

4 Phil. 352

[G.R. No. 1721. March 29, 1905]

**THE UNITED STATES, COMPLAINANT AND APPELLEE, VS. CHARLES H. OSBORN,
DEFENDANT AND APPELLANT.**

D E C I S I O N

WILLARD, J.:

For the purposes of this appeal we reject the testimony of Fisk and other witnesses, relating to alleged confessions or admissions made to them by the defendant, except so far as such admissions or confessions were confirmed by the defendant in his testimony at the trial, and we do not decide whether such admissions or confessions were properly received in view of section 4 of Act No. 619, and the decision of this court in the case of the United States vs. Isidoro Pascual^[1] (1 Off. Gaz., 706). We are satisfied that there is sufficient competent evidence in the case upon which the defendant should be convicted without considering the evidence objected to by him in this court.

The defendant, Osborn, from some time in September, 1902, until July 5, 1903, was a Constabulary supply officer at San Fernando, in the Province of Union. As such officer he disbursed money for salaries and in payment of other claims against the Government, and had charge of a supply of commissaries, which he sold, the proceeds of said sales being turned over to the Government by him. He kept two sets of accounts, one relating to the transactions connected with the disbursing of money and the other connected with the sales from the commissary. At the trial it was proved from the books and papers kept by himself, and as he kept them, that on the 5th day of July, 1903, he should have had on hand in cash, in his account as disbursing officer, \$7,634.46, and in his account relating to commissary supplies \$915.01, making a total of

\$8,549.47, local currency. As a matter of fact, on that day he did not have this sum on hand, but only had \$3,125, so that there was then an actual deficit in money of \$5,424.47. Of the existence of this deficit there can be no possible doubt, because, as has been said above, the accounts which the defendant himself kept showed it. That he kept his accounts with reasonable accuracy is shown by the fact that after an examination by the agents of the Insular Treasurer they charged him in these two accounts with only \$191.67 more than he had charged himself, and of this amount (\$191.67) \$100 was due to an error in addition, whether or not intentional it is not necessary now to decide. Moreover, at the trial the Government waived any claim as to this amount of \$191.67.

An actual deficit existed in his accounts, and he has not repaid the amount of such deficit to the Government. It is therefore not necessary to decide whether this case falls within article 390 or article 392 of the Penal Code, because the penalty would be the same in either case. Neither is it necessary to decide whether the mere existence of a deficit is sufficient to support a conviction under article 392, for there is evidence in this case clearly indicating that the defendant knowingly and intentionally parted with the above-mentioned Government money which he had in his possession. That evidence is found in the transaction connected with the \$3,000 check used by the defendant at the time of an examination of his accounts by officers of the Government, on May 28, 1903. On May 31, 1903, his own books showed that he should have had in his possession, upon his account as disbursing officer, \$3,598.28, local currency. When Fisk, the Government official who made the examination, counted the cash, there was found in the safe a check for \$3,000. This check was made May 26, 1903, by Dean Tompkins, as treasurer of the Province of Union, to the order of the defendant, and for the sum of \$3,000. How the check came to be in the defendant's safe at this time it is not necessary to decide; it is not necessary to determine whether the defendant's statement in that respect is true or not. It is sufficient to say that at that time the defendant exhibited this check to Fisk, the examining officer, as a valid check for \$3,000, and used it as \$3,000 in cash in balancing his accounts at that

examination. The testimony shows that by such use of this check his accounts balanced and that there was an excess of \$30 or \$40. Without this check there would have been a deficit of over \$2,900. Within two or three days after this examination, on May 28, Osborn returned this check to Tompkins, and it was canceled. It never represented any actual transaction between them, as Osborn knew. He then knew that it was worthless, and then used it for the purpose of committing a fraud upon the examining officer, and of concealing the fact that there was a deficit in his accounts. This act alone is sufficient to prove that he had, prior to that date, intentionally used the Government money for unauthorized purposes, and excludes the idea that the money had been stolen from him, or had been lost without his fault. This use of the check and its fraudulent character plainly appear from his own testimony given at the trial. We hold that the evidence sufficiently proves that between the dates mentioned in the complaint the defendant misapplied the money of the Government to the amount of \$5,424.47, local currency, the amount shown by his own books.

What has been said disposes of all of the assignments of error made by the defendant in his brief except the fifth and sixth.

As to the fifth assignment, the court did not err in allowing the witness Johnston to testify that he had made an examination of the books and accounts of the former treasurer of the Province of Union. This testimony was given merely for the purpose of qualifying the witness to testify as to the handwriting of that treasurer.

The court admitted in evidence the following receipt dated March 20, 1903:

“Received of C. H. Osborn, supply officer, P. C, two boxes said to contain ten thousand dollars, local currency. Dean Tompkins, Treasurer Province Union—”

and received, also, evidence tending to show that Osborn could not have had at this time that amount of money on hand. We think the court erred in receiving this testimony, because we have not been able to

find any evidence in the case showing that Osborn knew anything about this receipt, or ever saw it. This error is unimportant, however, because, as we have said above, there is sufficient competent evidence in the case outside of it to convict the defendant, and in arriving at the result which we have reached we have not taken into consideration this testimony.

Testimony was offered in the court below to show that there was a deficit in the defendant's commissary supply account amounting to \$539.76, local currency; that on the 5th day of July, 1903, the difference between the value of the commissary supplies which he should have had on hand and the value of those which he actually did have on hand was this sum of \$539.76. It seems apparent, from the judgment of the court below, that that court in fixing the punishment of the defendant did not take this amount into consideration, but did take it into consideration in fixing the amount of his civil responsibility. With reference to the criminal responsibility, it is a matter of indifference to the defendant whether this is considered or not, for his punishment would be the same in either case.

This is also probably true as to his civil responsibility. We are, however, not satisfied that the evidence was sufficient in this case to show misappropriation by him of any definite number of these articles. The defendant was arrested on July 5, 1903. The keys of the building in which he kept these supplies were then taken from him. He was taken to Manila, and was returned to San Fernando on the 13th of July. He had the keys after this time for about three days, but it does not clearly appear that during these three days, even, he was in the exclusive control of the property, and it is more probable that he was not. The inventory upon which the examiners relied in determining this shortage of \$539.76 was not taken until the month of August. For nearly a month before the inventory was taken the goods were not in the possession nor under the control of the defendant. The only evidence to show the condition of the goods during that time was a statement by one witness to the effect that no goods were sold and no clothing issued, but his statement does not cover the whole time between the 5th of July and the time of the taking of the inventory.

The defendant testified that he had sold to certain officials of the Government of recognized responsibility goods on credit. The examiners, not finding any record of such sales on credit, gave him no allowance therefor. He had on hand supplies of certain kinds to the amount of \$181 more than he should have had on hand. The examiners, following the custom established in such cases, gave him no credit for this amount. For condemned goods they did give him credit.

The examiners, in short, reported that from the evidence before them, they considered that he was responsible for this amount, \$539.76. We have not before us the evidence on which they based their opinion as we have in the case of the difference of \$191.67 between themselves and the defendant in respect to the latter's accounts as disbursing officer.

Upon the whole case we hold that there is not sufficient evidence to show a misappropriation of articles to the amount of \$539.76, or any other definite sum.

The judgment of the court below is modified only in the following respects: The amount misappropriated by the defendant is fixed at the sum of \$5,424.47, local currency, and the judgment as to civil responsibility to be entered in this case is fixed at said sum. The penalty of *inhabilitacion temporal especial* is fixed at twelve years.

In all other respects the judgment is affirmed, with the costs of this instance against the appellant.

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

^[1] 2 Phil. Rep., 457.

