

THE UNITED STATES, PLAINTIFF AND APPELLEE, VS. MODESTO GARCIA, DEFENDANT AND APPELLANT.

G. R. No. 3173. August 23, 1907

Ponente: JOHNSON, J.

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JOHNSON, J.:

This defendant was charged with the crime of embezzlement, was tried in the Court of First Instance of the Province of Leyte, was found guilty of the said crime and sentenced to be imprisoned for a period of six years and one day and to return the sum P1,862.14, the amount embezzled, to the provincial treasury of the Province of Leyte, and to pay the costs. From this judgment the defendant appealed to this court.

The complaint filed in said cause charges that the said Modesto Garcia, from June, 1904, to August 19, 1905, was municipal treasurer of the pueblo of Caybiran of the Province of Leyte, P. I., duly appointed, and as such municipal treasurer had the duty, among others, of guarding and keeping in his custody the public funds belonging to the said municipal government of the said pueblo and of the provincial government of the Province of Leyte; that the said defendant willfully, feloniously, and with criminal and malicious intent took and allowed others to take the sum of P2,265 for his own use and personal profit, to the prejudice of the municipal government of Caybiran and of the provincial government of the Province of Leyte, without said sum or any part thereof having been returned to the said municipal treasury; all contrary to law.

This complaint was filed on the 21st day of August, 1905. On the 27th day of November, 1905, the attorney for the defendant, Amzi B. Kelley, filed a demurrer to said complaint. In the record brought to this court there is a fugitive piece of paper pinned to the record, which would indicate that the demurrer was overruled and that the defendant excepted to such ruling. Nothing further indicates what action the judge of the lower court took upon such demurrer. The attorney for the defendant in this court does not insist upon the exception and therefore we will not consider it.

Counsel for the defendant in this court assigns as error the following:

"It appears from the record that the sentence and proceedings herein are coram non judice." An examination of the record, however, discloses beyond peradventure of doubt that the case was tried before the Hon. Charles S. Lobingier, at Tacloban, Province of Leyte, P. I., on the 27th of November, 1905.; that the complaint was read to the defendant and that he pleaded "not guilty;" and further that Domingo Franco, provincial fiscal of said province, appeared on behalf of the United States and that Amzi B. Kelley appeared for the defendant; and not only this, but an examination of the evidence adduced during the trial discloses that the said Amzi B. Kelley was present, cross-examined the witnesses presented by the plaintiff, and that the defendant took the witness stand in his own behalf.

By reference to section 7 of Act No. 867 it will be seen that the regular terms of court of said province are held in the months of January, April, July, and November. An examination of the record discloses that the defendant was duly tried by the regular judge of said province, at a regular term; that he was present by himself and attorney and personally participated in the trial of the cause and made no objection whatever to the

competency of the court. We are of opinion, therefore, that the error assigned by the defendant's attorney in this court is without foundation.

Notwithstanding that this is the only assignment of error made by the attorney for the defendant in this court, we proceed to an examination of the evidence, for the purpose of ascertaining whether or not the evidence adduced during the trial of said cause is sufficient to justify the sentence of the lower court. An examination of the evidence discloses the following facts:

That one J. L. Manning, a duly appointed examiner for the Bureau of the Treasury of the Philippine Islands, duly and regularly examined the accounts of the defendant and found that the defendant was short in his accounts in the sum of P1,862.14; that the defendant admitted to the said Manning that he was short in his accounts and that he would plead "guilty" to the charge of embezzlement.

The defendant also admitted or confessed to the provincial fiscal that he was short in his accounts. The defendant admitted, as a witness in the trial of said case, that he was short in his accounts in the sum of P450. In our opinion the evidence adduced during the trial is sufficient to justify the finding of facts by the court below.

Paragraph 3 of article 390 of the Penal Code provides that the public official who has in his charge public funds, etc., and who takes or consents that others take the same shall be punished with presidio mayor, if the amount taken exceeds 6,250 pesetas. The amount taken in this case exceeded that amount and did not exceed 125,000 pesetas. There were neither aggravating nor extenuating circumstances accompanying the commission of the crime, therefore the defendant must be punished in the medium degree of presidio mayor. The medium degree of presidio mayor is from eight years and one day to ten years. It is the judgment of this court that the defendant should be imprisoned for a period of eight years and one day. The sentence of the lower court is therefore hereby modified and the defendant is hereby sentenced to be imprisoned for a period of eight years and one day of presidio mayor with the accessory penalties of article 57 of the Penal Code, to return the amount embezzled, without subsidiary imprisonment as provided by article 51 of said code, and to pay the costs. So ordered.

Arellano, C. J., Torres, Willard, and Tracey, JJ., concur.

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