2 Phil. 461

[G.R. No. 994. August 31, 1903]

THE UNITED STATES, COMPLAINANT AND APPELLEE, VS. R. W. DOUGLASS, DEFENDANT AND APPELLANT.

D E C I S I O N

MCDONOUGH, J.:

The defendant was convicted in the Court of First Instance of Cebu of having, on the 16th day of February, 1902, misappropriated and embezzled public funds amounting to $1,114.85, Mexican currency, taken by him, or by others with his consent, from the public treasury of Cebu.

He was sentenced to serve a term of three years and eight months' *presidio correccional,* and has been in'prison since his arrest, in February, 1902.

The complaint alleged, in substance, that the defendant took this money or consented to the taking of it by others; and he filed a demurrer to the complaint, on the ground that it was bad for uncertainty, because the word "or" was used instead of the word "and." The demurrer was overruled by the court below, and we are of opinion that the court did not err in doing so.

It is true, as contended bv the counsel for the defendant, that there are many cases and authorities which hold that a charge that the defendant "murdered *or* caused to be murdered," or that he "murdered *or* wounded," or "forged *or* caused to be forged," "passed *or* attempted to pass," etc., is bad for uncertainty as to which one of two things is meant

In this case, however, the defendant is not charged with committing one of two offenses.

Article 390 of the Penal Code provides that "the public official who by reason of his duties has in his charge public funds or property, and who should take, or consent that others should take, the same shall be punished," etc.

There is in this article but one offense, which may be committed by the official in two ways, either by himself taking the money or by consenting to the taking of it by others.

It is not objectionable, when a single offense may be committed by the use of different means, to charge, in the alternative, the various means by which the crime may have been committed. (United States *vs.* Potter, 21 Fed. Cases, 604; Bishop's New Criminal Procedure, sec. 434.)

The evidence upon which the defendant was convicted is wholly circumstantial, and the question to be determined is whether these circumstances, which are strong enough to cast suspicion upon the defendant, are sufficiently strong to overcome the presumption of innocence, and to exclude every hypothesis except that of the guilt of the defendant

The defendant was chief clerk and deputy treasurer of the Province of Cebu from May 1, 1901, to February 28, 1902, and as such official he had charge of receiving and depositing the public moneys.

These moneys were kept in a small field safe in the office of the treasurer, situated in the Government building in the city of Cebu, and the safe was usually locked with two brass padlocks, such as were used in the Army. The treasurer's office consisted of three rooms in a direct line, with doors between, and with three outside doors, which were locked with ordinary door locks, and which were not barred. The governor and his family and servants resided in this building, and it also contained the post-office and telegraph office. It is claimed that the crime was committed some time Sunday evening or Sunday night, February 16, 1902.

The treasurer, Mr. S. Young, formerly a second lieutenant in the Seventeenth Infantry, testified that he was in the office on Sunday, February 16, from 9 o'clock in the morning until noon, and from 2 o'clock until 5 o'clock in the afternoon; that when he went away the back doors were locked; that he locked the front door when he went out; and that he did not particularly observe the safe.

On the morning of February 17, when he went into the office, he found that the safe had been opened; that on the floor near the safe he observed a small steel box, a japanned tin box, a cigar box containing a revenue stamp and a $10 bill, Mexican currency; an empty sack, a broken lock, a piece of a candle partly burned, a burnt match, and some receipts for revenue stamps; and in the safe itself there were an empty sack and one of the locks usually used to lock the safe. The broken lock was the other safe lock. These two brass locks had

been issued to the treasurer, when he was in the Army, by the quartermaster. When he first received them there were two keys for each lock, but his muchacho, who subsequently moved to Iloilo, lost a key of each lock before Lieutenant Young had become treasurer. The defendant at first used only one of these locks upon the safe, and the matter of using one or two was left entirely to him, but he usually used both locks. The lock which was found on the floor had been filed and the hasp broken; the other lock was intact.

The treasurer that Monday morning, with others, examined the windows and found them in the usual condition, and also examined the condition of the grounds outside the windows for tracks or footprints, but found none. He did, however, find a large crooked door key lying on a hat rack outside the door, Which key he tried on one of the locks, but without being able to unlock it. This key had before been lying on one of the desks in the office.

