43 Phil. 942

[G. R. No. 18464. October 16, 1922]

THE PEOPLE OF THE PHILIPPINE ISLANDS, PLAINTIFF AND APPELLEE, VS. AW YONG CHIOW SOO, DEFENDANT AND APPELLANT.

D E C I S I O N

AVANCEÃ‘A, J.:

The appellant was convicted of theft and sentenced by the lower court under paragraph 1 of article 518 in connection with paragraph 2 of article 520 of the Penal Code to eight years and one day of *presidio mayor*, and to indemnify the Yokohama Specie Bank, Ltd., in the sum of P77,801.30.

On or about April 5 or 6, 1921, the Yokohama Specie Bank, Ltd., received from its branch office at Kobe, Japan, two bills of exchange Exhibits A and 1 each for 33,300 yen (equivalent in all to P77,801.30) drawn by H. Yamamoto and Co., Ltd., of Kobe, upon the herein accused for the value of certain merchandise. These bills were purchased by the bank for collection, accompanied by the invoices for the merchandise, consular statements, bills of lading, and other necessary documents, all in duplicate. The drafts were accepted by the accused and made payable June 7, 1921. Upon their maturity, the drafts were sent to the accused, together with the duplicates of the two bills of lading, and by this means the accused withdrew the merchandise from the customhouse without paying the drafts before or after such withdrawal.

The prosecution and counsel for the defense have attempted to establish the other facts in different ways.

According to the prosecution, for the purpose of collecting the amount of the bills of exchange, there were sent to the accused the two duplicates of the bills of lading together with the originals, the two drafts, the invoices, the insurance papers for the merchandise and other pertinent documents, all inclosed in a package, and that the accused returned the papers to the bank retaining, however, without the consent of the bank, the two duplicates

of the bills of lading which he used in withdrawing the merchandise from the customhouse. According to the defense, the accused received only the two duplicates of the bills of lading without any memorandum.

The prosecution is based upon the theory that the fact of the two duplicates of the bills of lading, together with the other papers relating to the merchandise, having been sent to the accused who afterwards claimed to have returned them to the bank, apparently returning all the papers, but as a matter of fact retaining fraudulently the two duplicates of the bills of lading, constitutes the crime of theft. There is no sufficient proof, however, that the said two duplicates of the bills of lading were sent to the accused with the other documents referred to. The proof presented upon this point is the testimony of the acting manager of the bank, K. Yamaguchi, of the messenger, Ramon Pingol, and of an employee, Gerardo Cruz. But Yamaguchi testified that what he knew about the forwarding of these documents to the; accused was what he had learned from Gerardo Cruz who had instructed that they be delivered to the accused. The testimony of this witness upon this point must, therefore, be stricken out. Ramon Pingol, the messenger who took the package to the office of the accused, testified that he saw the documents when they were placed in the package but that he did not read them. According to his testimony, therefore, he did not know what documents the package contained. Gerardo Cruz affirmed that he personally placed all the documents within the package and then gave it to Ramon Pingol.

The testimony of Gerardo Cruz is, in fact, the only proof that the other documents above-mentioned had been sent to the accused besides the two duplicates of the bills of lading. But against this testimony there is the testimony of the accused that he received nothing but the two duplicates of the bills of lading, this point being corroborated by another witness, an employee of the accused, who claims to have been present at the time the accused opened the package and extracted therefrom the two duplicates only, which he thought were delivered to him for the purpose of withdrawing the merchandise from the customhouse. Even disregarding this testimony, the fact that the other documents were in possession of the bank before the trial of this case is proof that they had not been sent to the accused, unless it be proven that they were returned by him to the bank.

Indeed an effort was made to prove that the accused returned the other documents to the bank, but the evidence presented is not sufficient to establish this fact.

Ramon Pingol testified that in the afternoon of the day on which he took the package to the office of the accused, he saw the latter at the bank with a paper in his hand talking with Mr.

