

34 Phil. 227

[G.R. No. 10449. March 13, 1916]

**THE UNITED STATES, PLAINTIFF AND APPELLEE, VS. ACLEMANDOS BLEIBEL,
DEFENDANT AND APPELLANT.**

D E C I S I O N

ARELLANO, C.J.:

Defendant signed the following document in behalf of the party herein who claims to have been aggrieved:

“Iloilo, P. I., August 12, 1913.—I, Aclemandos Bleibel, of age, a native of Syria and resident of Iloilo, declare that I have received from Messrs. Juan Ysmael & Co., Iloilo, the following articles to sell on commission, and as soon as I dispose of any of the said articles I am obliged immediately to remit the value thereof to Messrs. Ysmael & Co., in Iloilo.—I assume all risks, whether from fire, typhoon, or other accidents, and furthermore I am obliged to return the articles hereinafter mentioned, or to pay their value, at the moment they are demanded of me by said Ysmael & Co.—(Here follows the list of the jewelry, all earrings, of a total value of P597.90,—10 per cent commission, P59.79 : total, P538.11.—The total sum for the earrings: P538.11 net). In witness whereof, I sign the present document.— (Sgd.) Aclemandos Bleibel.—(The signatures of the witnesses follow.)” (Exhibit A.)

The accused proceeded to Leyte, the record does not show on what date, and took up his residence in Abuyog. On February 21, 1914, Ysmael & Co. addressed the following letter to Aclemandos Bleibel:

“DEAR SIR : We hereby demand of you immediately to return the following articles which you received from us under contract of August 12, 1913, to sell on

commission (a list of them follows), or their value, amounting to P538.11.”
(Exhibit B.)

This letter was registered in the Iloilo post-office, but the date of the registration stamp does not clearly appear, it being blurred. (Exhibit C.) Neither does the record show when the letter was received in Leyte by the addressee, for, as defendant testified, it was his brother who received it in Tacloban, Leyte, and, until May, 1914, defendant had no knowledge of the demand contained in the letter. The positive date given in the record is May of said year. An answer was not received until August, and on September 29, 1914, the present proceedings were commenced against defendant.

The trial opened on November 19, 1914. James Hamady, manager of the firm of Ysmael & Co., of Iloilo, testified that the net value of the goods delivered on commission to defendant was P538.11; that this amount had already been totally paid to witness by Bleibel before the latter was arrested by reason of these proceedings, but after .he had been arrested the first time. Upon cross-examination by the defense, he also stated that defendant was an employee of the firm at a monthly salary of P100 and had a balance in his favor of P143, more or less.

“Question: And did you not pay him this sum before proceedings were brought against him?—Answer: No, because he did not ask it of me. He was absent.

“The court: I have understood that you owed the accused P143 at the time your complaint was filed.—A. Yes, sir.

“Q. So that what the accused owes you is a little more or less than P400.—A. Yes, sir.”

Two arrests are mentioned: One made in Tacloban, Leyte, in August, 1914, when defendant immediately paid the whole amount; and the other, in Iloilo, in November, 1914. This court finds nothing in the record to evidence the first arrest. The record contains only the following proceedings: The complaint, dated September 29, 1914; the arraignment of the accused on November 19; his plea of not guilty; the judgment of the same date, November 19, 1914; its notification to defendant on the same date; the notice of appeal therefrom; the bond given in behalf of the accused by two bondsmen, on the same date of November 19, 1914; the Exhibits A, B, and C, and the testimony of James Hamady and that of the

defendant. Nor do we understand how such arrest came to be made in August, 1914, when the complaint had not yet been filed, for it was not presented until September 29, 1914.

This court cannot consider facts that do not appear in the record. What the record shows, by the principal's testimony, is that the proceeds from the sale on commission were totally paid to him in August, 1914, and that the complaint was filed on September 29, 1914. When the latter was filed, the obligation contained in Exhibit A had already been extinguished; and no action whatever, either civil or criminal, lay in behalf of the so-called offended party by reason of the contract Exhibit A. The complaint should have been dismissed.

The averment of the complaint, to wit, that the accused deceitfully and fraudulently took and received from Juan Ysmael & Co. various pieces of jewelry to the value of ₱538.11, has in no wise been proven; what the evidence does show is that the principal voluntarily delivered them to the commission agent. The complaint recites that after the accused had received said jewelry he neither returned it nor delivered the value thereof to Juan Ysmael & Co. But the failure to return or deliver the value of things given for sale on commission, *after they have once been received*, does not constitute the crime of estafa, unless they have been sold and the commission agent has misapplied or appropriated the value thereof. The delay in the fulfillment of a trust or in the delivery of the sum received on such account only involves civil liability. (Decisions of November 29, 1886, and December 23, 1890.) So long as a sum of money which a person is obliged to deliver is not demanded of him, and he fails to deliver it on account of his having wrongfully disposed of it, there is no estafa, whatever be the consideration for the debt. (Decision of November 21, 1905.)

We do not find even one single thing to support the truth of such assertions. What is fully proven is that prior to the filing of the complaint on September 29, 1914, defendant had already paid his principal the entire value of the goods sold on commission, to wit, ₱538.11.

The principal had no right to avail himself of a criminal action to recover ₱538.11 from defendant so long as he was owing the defendant ₱143 for salary on the date of the filing of the complaint, without first having made a settlement of accounts. This would have disclosed, as the lower court remarked, not that the accused was then owing ₱538.11, but about ₱400, or, to be exact, a balance of ₱395.11. It is a well-settled rule of law that no estafa is committed by an insurance company's agent who does not return the balance which the company believes him to be owing it, if he proves that the company does not credit him with moneys to which he is entitled. (Decision of June 28, 1906.) The same rule was laid down in the case of *United States vs. Santiago* (27 Phil. Rep., 408).

It has been fully proven by the evidence of record brought before us: (1) That the total value of the jewelry delivered by the principal to the commission agent, the defendant, was paid to the principal by the latter in August, 1914; (2) that the complaint for estafa was filed on September 29, 1914; (3) that the commission agent, the defendant, did not appropriate to himself nor divert to his own use any money whatever obtained as commission; on the contrary, the record clearly shows that before the complaint was filed he had extinguished his civil obligation to pay the value of the jewelry he had received for sale on commission; (4) that, consequently, he did not commit the crime of estafa charged to him; (5) that the rule laid-down in various decisions, to wit, that, once the crime of estafa has been committed reimbursement of the sum embezzled is no bar to a conviction for the crime already consummated, is not applicable to the case at bar, inasmuch as in the present instance not only has no crime whatever of estafa been committed, but also, according to the record brought before us, there was no intention to commit such a crime. Hence, necessarily, the judgment appealed from, in which defendant was sentenced to five months and eleven days of *arresto mayor* and to pay the costs, cannot be affirmed.

Neither can it be affirmed in so far as it orders the bondsmen of the accused to pay the costs incurred by the latter's arrest, and declares the bond confiscated.

The bondsmen gave their bond on November 19, 1914, On November 19,1914, the case came to trial. On November 19, 1914, defendant was present and testified at the trial. Nowhere in the record does it appear that defendant was arrested, nor what was the cause of the bondsmen's liability. Moreover, the bondsmen are not included in the complaint; no action whatever was instituted against them; they were in no manner parties to the action; there is not a single word against them in the record; and, therefore, they were not heard, nor was there any reason to hear them at trial, for no charge at all was entered against them. The sentence contained in the judgment is absolutely contrary to law.

The judgment appealed from is reversed in all its parts, with the costs of both instances de officio. So ordered.

Torres, Moreland, Trent, and Araullo, JJ., concur.