There were employed in the office of the treasurer, his deputy, Mr. Uppington; the defendant; Marcelino Regna, clerk; Aviola, a clerk; Catalino Ignacio, a clerk; Antonio Medalle, a clerk, and Andres Acular, a clerk,

Six persons had keys to the treasurer's office, viz, the treasurer, his deputy, the defendant, Aviola, Mr. Holcombe, supervisor of the province, and a Mr. Burke, and all the keys opened every door except one, upon which there was a padlock. Of the money taken from the safe, $122 belonged to the liizal monument fund and $132 was a special fund received from the deputy treasurer of El Pardo. The defendant was directed by the treasurer not to deposit these special funds in bank. It was shown by the books that the defendant had made deposits prior to the 16th of February as follows: February 1, 4, 6, 7, 10, and 12.

The treasurer testified that after the robbery he asked the defendant why he had four days' receipts in the safe, and that the defendant said it was in order to accumulate money enough to meet the payment of a check of $170, gold, sent to Manila, that the bank's charge would be 2.40 instead of 2.10, and the object was to avoid this extra payment by accumulating gold to meet that check.

The treasurer spoke to the defendant February 17 about the amount of American money he had accumulated in the safe, but did not recall the answer, except that he said never mind about that as he had some American money at his house which he had been saving to pay his way home. It seems that he had sent in his resignation in January, but was requested to continue in his place until some other arrangements could be made.

The defendant that morning busied himself examining the books to ascertain the amount of

the loss and in preparing a statement for the Auditor.

On the 17th day of February, 1902, the treasurer had a conversation with the defendant about the burglary, during which conversation the defendant stated that he entered the office to get some writing paper on Sunday afternoon, about half past 5 o'clock, as stated by the treasurer on direct examination; but on cross-examination he stated that perhaps the defendant said 6 or half past 6 o'clock.

A number of witnesses testified for the Government that the candle which was found had been burned evenly; that no candle grease or drippings had run down its side; and that there was no candle grease on the floor.

The prosecution evidently considered this point of importance, as showing that the candle was not burned there at all in connection with the filing of the lock, for Mr. Jacobs, the traveling examiner of the Insular Treasury, testified as follows:

> "When a candle is burnt in a candlestick the tallow does not drop on the outside. It is perfectly smooth all the way up. If it is not burnt in a candlestick, the tallow will run down the side of the candle."

The prosecution had four witnesses sworn as experts (three of whom were scarcely qualified) who testified that the lock could not have been filed, as it was filed, while locked on the safe, and that, therefore, they concluded that it was not on the safe when it was filed. On the other hand, to offset this testimony, the defendant had four men sworn whose qualification to testify as experts could not be questioned, and each one of these witnesses swore that the lock could be filed as it was filed while it was locked and on the safe.

Witnesses for the prosecution testified that no filings were found on the floor near the safe or, in, fact, anywhere else, except Mr. Boss, the Constabulary inspector, and he stated that he found filings on that part of the lock which covered the keyhole. The defendant's experts gave various reasons for the absence of filings.

One of the Constabulary men who were assigned to guard. the entrance *gate* to the treasurer's office stated that, while on duty there February 16, 1902, he saw the defendant pass into the office *after* 5 o'clock in the afternoon, and that he remained in the office about forty minutes; that he saw defendant when he came out and spoke to the defendant, who asked him to have a cigar; that defendant had in his hand, when he came out, some plain

white paper and nothing else, and that he had no package.

This witness stated that it was not very dark when defendant came out of the office. There was light enough to see letters without distinguishing them. The witness had no watch, and only guessed at the time. He also stated that he heard no noise while the defendant was in the office, but when he went in the witness heard the noise of opening the entrance door, but not of closing it.

He also testified that the back gate was closed and locked. The other officer who was assigned to duty at the gate, testified that he had been at supper; that he did not get back until the vesper bells rang; that he did not see the defendant there at all nor did he see anyone enter or leave the building that night; nor did he know who was in the building. Both officers testified that the back gate was locked, one of them stating that it was locked with a padlock, although it appears from other testimony that this padlock was not placed on the gate until about the end of February, and that up to that time this gate had not been locked at all.