K. Yamaguchi. Gerardo Cruz swore that the other documents that had been sent to the accused were later on handed back to him by K. Yamaguchi. It would appear from this testimony that said documents were on the same afternoon returned to K. Yamaguchi by the accused who, in turn, gave them to Gerardo Cruz. But Mr. K. Yamaguchi emphatically contradicted both witnesses, affirming that he did not know whether the accused went to the bank after the package had been delivered to him, and that probably the accused took the documents to the bank and turned them over to one of its employees.

Our conclusion is, therefore, that the basis for the prosecution has not been sufficiently established and the truth of the matter is that the accused received only the two duplicates of the bills of lading for the merchandise without any memoradum.

Leaving aside the other facts and considerations, it is evident from what has been said that the documents, by means of which the accused was able to secure possession of the merchandise, had been given to him by the bank, without employing fraud or deceit in obtaining possession of the same. In withdrawing the merchandise from the customhouse by means of the duplicates of the bills of lading which the bank had entrusted to him, the accused might have been guilty of dishonesty, but it does not follow from this that he is guilty of theft, or any other crime.

It is universally recognized that the crime of theft implies an invasion of possession, and this doctrine is well accepted in both the common-law and civil law jurisdictions. It follows, therefore, that there cannot be theft when the owner has voluntarily parted with the possession of the thing.

Against this general principle there are certain cases that seem to constitute an exception, but after careful examination they reconcile themselves with the general doctrine enunciated. We refer to the class of cases of which United States vs. De Vera, p. 1000, *post*, is an illustration. The facts of that case were substantially these: Upon a certain occasion when three *Igorrotes* were in Manila, desirous of selling a bar of gold, they were accosted by a person who invited them to his house, saying that there was a woman there who would buy the gold. They accepted the invitation, and met a woman who appeared desirous of purchasing the gold. She requested, however, that they should first deliver it to her so that she could take it to a silversmith for examination, as to its fineness, promising to return and report shortly. The gold was accordingly placed in her hands for that purpose, together with P200 in paper money to be changed into silver and returned to the Igorrots. The woman then left and appropriated the gold bar and the money to her own use. Upon being

apprehended she was tried and convicted of theft.

One of the salient features of that case is found in the fact that the accused obtained the property, which was the subject of the theft, by deceit, intending all the while, without a doubt, to appropriate the property. Under such circumstances, the law refuses to concede to the accused the benefit of having had legal possession. At most, such a person acquires only the manual custody, not the true legal possession, and the situation may be likened to a herdsman who furtively appropriates some head of cattle of his master. (Decisions, supreme court of Spain, June 23, 1886, and May 25, 1893,) In the case cited the simplest view to take of the situation would perhaps be to say that the accused became, for the time being, a mere agent or servant of the injured party for the purpose of securing a test of the gold and having the money changed. Be that as it may, the decisions referred to in the opinion in that case show that where an accused person appears to have obtained the subject of the crime by deceit or misrepresentation, intending at the time to convert the property, he may be convicted of larceny. But where, as in this case, no deceit is practiced by the accused to obtain possession of the property, the conviction for theft cannot be sustained. The most that can be said in this case is that the accused abused the confidence reposed in him by the bank, which, undoubtedly, makes him civilly liable for the conversion of the documents which he used to the damage of the bank, but without rendering him amenable in any way to the penalties of the criminal law.

We have said that there are other facts and considerations in this case. The accused testified when he received the two duplicates of the bills of lading without any memorandum, he believed that, in view of the fact that a few days previous he had obtained an extension of time from the bank within which to pay his two drafts, the bank was entrusting to him the said duplicates, and that is why he used them in withdrawing the goods from the customhouse. Indeed, there is evidence that the accused had asked for an extension of time in order to pay his drafts. The accused was an old client of the offended bank and had succeeded in winning its confidence to the extent that the bank had granted him a credit of P40,000 without special security. At former times the bank had entrusted other bills of lading to the accused, without exacting payment therefor, although he was later required to sign a trust receipt. In view of his past relations with the bank, the accused claims that when he received the two drafts of the bills of lading here in question he believed that they had been entrusted to him, as upon other occasions, and that the trust receipt would be sent to him later for his signature. Under these circumstances there is also lacking in the present case another element of the crime of theft, which is the intention of personal gain.

