

7 Phil. 464

[G.R. No. 3253. February 09, 1907]

**THE UNITED STATES, PLAINTIFF AND APPELLEE, VS. E. S. JOCKERS,
DEFENDANT AND APPELLANT.**

D E C I S I O N

CARSON, J.:

The accused was employed by Weingarten Brothers to peddle on commission in the city of Manila cheap jewelry, collars, cuffs, underwear, and other articles of like nature. On the 16th of February, 1906, he informed his employers that he had a special opportunity to make a sale to two Turks who were to meet him that evening at the Waldorf Hotel. Upon this representation he was intrusted with goods valued at P267.18, Philippine currency, for which it was understood that he would render an account the following day, the terms of his commission obligating him to return the goods intrusted or the money received therefor, less his commission.

It does not appear whether this representation was or was not made in good faith, but the accused failed to return on the following morning as agreed, and he left the city of Manila, taking the goods intrusted to him to some of the outlying barrios and municipalities, where he remained until the 24th of February, when he was arrested at the instance of his employers.

During his absence he sold various articles from his stock, amounting to P37.77; Philippine currency, for which he failed to make an accounting, the rest of the goods being found in his possession and being returned to his employers.

The information charges the accused with *estafa* of all the goods intrusted to him, but we are of opinion that, as to the goods unsold and which were returned to the owners, the charge of *estafa* can not be maintained. The evidence of record strongly tends to establish the fact that in taking the goods intrusted to him outside of the city of Manila, he was merely seeking a better field for his peddling operations and that it was not his intention to

appropriate these goods to his own use or make away with the proceeds after selling them. The fact that he did not return at the time stipulated, and the fact that he went beyond the limits of the city of Manila without the permission of his employers, taken by themselves and without any other evidence as to his motive, might and probably would be, sufficient to raise the presumption that it was the accused's intention to make away with all the goods intrusted to him but his conduct during his absence appears to have been wholly inconsistent with the existence of such an intention, and we think in view of all the circumstances that it affirmatively appears that he at no time entertained such a plan.

There can be no doubt, however, of the guilt of the accused of the crime of *estafa* as to the goods intrusted to him on commission which were not returned to his employers, and as to which he failed to make an accounting. These goods were received on commission with the obligation to return them to their owners or, in the event of sale, to return the money received therefor, less the commission agreed upon; and his failure to return them to his employers, or in the event that they were sold, to deliver the amount received therefor in conformance with his agreement, brings him precisely within the provisions of paragraph 5, article 535 of the Penal Code. The trial court found the accused guilty of *estafa* of the goods which were not returned, under the provisions of article 541 of Penal Code, but that article is only applicable in those cases where the facts which constitute the crime do not fall within the provisions of some other article of the code, and, as stated, we are of opinion that the facts in this case constitute the crime defined in paragraph 5 of article 535.

The accused, upon cross-examination, admitted that he had been previously convicted of the crime of *estafa* upon another and distinct charge, but the original judgment of conviction was not produced at the trial, and the exact nature of the offense committed, and the penalty inflicted is not established with sufficient certainty to justify the taking of this alleged previous conviction into consideration as an aggravating circumstance.

The judgment of conviction under the provisions of article 541 is reversed, but we find the accused guilty of the crime of *estafa* as defined in paragraph 5 of article 535 of the Penal Code, of goods to the value of P37.77, Philippine currency, and sentence him under the provisions of paragraph 1 of article 534 to three months' *arresto mayor*, to return the goods of which he failed to make an accounting, or the value thereof amounting to P37.77, Philippine currency, or to subsidiary imprisonment in the event of insolvency, and to the payment of the costs in both instances.

The accused is not entitled to a reduction of the penalty under the provisions of article 93 of

the *Ley Provisional* for the application of the Penal Code in the Philippine Islands, the value of the goods unaccounted for having been in excess of 100 pesetas.

After twenty days let judgment be entered in accordance herewith and ten days thereafter let the record be returned to the court wherein it originated for proper action. So ordered.

Arellano, C. J., Torres, Mapa, and Tracey, JJ., concur.

Willard, J., dissents.