Mr. Uppington, who was a deputy treasurer in the office, testified that there were usually two locks kept on the safe, but that, two days before the burglary, defendant used only one lock, saying that "one lock was as good as two;" that sometimes the witness carried the keys to the safe, but that defendant generally carried them; that defendant seemed surprised when he arrived at the office that morning (other government witnesses testified that he did not appear to be surprised); that the first room in the office was occupied by the treasurer and the witness, the second room by the defendant, and the third room was used as a local collecting room and by clerks; and that defendant's salary was $1,200, gold, a year.

He stated that he and the defendant were out driving together Sunday afternoon, February 16, from about half past 3 until 4 or 5 o'clock, and that on their return defendant went to his hotel to get his dinner.

Mr, Holcombe, the supervisor of the province, stated that about the end of January, 1902, defendant asked him if he knew anybody who had money to loan, saying that he was in a transaction which required a good deal of money, and that he was hard pressed. He stated that a certain woman was calling on him for a great deal of money and that it was costing him more than he bargained for, and also stated that the defendant when he entered the office February 17 said,"Well, it had to come," and that he did not seem surprised. This witness, on cross-examination, stated that he knew defendant well; that he frequently

borrowed small sums of money from the defendant; and that he had borrowed $25 from defendant December 24, 1901. A merchant of Cebu testified that he called at the treasurer's office in the afternoon of February 14, asked defendant to cash a check for him amounting to $343, so that he could pay his license amounting to $128; and that defendant declined to cash the check, saying that he had not the money. This witness called next day to pay his license fee and defendant complained of business being dull, saying that the collections amounted the dajr before to only $30, $35, or $38, the witness did not recall which; it was in that neighborhood he said.

Mr. Jacobs, an examiner for the Insular Treasurer, testified, that the collections of the office were as follows : February 12, $252.18; February 13, $222.84; February 14, $341.40; and February 15, $42.43,

This witness also testified that the steel box of Mr. Holcombe had not been tampered with, and that there was no instrument there by which the clasp of the lock could have been twisted, except possibly the old, bent key.

This witness also testified that the treasurer, Mr. Young, on February 17 told him that "it was customary to deposit the next morning money collected the previous day, but that the money had been allowed to accumulate for four days as he was endeavoring to get some United States currency for some purpose, and that this accounted for his not having deposited the money as usual;'7 he further stated that the defendant knew this witness was in the city; that on the 12th of February he desired to examine the accounts of the treasurer, but that Mr. Young said he was not ready yet for the examination, as he had not been able to go into the province and settle his accounts with his deputies.

Mr., Holcombe was recalled, and testified as to the location and measurement of doors and walls and his instructions to keep the gates locked. He said the rear gate was kept locked about the end of February, when the lock then in use was put on. The key of this lock was kept hanging in his office. On cross-examination he was asked this question:

> "Now, Mr. Holcombe, don't you know that that gate [the back'gate] was open on the 16th? Didn't you tell me in your office that that gate was open on the 16th ?"

His reply was: "I heard that; I didn't examine the gate. I didn't go there and examine it, and I told you also who told me."

The foregoing is in substance the case made out by the prosecution.

The defendant, in his own behalf, testified that he was 26 years of age; that before becoming deputy and chief clerk in the office of the treasurer he had been a first sergeant in Company B, Forty-fourth Infantry, United States Volunteers; that when in the United States he had been a bookkeeper in a grocery house and a clerk in a bank; that he took the position in the treasury at the request of Lieutenant Young, and was discharged from the Army to enable him to take the office.

Asked to account for his whereabouts on Sunday, February 16, he stated that he remained in his room, on Oalie Manso, during the forenoon; that about half past 4 in the afternoon he started for the treasurer's office to get some letter paper when he overtook Mr. Uppington on the street, and they decided to take a drive. They ordered a carriage from Seflor Cabrera and went into a saloon, and drank some beer; that about 5 o'clock the carriage came along and they drove out toward Ouadalupe, 3 miles from Cebu. On the way back one of the wheels flew off the carriage, and they had to walk home. When opposite the French Restaurant, where defendant boarded, he went in to get his dinner. After dinner he met some friends in front of the restaurant and then went to the treasurer's office, got some typewriter paper, went out, and closed the door.

