

[G.R. No. 3305. February 23, 1907]

**THE UNITED STATES, COMPLAINANT AND APPELLEE, VS. PILAR JAVIER,
DEFENDANT AND APPELLANT.**

D E C I S I O N

JOHNSON, J.:

This defendant was charged in the Court of First Instance of the city of Manila with the crime of *estafa*, committed as follows:

“That on or about the 23d day of February, 1905, in the city of Manila, Philippine Islands, the said Pilar Javier, then and there, willfully, unlawfully, and feloniously did defraud and prejudice E. C. McCullough & Company, a corporation organized, existing, and registered under the laws of the Philippine Islands, in the sum of five hundred and fifty (550) pesetas, in this, that she, the said Pilar Javier did then and there falsely and fraudulently represent to the said E. C. McCullough & Company that she was conducting a school of stenography and typewriting and was desirous of renting typewriters for use in said school, and the said E. C. McCullough & Company, relying upon the truth of these representations, was induced to deliver and did deliver, under rental to her, the said Pilar Javier, one No. 5 Remington typewriter, bearing the number 15,846, of the value of fifty-five dollars (\$55), United States currency, which sum is the equivalent of and equal in value to the sum of five hundred and fifty (550) pesetas; that then and there, the said Pilar Javier did willfully, unlawfully, and feloniously, and with the intent of profiting thereby, misappropriate, misapply, and convert to her own use the said Remington typewriter numbered 15,846, received by her as aforesaid from the said E. C. McCullough & Company, to the damage, injury, and prejudice of the said E. C. McCullough & Company in the sum of five hundred and fifty (550) pesetas; contrary to the statute in such cases

made and provided.”

After hearing the evidence adduced in said cause, the lower court found the defendant guilty of said crime and sentenced her to be imprisoned for a period of two months and one day and to pay the costs.

The court on a subsequent date, at a subsequent hearing, ordered that said typewriter be returned to the owners, McCullough & Company. From said sentence of imprisonment of the lower court, the defendant appealed to this court.

It is admitted by the prosecuting witness and by the defendant that the latter rented the typewriter in question from McCullough & Company; the defendant, however, insists that subsequently McCullough & Company agreed that when the amount of rent paid should equal the value of the machine that it should become her property. The testimony of Elser and Frank, clerks in the store of the said McCullough & Company, indicates that the defendant rented the machine in question in the month of February, 1905. The lower court in its decision found that the defendant rented the machine in the month of February, 1905. The defendant herself testified that she rented said machine on the 12th day of December, 1904, and was to pay therefor the sum of \$5, gold, per month. While the date of the contract of rent is not important in the decision in this case, yet, nevertheless, in view of the statements of the lower court that he did not believe her with reference to other facts, attention is called to the fact that her testimony upon this point is supported by a receipt which she presented, signed by E. C. McCullough & Company, dated the 12th of December, 1904, for the rent of one No. 5 Remington typewriter for one month. The defendant also presented receipts for rent paid for the months of January, February, March, and April, 1905, for the machine in question.

The record discloses that there were some negotiations between the defendant and McCullough & Company, after possession of the said machine was given to the defendant, with reference to the purchase of the same, and there is some question raised in the record whether or not the defendant had not actually purchased the said machine; however, we make no finding upon that question, for the reason that the evidence is not sufficiently clear.

The record further discloses that some time in the month of April or the first of May, 1905, E. C. McCullough, upon investigation, found that the typewriter was not in the possession of the defendant and upon further investigation found that the machine in question had been pawned with one Harry J. Finnick, a pawnbroker in the city of Manila. The receipt given by

the said Finnicks for the machine was introduced in evidence and shows that the machine had been pawned to him on the 3d day of March, 1905, by one Juan Goyenechea; the evidence also shows that he was the husband of the accused. The defendant testified that she had been very ill; that she did not know that the machine had been taken out of her house; that she had been unable to use the same and therefore had not noticed its disappearance. This statement of the defendant as to her illness was evidently believed by the lower court, for in his decision he says: "In view of the fact that this defendant is a delicate woman and from her appearance her health seems to be in a bad condition, she having a suckling baby which looks to be about two months old and two or three other children, etc."

The sentence of the lower court does not disclose under what provision of the Penal Code the defendant was found guilty and sentenced. From the statement of facts in said sentence, however, it is presumed that the court found the defendant guilty under paragraph 5 of article 535 of the said code. We do not believe that the evidence justifies the conclusions of the lower court. We do not believe that the defendant gave her consent to the pawning of the said machine or had any knowledge of the fact that it was pawned at that time, and in view of all the circumstances presented during the trial of said cause, we are of the opinion that the sentence of the lower court should be reversed and it is so ordered.

The record discloses that the sentence of the lower court was rendered on the 15th day of July, 1905, and that upon the 4th day of August, 1905, the lower court made an order directing the return of the typewriter in question to the said McCullough & Company. On the 8th day of August, 1905, Harry J. Finnicks, by his attorneys, appeared in the lower court and excepted to the order of the judge, directing the return of said typewriter and asked that the said order be set aside, for the reason that the said Finnicks had not been cited to appear in the cause and that he had been deprived of his rights in said typewriter, without having an opportunity to be heard. The record does not disclose that the lower court took action upon this petition of the said Finnicks. No exception was made and no appeal taken. We, therefore, make no finding upon that question.

After expiration of ten days let judgment be entered in accordance herewith and ten days thereafter the record remanded to the court from whence it came for proper action. So ordered.

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

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