

GEORGE L. TUBB, PETITIONER, VS. PEOPLE OF THE PHILIPPINES AND THE COURT OF APPEALS, RESPONDENTS.

G. R. No. L-9811. April 22, 1957

Ponente: CONCEPCION, J.

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CONCEPCION, J.:

This is a petition for review by certiorari of a decision of the Court of Appeals. The facts are set forth in said decision, from which we quote:

"On August 15, 1947, accused George L. Tubb called on complainant William H. Quasha at the latter's office at Dasmarias St., Manila. The accused had known Quasha earlier in the same year 1947 when he was defended by said Quasha in a court-martial case. During the meeting, Tubb talked Quasha into investing in the rattan business, and said that rattan could be bought for P0.20 a piece in Southern Luzon and sold for P0.70 a piece in Manila. Quasha delivered the sum of P6,000.00 to the accused on the following day, August 16th, with the understanding that the money shall be used exclusively by the accused in the purchase of rattan for resale in Manila; that the rattan so bought shall be brought to Manila within a few days; and, that the profit to be realized from the sale shall be divided equally between the accused and the complainant after the capital of P6,000.00 has been returned to the latter.

"The prosecution has also shown that on August 21, 1947, complainant received a telegram from the accused, who was in Calauag, Quezon province, asking him to procure a license from the Bureau of Forestry" for the purchase of forest products (Exhibit C). The complainant replied in a letter (Exhibit E, dated August 22, 1947), saying that although a license was not required to purchase forest products, he was sending to him (Tubb) an application to cut and gather products as a lessee or concessionaire. This letter was received by the accused, who sent back the application, duly accomplished, in a letter of the said accused (Exhibit D, dated August 27, 1947) through defense witness Amado Resurreccion. The license was secured and same sent to the accused. On September 16, 1947, when the complainant did not receive a word from the accused, the said complainant sent a telegram of inquiry (Exhibit G), but the same was answered by the postmaster of Calauag, Quezon, whose telegram (Exhibit H) disclosed that the accused was no longer residing in Calauag. Quasha went to the former office of the accused at the Samanillo Building, but he was informed that the latter had not been heard from for some time.

"Sometime in 1948, Quasha met the accused at the Manila Hotel. Quasha asked the accused what he (accused) had done with his P6,000.00. The accused merely said that there was no use telling what happened, but that he will try to pay the complainant back as he was then working for one Gabino Angchuan of Cebu City and could get money from his said employer. Quasha did not hear from the accused for a long time again after their chance meeting at the Manila Hotel. The complainant wrote to the accused in Cebu City, care of Gabino Angchuan, but his letter was not answered. When the complainant heard that the accused was in Cagayan de Oro, Oriental Misamis, the complainant wrote to him, threatening him with a criminal action if he did not pay within a period of one month (Exhibits K and J, dated July 25, 1949, and January 28, 1950, respectively).

"The accused did not take the witness-stand, but his counsel presented Avelino Leyco, Amado Resurreccion and Joe Oberly, as his witnesses. It is argued by the defense that the accused, together with Amado

Resurreccion and with the assistance of Avelino Leyco, did buy plenty of rattan in Polillo and in Calauag-, but they get drenched in the rain due to the typhoons which, visited those places, so that they become moldy and spoiled."

"The trial court convicted the accused of the crime of estafa, as defined and penalized under Article 315, subsection 1 (b), of the Revised Penal Code, and sentenced him to an imprisonment of one year of prison correctional, to indemnify the complainant in the sum of P6,000.00, with subsidiary imprisonment in case of insolvency, and to pay the costs.

"In this appeal, the main question is whether appellant is criminally liable for estafa or civilly liable only for the principal sum of P6,000.00. In support of its contention, the defense insists that there was a lawful partnership between the appellant and the complainant and the failure of the venture rendered the former liable only for a liquidation of the partnership.