He spoke to the guard at the gate, and asked him if the telegraph office was open, and, being told that it was, he went upstairs to see the bulletin. He asked for it and was told that Mr. Holcombe had it. Defendant asked Holcombe if he had it and the reply was that he had, but he did not succeed in finding it.

Defendant then went to his house, arriving there about a quarter to 7 o'clock, and wrote a letter to his brother. At about that time Marcos Alo, the owner of the house, who had been out to a funeral, walked in.

Defendant said he did not go out again that night, nor until he started for the office next morning. He found quite a crowd at the office when he arrived, and he immediately began to figure up from the books the amount of the loss.

Defendant stated that he may have spoken to Mr. Holcombe about a loan, but he made no such remark as he testified to regarding the need of money. Holcombe, he said, was frequently a borrower from him, and defendant knew that Holcombe had no money, and he could not expect to borrow from him. Asked to explain why there was only one lock on the safe February 16, defendant stated that at times there were two locks on the safe. He

always put two locks on when he had exceptionally large sums of money in the safe, and he frequently had $2,000. There was, he said, no established rule about depositing money. He frequently deposited every day, and sometimes waited two and three days before doing so, depending on his opportunity.

On the morning of the burglary the safe was locked on the left-hand side, facing the safe. When unlocked, and the locks were left on the safe, often, when the cover was raised, the right-hand lock would fall down into the safe, and on this particular night, mentioned by Mr. Uppington, he, Uppington, came into the office and said, "Let us go; it is after closing time." Defendant closed the left-hand lock, and then discovered, when about to clasp the righthand lock, that it had dropped inside the safe. He then made the remark that it did not matter. He stated that after closing the office on Sunday he did not go there again until Sunday evening, when he went for the paper.

Defendant was cross-examined at great length, but nothing of a damaging nature was discovered, unless it be said that, his transactions with the woman mentioned before may be considered as such.

Defendant stated that he could not have made the request to borrow money from Mr. Holeombe, because he never had occasion to use the money for the purpose stated. Question: Do you say that under oath?

Answer: Yes, sir. I lent her money when I was boarding at her house. I lent her 100 pesos and was paying her 60 pesos a month for board. I did not pay her my bill that month, and I advanced this money knowing that my board bill was not paid for this month. It was customary for all the boarders to pay her personally.

Question: Who was boarding there at that time?

Answer: Mr. Holcombe and some inspectors of Constabulary, I believe.

Question: Was she living with her husband at that time?

Answer: I believe so.

The defendant boarded with this woman from October or November until January and then went to board at Hotel Frances. While he was at this hotel, he stated that he did not directly or indirectly pay her any money.

Defendant was asked if he knew whom she was living with and whether or not he paid house rent for the house in which she lived, but declined to answer these questions for the reason that his answers might involve him in another case, and the court decided that he need not answer them.

He testified that he was not at the treasurer's office longer than about five minutes on Sunday evening, and that it was just dusk when he was there.

He stated that he usually refused to cash checks, even when he had the money in the safe. He had funds when Mr. Hubbel called with the check. The treasurer had arranged with the bank to cash checks, and the custom was to tell the people to go to the bank to get checks cashed. He did not remember whether or not he had the two locks on the safe February 15. The lock was often found beside the safe, as it would fall from the hasp when the lid of the safe was raised.

He said he had enough money at home to meet the gold check, because he had been saving from his salary to have enough to go home.

Diego Cabrera testified that on the 16th of February he let a carriage to the defendant, from 5 to 6 o'clock p.m. He showed in his book the entries made when the carriage went out and when it came back.

Marcos Alo testified that on his return to his house with his wife from a funeral on February 16, shortly before 7 o'clock p. m., he saw the defendant there writing at a table. The defendant was at that time living at the house of the witness.

Fabiana Mendoza, wife of Marcos Alo, testified that she saw the defendant writing at a table in her house on February 16 before 7 o'clock in the evening.