In view of the foregoing, without prejudice to any civil action that the bank may have against the accused for the value of the two drafts, and reversing the judgment appealed from, we hold that the accused is not guilty of the crime of theft and he is hereby acquitted with costs *de officio*.

Araullo, C. J., Johnson, Street, Malcolm, and *Villamor, JJ.,* concur.

DISSENTING

OSTRAND, JOHNS, and **ROMUALDEZ,** *JJ.,*

We dissent.

The defendant is accused of theft. The goods alleged to have been stolen were shipped to the defendant from Kobe by H, Yamamoto and Co., Ltd. The Kobe branch of the bank drew upon the defendant sixty days' sight drafts for the amount of the purchase and mailed them, with the consular invoices, bills of lading and marine insurance policies attached, to the Manila branch of the Yokohama Specie Bank for presentation to the defendant, and the drafts were presented and duly accepted on April 7, 1920. Up to this point there is no dispute as to the facts.

The evidence for the prosecution shows that in the morning of July 7, when the drafts became due, the bank sent its collector to the office of the defendant and who took with him all of the documents connected with the shipment, including the invoices, insurance policies, and bills of lading, in duplicate. The defendant was not then in his office and the collector left all of the papers with one of the defendant's employees. The collector returned in the afternoon of the same day and found the defendant in his office, who then told him that he would make arrangements with the bank for the payment of the drafts. On the same day the defendant went to the bank and returned what the bank supposed was all of the papers which had been delivered to the defendant, but did not make any arrangements with the bank for the payment of the sight drafts. Assuming that the defendant returned all of the papers which had been delivered to him, the bank did not then examine the papers which he

returned. Upon an examination of the papers two or three days later, the bank for the first time found that the duplicate bills of lading were not among the papers which were returned. Upon making this discovery, the bank endeavored to withdraw the merchandise from the customhouse, and for that purpose caused an original entry and importers' declaration to be prepared by a customs broker, and then found that the defendant had already applied for, and obtained, the delivery of the goods from the customhouse by means of the duplicate bills of lading.

Instead of believing this testimony which is entirely reasonable and in accordance with ordinary bank practice, the majority of the court gives full credence to the nothing less than absurd story of the defendant and two of his employees to the effect that only one of the duplicates of each bill of lading was sent to him by mail on the day following the due date of the drafts and that the defendant, believing that the bank had generously conceded him a credit of P77,801.30 without additional security and without any special agreement as to the time of payment, took the duplicates to the customhouse and obtained possession of the goods in good faith! When it is considered that the defendant is an experienced business man who, apparently, had been engaged in the import business for years, that he had had a number of transactions of a similar nature with the bank, that he therefore must have known that the title to the goods did not pass to him until the drafts were paid or the payment arranged for, and that some time previous to the occurrence in question the bank reduced his overdraft allowance from P40,000 to P10,000, the reason for the easy faith and confidence placed in the defendant and his testimony by the majority of the court becomes very difficult to comprehend.

The majority opinion lays some stress on the fact that, assuming that the testimony of the witnesses for the prosecution is true, there is no direct evidence of the defendant having returned the bills of lading, invoices, and insurance policies to the bank. But if it is shown that the package of papers was left with the defendant in the afternoon ox July 7, that he was seen with the package in the bank later, on the same afternoon, and that on the next morning the package was on the desk of the clerk in charge of that branch of the business of the bank, what further evidence of the return of the package to the bank is necessary?

In our opinion, there can be no doubt whatever that the defendant obtained possession of the merchandise in question without the consent of the owners thereof; that he at that time well knew that he was not the owner of the goods and not entitled to their possession; and that by thus obtaining possession of the goods and converting them to his own use he became guilty of theft and should be punished accordingly.

The sentence appealed from should be affirmed with a slight modification of the penalty imposed.

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