting attorney, newspaper reporters, police officers, or others.

2. As to the 40 pesos mentioned above, there was sufficient evidence to convict the defendant.

This was a claim against Timoteo Sevilla. The receipted bill delivered to the defendant was found in the possession of this debtor and was produced at the trial. The defendant admitted to Francisco Gonzales, and, as we understand the evidence, to Don Geronimo Jose, that he had collected this amount.

3. To the first complaint presented the defendant demurred. The fiscal having admitted that the demurrer was well taken, the court on October 18 directed the complaint to be amended. The defendant moved to dismiss the amended complaint on the ground that the demurrer had put an end to the proceeding. This motion was denied. The claim of the defendant is that he demurred to the complaint on the fourth ground mentioned in section 21 of General Orders, No. 58, namely, that the facts stated did not constitute a public offense and that this is a defect which can not be avoided by an amendment, as provided in section 23.

This claim can not be sustained. A complaint as drawn may fail to charge an offense by reason of the omission of some material fact which exists, but which the fiscal by oversight

has neglected to insert in the complaint. With this fact inserted the complaint would charge an offense. Such a mistake is one that can be avoided by an amendment and the court is by said section 23 authorized to so direct.

The judgment is modified by changing the penalty from six months to two months and one day, and the indemnity from 1,043 pesos to 40 pesos. In all other respects it is affirmed with costs of this instance *de officio*.

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

McDonough, J., did not sit in this case.