William J. Platka testified that he was a clerk in Mr. Holcombe's office, and that he, with seven soldiers, whom he named, were in the Government building Sunday evening, February 16, from about 7 o'clock until about half past 8; that they entered through the back gate and passed out the same way; and that the gate was wide open. They were there to rehearse a couple of pieces for the stage. He testified that there was no lock on the gate, and it was not locked before that time, as he went through that gate every morning going to work.

This witness testified that he was instructed by Mr. Holcombe to procure a lock for the gate,

and he put the lock on himself next day after the robbery.

He also testified that he saw defendant Sunday evening, about 6 o'clock, coming from the French Restaurant, about ten minutes' walking distance from the treasurer's office.

John S. Ladd, the postmaster, testified that the post-office is located in the Government building; that during the military time the back gate was kept locked, but it was not kept locked in January and February, up to February 17. It was locked the day after the robbery.

Another witness testified that on the 8th day of February he borrowed $8,. gold, from the defendant.

From the foregoing testimony the prosecution.drew the inference that the defendant must be guilty, for the following reasons:

1. He was the last person who entered the office that night.
2. The doors, windows, and gates were so well protected and guarded that there were no indications that anyone else entered or could have entered.
3. The lock was not filed in the office while on the safe, because witnesses for the prosecution were of opinion that it could not have been filed while on the safe in the way in which it had been filed; and that, as the defendant was the only person who had access to the lock, he alone could have cut it that way.

It is true that one of the Constabulary men who were stationed at the front gate testified that the defendant was the last person he saw enter the building on the night of the 16th of February, and another testified that no one else entered that night; but there is proof positive that six persons had keys to the doors—two of these not employees of the treasurer—and that eight persons entered the building that night after the defendant left it.

It is also true that the doors and gates were not so well secured as to exclude others, for even Mr. Holcombe had to admit that the rear gate was not locked that night; the postmaster testified it had not been locked for two months prior to that time, and a clerk in Mr. Holcombe's office testified that he entered the building through that gate that night with seven others; that the gate was wide open; and that there was no lock on it until he put one on afterwards by direction of Mr. Holcombe, the custodian of the building. Any one of the half dozen or more persons having keys could have entered just as easily as did these persons.

The next point urged is that the lock was not filed while locked on the safe and that the burglary was not real, but was put up by the defendant to enable him to take the money without being suspected. To support this theory the prosecution produced testimony like that of Mr. Jacobs, to the effect that the candle could not have been used on that occasion because no candle grease or dripping Avas found on its side, for if it had been burnt in a candlestick it would not show drippings, but when burnt without a candlestick it must necessarily shown drippings. This is pretty light evidence—evidence which is contrary to the everyday experience of all of us who use candles.

The prosecution also called in three so-called experts and one real expert to show that in their opinion the lock could not have been filed as it was filed while locked on the safe; and while one of these witnesses testified that he found filings on the lock, others stated that they found no filings. The defense met this testimony with the testimony of four practical and experienced metal workers, real experts in their line, all of whom swore that in their opinion the lock could be filed as it was while locked on the safe.

There was some evidence about the defendant desiring to borrow money, at a time, too, when he was lending money to the witness who gave the testimony; and some effort was made to connect the defendant with a woman scandal, but the learned Solicitor-General does not give this proof much consideration. If we are expected to infer that because men may want to borrow money and expend it on fast women they are therefore thieves, we may soon expect a large increase in our prison population. At most, the proof in this case casts suspicion on the defendant. We may simply guess that he is guilty; but if we do that, what becomes of the presumption of innocence until guilt is proved? What are we to do with section 57 of General Orders, No. 58, which provides that “a defendant in a criminal action shall be presumed to be innocent until the contrary is proved, and in case of a reasonable doubt that his guilt is satisfactorily shown he shall be entitled to an acquittal?”

The burden of proof of guilt was upon the prosecution (sec. 59, G. O., No. 58), and it remained with the prosecution throughout the trial.

