

THE UNITED STATES, PLAINTIFF AND APPELLEE, VS. EUGENIO KILAYKO, DEFENDANT AND APPELLANT.

G. R. No. 10856. August 28, 1915

Ponente: TRENT, J.

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TRENT, J.:

An appeal from a judgment of the Court of First Instance of the Province of Iloilo, condemning the appellant, Eugenio Kilayko, to one year eight months and twenty-one days of presidio correctional, to indemnify the injured party in the sum of P2,500, with interest, or to return to him a note for the same amount indorsed by Mirasol, or to suffer the corresponding subsidiary imprisonment, and to the payment of the costs of the cause for the crime of estafa.

Counsel de officio for the appellant insists that: "1. The court erred in failing to inform the defendant that it was his right to have counsel before being arraigned, and in failing to ask defendant if he desired the aid of counsel, and in failing to assign him counsel, and in failing to allow a reasonable time for procuring counsel. 2. The court erred in weighing the evidence and in finding the defendant guilty."

When the case was called for hearing on February 23, 1915, and before arraignment, the appellant stated to the court that he was not prepared for trial. The court reminded him that the case had been continued for a week and that he must get himself a lawyer at once. The appellant answered that if the case could not be continued he would place himself at the disposal of the court, that he did not have any money to pay a lawyer, and that he would defend himself. The court thereupon proceeded with the trial.

The rights set forth in section 17 of General Order No. 58 are personal in their nature and may be waived. (U. S. vs. Go-Leng, 21 Phil. Rep., 426.) In the case at bar the appellant waived his right to have the aid of counsel by announcing that he would defend himself. He had the right to conduct his own defense. Under these circumstances it was not necessary to continue the trial of the cause for the purpose of allowing the appellant time to secure counsel. In the beginning of October, 1914, the appellant wrote to the complaining party, Luzuriaga, requesting the return of a note for 72,500, which became due on October 2, 1914, in order to renew it. In January, 1915, Luzuriaga, paid to one T. S. Holt 72,675, the amount of the appellant's note in favor of Holt on which Luzuriaga was surety. Luzuriaga testified that the note for 72,500 was never returned to him, nor renewed, nor paid. This testimony was met by the appellant by introducing in evidence a note for P2,500, dated January 21, 1915, and by stating that this was the renewal of the note which he obtained the 1st of October. Upon the question whether the last 72,500 note was in lieu of the October note, we have the uncorroborated testimony of the appellant who testified that this was a renewal of the old note. While, on the other hand, we have the testimony of the complaining party, corroborated by that of the law clerk of Bordman, to the effect that the new note represented a partial payment on the amount which Luzuriaga had paid Holt. The law clerk stated that some of the transactions took place in his office and that the appellant told him that, he (the appellant) had destroyed the first note. We must, therefore, conclude that the testimony of record fully sustains the finding of the trial court, wherein it was found that the appellant did, in fact, destroy the note for 72,500, which became due on October 2,

1914, and which was indorsed by Mirasol.

The appellant received the 72,500 note, which was due in October, 1914, with the obligation to return in lieu thereof a new note for the same amount or, in case that he could not secure the signature of Mirasol on the new note, to return the old note to Luzuriaga.

Article 534 of the Penal Code reads: "Any person who shall defraud another in the substance, quantity, or quality of anything which he shall deliver the latter by virtue of an obligation to do so shall suffer:

"3. The penalty of presidio correctional in its minimum and medium degrees, when the fraud exceeds six thousand two hundred and fifty pesetas."

Article 535 of the same code provides that the penalties prescribed in article 534 shall be imposed upon: "9. Any person who shall commit a fraud by removing, concealing or destroying in whole or in part any court record, office files, document, or any other paper."

There are two essential elements in every crime of estafa, as defined in paragraph 9 (supra), viz, fraud and injury. If either of these is lacking, there can be no such crime.

The appellant failed to comply with his obligation to return the old note, or a new one in lieu thereof. In destroying the old note and then trying to make it appear that he gave the injured party a new note shows beyond question that he intended to defraud the complaining party out of the amount of the old note. These facts establish the first essential element in the crime charged.

The destruction of the old note, this old note being a document within the meaning of paragraph 9 above quoted, caused a positive injury to Luzuriaga, because it dispossessed him of the evidence of a debt of considerable value, thereby making it difficult for him to enforce the collection of this sum. For the purpose of showing the existence of this injury, it was unnecessary to prove whether, as a matter of fact, Luzuriaga could collect the P2,500 without exhibiting the note. The commission of the crime of estafa by destroying the old note is independent of the subsequent enforcement of the collection of the amount due. Whether or not Luzuriaga collects the amount can change in no manner the legal effects of the destruction already consummated of the old note. The second essential element is, therefore, fully proven.

The extent of the injury, when it consists of the destruction of a promissory note, must be based upon the amount which such a note represents without regard to whether or not the amount is actually collected subsequent to the destruction. (U. S. vs. Tan Jenjua, 1 Phil. Rep., 38.)

As the destruction of the note in question does not necessarily involve the loss of the P2,500, the question arises whether the appellant should have been condemned to the payment of this amount, with the corresponding subsidiary imprisonment in case of insolvency.

In the case of Tan Jenjua (supra), the defendant was convicted of estafa consisting of concealing or destroying a certificate of deposit on one of the banks in the city of Manila in favor of Fulgencia Tuason for the sum of P2,600. While the court held that the extent of the fraud in this case should be graded according to the amount which the document or certificate of deposit represented, no indemnity for the injury caused was allowed, notwithstanding the fact that the sentence of imprisonment was exactly the same as if the defendant had received the amount and converted it to his own use. We can see no difference in principle between this case and the one at bar. The only difference in the facts, in so far as this branch of the case is concerned, is that in the one the defendant did not owe the injured party the amount mentioned in the document, while, in the other, he did.

In the case of the U. S. vs. Raboy (25 Phil. Rep., 1), the defendant was convicted of larceny consisting of the stealing of four checks amounting to P515.44. The imprisonment imposed by this court was the same as if he had stolen that much money, but no judgment for indemnity was entered because the checks were recovered. And, in the case of U. S. vs. Diris (26 Phil. Rep., 133), the defendants were convicted of robbery of P353 in cash and a receipt for P100. The lower court gave judgment in favor of the injured party for P453 as indemnity. This court reduced the indemnity to P353, holding that the receipt had only a nominal value in so far as the indemnity was concerned.

It might be stated that in the case under consideration the injured party submitted to the court in the trial of this criminal case the question of his civil indemnity. There is in the record no express reservation on the part of Luzuriaga reserving his right to prosecute in a separate action his right to civil damages for the injury caused, but, when we consider the fact that the note which was destroyed by the appellant was secured by Mirasol, thereby presumably making, the note collectible, we can hardly see that under this circumstance Luzuriaga would exempt Mirasol by submitting the civil side of the case to the court at the time the criminal case was tried. However this may be, we are of the opinion that in accordance with the principle announced in the above cited cases, that part of the judgment wherein the defendant is condemned to pay 72,500, with interest, and to suffer the corresponding subsidiary imprisonment in case of insolvency must be eliminated for the reason that, as we have indicated, the destruction of the note does not necessarily carry with it the loss of its face value.

For the foregoing reasons the judgment appealed from is modified by eliminating therefrom the indemnity. In all other respects the judgment is affirmed, with costs against the appellant. So ordered.

Arellano, C. J., Torres, Johnson, Carson, and Araullo, JJ., concur.

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