

THE UNITED STATES, PLAINTIFF AND APPELLEE, VS. LOUIS A. DOWDELL, JR., AND WILSON W. HARN, DEFENDANTS AND APPELLANTS.

G.R. No. 4191. July 18, 1908

Ponente: TRACEY, J.

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TRACEY, J.:

This is an appeal from a conviction for malversation of public moneys. The accused were all officers of the Philippines Constabulary, Dowdell having been supply officer for the Province of Samar and Harn his subordinate, while McIlvane was a friend visiting Harn during the occurrence in question.

On January 12, 1907, Dowdell, who had been relieved of his charge and ordered to turn over the property in his hands to his successor, announced to Major Murphy, the senior inspector of Constabulary for Samar, that the safe had disappeared from his office, containing some P6,000 in paper and three or four thousand in coin. Some days later, at the instance of McIlvane, the safe was fished out of the bay, containing only two coins of the value of 40 centavos; but the sum of P9,971.26, in paper and silver, was found hidden in various places on the premises occupied by Harn and was turned over to the Government

After separate trials the accused were found guilty and the two supply officers were sentenced to terms of imprisonment of six years and one day, and their visitor, as an accomplice, to imprisonment for four months, each of them to pay one-third of the costs.

From the testimony of McIlvane it appears that during the week preceding January 12, the three men had been shooting and drinking together, consuming a great quantity of beer, but it is apparent that at the time of the taking of the money they all were clear-headed enough to know what they were about and to follow out a concerted and intelligent plan of operations. During the early period of their convivialities it was suggested by Dowdell that it would be well if his "safe and accounts were in the bay." On the next day when he appeared, he brought with him a bundle of bank bills wrapped in a newspaper, but the following day returned them to the office. On the succeeding day, however, the silver was brought to Harn's house, boxed in two oil cases, and the paper money appears to have been carried back again to the house by Dowdell that same evening. After dinner, at about 8 o'clock, the three men proceeded to the Constabulary, where Ham loft Dowdell and McIlvane, who together lowered the safe into a baroto in which it was taken out into the bay and there thrown into the water.

In an elaborate brief, the counsel for the defense attacked the procedure in the Court of First Instance, chiefly on the points that the record failed to disclose that the accused had been present throughout the trial or that they had ever been arraigned, or had pleaded; and at one stage of the case in this court the Attorney-General made a motion, which was denied, that the case be remanded to the Court of First Instance for a new trial on account of these defects thus disclosed. Upon an examination of the papers before us, after final argument, this court required a return by the clerk of the Court of First Instance, in full, of the proceedings in the court below, from which it now fully appears by entries in the minutes that each of the defendants was present throughout his trial and that

they were all arraigned and pleaded not guilty. It is unnecessary, therefore, to consider the constitutional, questions discussed in the briefs, based on the omissions from the imperfect record.

It is contended that the malversation in this case is qualified by the fact that the moneys taken were recovered by the Government. This incident is of no practical importance for two reasons, first, the money was not returned or made good by the accused, so as to entitle them to the benefits of the provisions of article 392 of the Penal Code, had that article been properly applicable, but was, on the contrary, recovered by the Government through its own efforts and in spite of their endeavor to the contrary, and, second, because their offense does not fall under the said article 392, as appropriation to their own use of public moneys which they were able to make good, but rather under article 390 of the Penal Code, as appropriation of public moneys to their own use with the intent of keeping it. The distinction between these two offenses, resting in the intention of the official to restore or not to restore the money, is clearly pointed out in the case of *The United States vs. Coates* (4 Phil. Rep., 581). Every fact in the present case points to the deliberate and permanent misappropriation of the fund.

In sentencing the two principal offenders, the trial judge took their drunkenness into consideration as an extenuating circumstance. The facts above recited, as we read them in the record, did not justify him in doing so. There was no such drunkenness as decreases their responsibility for their acts.

On the other hand, the Attorney-General asks for an increase of the penalty on the ground that the offense was committed by night. It is impossible to accede to this request, as, although the safe was disposed of after nightfall, the moneys, the taking of which constitutes the statutory offense, were withdrawn from the treasury during daylight.

Our conclusion is that the defendants, Dowdell and Ham, who alone have appealed, are guilty of malversation of public funds under article 390 of the Penal Code, without any extenuating or aggravating circumstance. The penalty imposed is that of *presidio mayor*, in its medium degree, with imprisonment for eight years and one day, one-half of the costs in this instance to be paid by each of the appellants, the judgment of the court below in other respects being affirmed. So ordered.

Arellano, C. J., Torres, Mapa, Carson, and Willard, JJ., concur.

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