It will not do to say that, because the defendant had an opportunity to commit the crime, therefore he did commit it. Others had opportunities as well as the defendant. No one thought of charging the treasurer himself with the offense; and yet from the testimony in this case one could infer or guess his guilt and support the guess with as strong circumstances as those adduced against the defendant. The treasurer at times had access to the safe; so had his deputy, Mr. Uppington, and so had Mr. Holcombe, to take money out of

his steel box; the treasurer was in the office all Sunday morning and Sunday afternoon up to 5 o'clock; the treasurer told the examiners February 12 that he was not ready to have his accounts examined; and the treasurer instructed the defendant to accumulate the receipts so as to be able to meet the gold check. Surely it could not be inferred from such proof as this, standing alone, that he committed the offense.

To justify a conviction upon circumstantial evidence, not only must the facts proved be consistent with and point to the defendant's guilt beyond a reasonable doubt *but they must be inconsistent with his innocence.* (Marple *vs.* People, 4 Hun. (N. Y.), 102.)

A reasonable doubt is not a mere guess that defendant may or may not be guilty. It is such a doubt as a reasonable man might entertain after a fair review and consideration of the evidence.

It has been held by the appellate division of the supreme court of New York that a judgment of conviction will be reversed where the circumstances, though suspicious, do not exclude every hypothesis except that of the guilt of the defendant. (People *vs.* Maxwell, 67 State Reporter, 541.)

It follows that the judgment of conviction should be reversed and the defendant should be acquitted. And having reached this conclusion, it is not necessary to pass upon the motion for a new trial made on the ground of newly discovered evidence, based on the confession of one Baker, now in prison in Cebu, who made affidavit that lie and another soldier who was a professional burglar passed through the rear gate, entered the treasury by means of a skeleton key, filed the lock of the safe, and stole the money.

Arellano, C. J., Cooper and *Mapa, JJ.,* concur.

Willard, J., dissents.

DISSENTING

TORRES, J.:

Since the accused, Douglass, has alleged that the real author of the robbery is one Baker,

according to statements made by the latter in an authentic document, the case at bar should not now be finally decided. The judgment appealed should be reversed and the cause remanded to the court below for a new trial, for the purpose of ascertaining whether or not the statement that Baker was the author of the criminal act is true. The mere allegation of Douglass and the extrajudicial statement which Baker is alleged to have made are not conclusive.

Aside from these allegations of Douglass, based on the statement of Baker referred to, it is possible that the merits of the case would not justify a jud'gment of conviction. This allegation, however, was made by Douglass after the proceeding had been concluded and judgment rendered. According to well-known principles of procedural law, we are permitted to render absolutely no judgment whatever in the matter at the present time. Such a judgment would have a tendency to prejudge the innocence or guilt of the accused Douglass, as well as that of the man Baker, who since the trial has extrajudicially confessed, as above stated, that he was the real author of the robbery. The evidence taken at a retrial of the case might establish in a decisive manner the innocence of Douglass and the responsibility of Baker, made a codefendant therein, for the crime in question.

But can it be asserted that it would be impossible for the contrary to happen—that the alleged confession of Baker should turn out to be false arid that Douglass's allegation should prove to be no more than a mere subterfuge for freeing himself from the charge made against him? Is it not possible that in the course of a retrial of the case there may be produced additional evidence showing Douglass's guilt, just as it may happen that there will be introduced stronger proof of his innocence, which, to say the least, at the present time appears very doubtful?

Established modes of procedure and the most ordinary prudence dictated by the principles of justice and the law counsel that, without now passing upon the guilt or innocense of Douglass, a new trial should be ordered—that a further investigation of the crime should be made and its real author definitely ascertained.

Suppose an action shall be brought against the new accused, Baker, after Douglass shall have been acquitted. May it not happen that it will then be shown by the most complete evidence—better, perhaps, than that which has been produced in the proceedings heretofore had—that Baker is innocent of the crime charged, and that Douglass is after all the guilty one. And if this be possible, the proper proceeding to be followed in this case is to reverse the judgment appealed and grant a new trial, to the end of avoiding a travesty of the

law and a possible miscarriage of justice.

I dissent, therefore, from the opinion of the majority of the court, and am of the opinion that judgment should be rendered as above indicated.

Date created: April 15, 2014