

7 Phil. 195

**[ G.R. No. 2828. December 14, 1906 ]**

**THE UNITED STATES, PLAINTIFF AND APPELLEE, VS. JUAN SOLIS, DEFENDANT AND APPELLANT.**

**D E C I S I O N**

**JOHNSON, J.:**

This defendant was charged with the crime of embezzlement, of public funds as follows:

“That the said Juan Solis on various dates between the 20th of September, 1904, and the 25th of February, 1905, in the; municipality of Zamboanga, Moro Province, Philippine Islands, being a public functionary employed in the office of the municipal treasurer of said municipality, appropriated to his own use public funds which were under his charge, amounting to 1,075 pesetas.”

After a consideration of the proof adduced during the trial of said cause, the lower court found the defendant guilty of said crime, sentenced him to be imprisoned for a period of three years six months and twenty-one days of privshlio corrciomil, and to return to the municipality of Zamboanga the sum of 1,075 pesetas and, in case of insolvency, to suffer subsidiary imprisonment, with the accessory penalties provided for in article 58 of the Penal Tode, and to pay the costs. From this decision the defendant appealed to this court,

From an examination of the record brought to this court we find (he following facts:

First. That the defendant, Juan Solis, was duly appointed as an employee in the office of the municipal treasurer of the municipality of Zamboanga on the 20th of September, 1904;

Second. That his duties as such employee were to brand cattle and to register such brands in the proper registry; Third. That while acting as such employee he received P1. each from

215 different persons for the alleged purpose of branding and registering their cattle;

Fourth. That these P215 so received were not delivered to the municipal treasurer of such municipality but were retained by the defendant and appropriated to his own use;

Fifth. That in the performance of the duties imposed upon the defendant by the municipal treasurer under his appointment he had no authority to receive said sums of money.

The lower court found the defendant guilty and sentenced him for violating paragraph 2 of article 390 of the Penal Code upon the theory that the defendant was: First, a public official; and second, had received public funds by reason of his duties as such public official.

Under the facts in this case the defendant was a public official (U. S. vs. Sarmiento, 1 Phil. Rep., 484), but as such public official he had no authority to receive public funds; therefore he can not be convicted under article 390 of the Penal Code and the decision of the lower court must therefore be reversed.

The evidence clearly shows, however, that the defendant while in the employment of the municipal treasurer did receive P215 which belonged to the said municipal treasurer as such. Paragraph 5 of article 535 of the Penal Code provides that the punishment provided for in article 534 shall be imposed upon those who "to the prejudice of another shall appropriate or misapply any money, goods, or any kind of personal property which they may have received as a deposit on commission for administration or in any other character producing the obligation to deliver or return the same, or who shall deny having received it."

The question arises, Can a person who is charged with the crime of *malversacion de caudales publicos* be convicted of the crime of *estafa* upon the same complaint? The crime of *malversacion*, or embezzlement, as denned by the Penal Code can only be committed by a public official who has charge by virtue of his official position of public funds. Even though he be a public official and is not responsible for public funds, or has no authority to receive the same, he can not be convicted of the offense of *malversacion*. If, however, while acting as a public official, he receives money without authority which belongs to another and appropriates the same to his own use and fails and refuses to deliver the same to the person to whom it properly belongs, he has committed the same acts which would make him liable under the Penal Code for the crime of *malversacion* had he authority as a public official to receive such funds. We are of the opinion and so hold that he has violated by these acts the provisions of the Penal Code providing a punishment for the crime of *estafa* and is therefore

guilty of the crime of *estafa* and is punishable under the provisions of the Penal Code. *Estafa*, when committed under the above conditions, is a similar or cognate offense to that of *malversacion*, or embezzlement, under the Penal Code; therefore the person charged with the crime of *malversacion*, or embezzlement, may be convicted of the crime of *estafa* under the same complaint.

This court has already held, in the case of *U. S. vs. Nery*<sup>[1]</sup> (3 Off. Gaz., 82), that “when a person is charged in a complaint with a crime and the evidence does not show that he is guilty of the crime charged, but does show that he is guilty of some other lesser offense, the court may sentence him for the lesser offense, provided the lesser offense is a similar or cognate offense and is included in the complaint.” This conclusion is also supported by the decisions of the supreme court of Spain. (See judgment of the 21st of February, 1889, 6th Viada, p. 292.) Paragraph 2 of article 534 of the said Penal Code provides that those committing the acts in said paragraph above quoted shall be punished with *arresto mayor* in its medium degree to *presidio correccional* in its minimum degree if the defraudation shall exceed 250 pesetas and not be more than 6,250 pesetas. The amount received by the defendant herein was 215 pesos or 1,075 pesetas. There were neither aggravating nor mitigating circumstances attending the commission of the crime, therefore the defendant must be punished in the medium degree in accordance with the provisions of article 81, in its relation with article 82 of the said code. The medium degree of *arresto mayor* in its medium degree to *presidio correccional* in its minimum degree is four months and one day to six months.

Article 399 of the Penal Code provides that the public official who, taking advantage of his official position, shall commit any of the crimes specified in chapter 4, section 2, title 13 of the Penal Code, shall incur, in addition to the penalties prescribed therein, that of temporary special disqualification in its maximum degree to perpetual special disqualification.

It is the judgment of this court that the said defendant shall be imprisoned for a period of five months of *arresto mayor* and shall incur eleven years and one day of temporary special disqualification.

After the expiration of ten days let judgment be entered in accordance herewith and ten days thereafter the case be remanded to the lower court for execution. So ordered.

*Arellano, C. J., Torres, Mapa, Carson, Willard, and Tracey, JJ., concur.*

<sup>[1]</sup> 4 Phil. Rep., 158.

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