"After carefully going over the evidence of record, we are not at all convinced that appellant actually bought rattan out of the money entrusted to him by the offended party for the purpose. The appellant did not advise the complainant of his whereabouts after he left Calauag, Quezon, despite the fact that he and Amado Resurreccion allegedly returned to Manila after leaving Calauag". After complainant met the appellant by chance at the Manila Hotel, the latter again absconded, so that despite the length of time given said appellant to repay the money received by him for a specific purpose, the complainant was iinaJJy compelled to go to court. The unexplained conduct of the appellant indicates a guilty conscience."

The conclusion reached by the Court of Appeals was:

"Under the above facts and circumstances, appellant is clearly guilty of estafa under Article 315,, paragraph 2(a), of the Revised Penal Code, and not under subsection 1 (b)" of the same Article of the Code, as correctly contended by the Solicitor General. The defense of lawful partnership can not be sustained. There can be no legal partnership where one of the supposed partners, taking advantage of a friendship which seemed to have ripened into a relationship of trust, represents himself to the other as one engaged in a business transaction when in fact he is not. Appellant's request by telegram that complainant secured a license for the purchase of products and his accomplishment of the application form for such license, with the request that the license be procured and sent to him as soon as possible, when such license is not required to enable one to purchase forest products like rattan, was part of a scheme to deceive the complainant. There is here, therefore, a perfect case of swindling by means of false pretenses, where formal demand is not necessary (*People vs. Scott*, 62 Phil. 553). The cases cited by appellant's counsel in support of his contention that a legal partnership was created between appellant and the complainant (*People vs. Clarin*, 17, Phil. 84, *People vs. Magdaluyo*, CA-G.R. No. 9131-R, May 15, 1954, and *People vs. Reyes*, CA-G. K. No. 8902-R, March 19, 1953) are inapplicable because in these cases the appellants therein actually invested or used the money received by them from their partners in the venture.

"The penalty provided by the applicable law is *arresto mayor* in its maximum period to *prision correccional* in its minimum period, or from 4 months and 1 day to 2 years and 4 months. There being no modifying circumstance to consider, the medium degree of the penalty should be imposed. Applying the Indeterminate Sentence Law, as amended, appellant should be, as he is hereby, sentenced to suffer an indeterminate penalty of from 4 months of *arresto mayor* to 1 year and 1 day of *prision correccional*.

"Modified as above-indicated, the judgment appealed from is hereby affirmed in all other respects, with costs."

Defendant-appellant assails the foregoing decision upon the ground that:

- "The Court of Appeals committed a grave error of law in rendering a decision which in effect holds that a person charged in the information with estafa as defined in Article 315, paragraph 1(b) of the Revised Penal Code may be convicted of estafa as defined in Article 315, paragraph 2 (a) of the same code.

- "The Court of Appeals gravely erred when, under the facts established or undisputed on the record, it did not acquit the petitioner herein."

It is alleged in the information in the case at bar:

"That on or about the 16th day of August, 1947, in the City of Manila, Philippines, the said accused did then and there wilfully, unlawfully and feloniously defraud one William Quasha in the following manner, to wit: the said accused received from the said William Quasha the sum of P6,000.00 for the purpose of buying for the latter rattan and other forest products from the province^ under the express obligation of delivering- the said articles, if bought on or before August 31, 1947, or to return the said amount if unable to buy also on or before August 31, 1947, but the said accused, once in possession of the same and far from complying with his aforesaid obligation, and in spite of repeated demands made upon him, absconded with the said amount of P6,000 and never appeared again, thereby wilfully, unlawfully and feloniously, with intent to defraud, misappropriating, misapplying and converting the said sum to his own personal use and in the said sum of P6,000, Philippine Currency."

It is clear from the foregoing that petitioner is accused of estafa under Article 315, paragraph (b) of the Revised Penal Code:

"(b) By misappropriating or converting . to the prejudice of another, money, goods, or any other personal property received by the offender in trust or on commission, or for administration, or under any other obligation involving the duty to make delivery of or to return the same, even though such obligation be totally or partially guaranteed by a bond; * * *."

In other words, petitioner is charged with the misappropriation of funds held by him in trust and with the obligation to return the same. Upon the other hand, the Court of Appeals convicted him of swindling by means of false pretenses, under paragraph 2 (a) of said Article 315, which punishes estafa committed

"2. By means of any of the following false pretenses or fraudulent acts executed prior to or simultaneously with the commission of the fraud:

"(a) Ry using fictitious name, or falsely pretending1 to possess power, influence, qualifications, property,- credit, agency, business or imaginary transaction or by means of other similar deceptions."

This offense is, however, entirely different and distinct from that described in paragraph 1 (b) quoted above. Moreover, some of the essential elements of the offense defined in said paragraph 2(a) are not alleged in the information herein. For instance, there is no averment therein of any "false pretenses or fraudulent acts executed prior to or simultaneously with the commission of the fraud," which distinguishes said offense from that referred to in paragraph 1(6), the main characteristic of which is "unfaithfulness or abuse of confidence", and this is the essence of the crime charged in said information. The allegations thereof are such as not to permit petitioner's conviction for estafa under said paragraph 2(a), without violating his constitutional right to be informed of the nature and cause of the accusation against him.

However, the findings of fact made in the decision of the Court of Appeals clearly show that the sum of P6,000 belonging to Quasha had been misappropriated by petitioner herein, for he disappeared soon after receipt of said sum, in August, 1947, and when, in 1948, Quasha found him at the Manila Hotel and inquired what he had done with his (Quasha's) money, petitioner merely said—in the words of the Court of Appeals—"that there was no use telling what happened", but that he would try to pay it back. Had said money been invested in rattan which later on was spoiled, as appellant tried to prove, he would have said so, instead of making to Quasha said statement, which like his conduct prior and subsequently thereto, implies that he had misappropriated the funds entrusted to his custody.

It is urged, that there can be no estafa without a previous demand, which allegedly has not been made upon herein petitioner, but the aforementioned query made to him by Quasha, in the Manila Hotel, was tantamount to a demand. Besides, the law does not require a demand as a condition precedent to the existence of the crime of embezzlement. It so happens only that failure to account, upon demand for funds or property held in trust, is circumstantial evidence of misappropriation. The same way, however, be established by other proof, such as that introduced in the case at bar.

The cases of *People vs. Evangelista* (69 Phil., 583) and *U.S. vs. Bleibel* (34 Phil., 227), relied upon by the petitioner, are not in point. The offense charged in the *Evangelista* case was not malversation, but of estafa, through false pretenses. The *Bleibel* case involved a commission agent who received from his employer, some goods, worth P538.11, with the obligation to return said goods, or the value thereof. Subsequently, the employer or principal made a written demand for compliance with said obligation, but the letter of demand did not appear to have reached the knowledge of Bleibel. He having, accordingly, failed to answer it, the principal filed against him a complaint for embezzlement. Soon thereafter, but before the filing of the corresponding information, Bleibel delivered said sum of P538.11 to his principal. It was held that mere delay in accounting for said amount, without competent proof of misappropriation thereof, does not constitute embezzlement. Besides, the principal owed Bleibel P143 for salary, and the former had no right to hold the latter criminally liable for said P538.11, "without first having made a settlement of accounts."

Apart from the fact that none of these circumstances obtains in the case at bar, a demand was, as above stated, made in the Manila Hotel upon the petitioner, and, worse still, the latter then impliedly, but, clearly, admitted that he had spent complainant's money for his (petitioner's) own personal benefit.

Wherefore, modified only in the sense that petitioner George L. Tubb is guilty of embezzlement under Article 315, paragraph 1(6), of the Revised Penal Code, the decision appealed from is hereby affirmed in all other respects, with costs against said petitioner. It is so ordered.

Bengzon, Padilla, Monteyor, Reyes, A., Bautista Angelo, Labrador, Reyes, J. B. L., Endencia, and Felix, JJ., concur.

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