

UNITED STATES, PLAINTIFF AND APPELLEE, VS. MERCEDES ALABANZA, DEFENDANT AND APPELLANT.*G.R. No. 4342. October 22, 1908*

Ponente: TORRES, J.

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On the 5th of August, 1907, the provincial fiscal of Ilocos Sur filed a complaint with the Court of First Instance of the said province charging Mercedes Alabanza with the crime of estafa because on or about the 29th of April, 1906, in the town of Vigan, Ilocos Sur, she abstracted or illegally and criminally appropriated a gold rosary of the value of P100, which she had received from the owner, Juliana Aquino, a resident of Lapog, for sale on commission, and did not comply with the obligation to return the rosary if it were not sold, or pay the value thereof, notwithstanding the demands made therefor.

Proceedings were instituted, and, after the accused had pleaded not guilty, an agreement, which appears on folio 6 of the record, was drawn up between the fiscal and the counsel for the accused to the following effect:

"(1) That on or about the month of April, 1906, the accused, Mercedes Alabanza, received from Juliana Aquino a gold rosary, valued at P100, for sale on commission with the obligation to return the rosary, or to pay in the value of the same; (2) that, notwithstanding the time that elapsed and the demands made for the return of the said rosary or the payment of its value, the accused has not, up to the present date, complied therewith; (3) that the accused in turn delivered the rosary to a certain Maria Reototar for sale on commission, and that the latter took it to Cagayan to be sold there, but that thus far she has not returned; (4) that the accused had no authority from the owner of the rosary, Juliana Aquino, to deliver it for sale to another person."

This agreement was presented to the court below, and the fiscal and the counsel for defendant stated that they waived their respective arguments; the lower court reserved its decision.

On the 31st of August and 2d of September, 1907, the provincial fiscal filed with the court the affidavits of Antonio Reototar, Claro Aninag, and Buenaventura Amigable, wherein they stated that they positively knew that Maria Reototar, sister to the first named, and a resident of Vigan, Ilocos Sur, had died of cholera some four years previously.

The judge below rendered judgment on the 24th of September, 1907, and sentenced the defendant to six months of arresto mayor, to the accessory penalties, to indemnify the aggrieved party in the sum of one hundred pesos, with subsidiary imprisonment not to exceed one-third part of the penalty, and to pay the costs.

The attorney for the accused moved for the reopening of the case on the ground that additional evidence had been presented by the fiscal, in the absence of the accused and of her attorney, in connection with the death of Maria Reototar who, as stated in the agreement, is now in Cagayan. The judge overruled the motion for the reason that the said affidavits had not been considered; the attorney for the accused then appealed from the judgment and the ruling of the judge denying his motion for a new trial.

Paragraph 5 of article 535 of the Penal Code provides that those who, to the prejudice of another, shall appropriate or misapply any money, goods, or any kind of personal property which they may have received as a deposit on commission, or in any other character, producing the obligation to deliver or return the same, shall be criminally liable.

On or about the month of April, 1906, Mercedes Alabanza received from Juliana Aquino a gold rosary, valued at P100, for sale on commission, with the obligation to return it to the owner if it were not sold, or to pay its value in case of sale.

Notwithstanding the demands made by Aquino and the time that had elapsed since the said month of April until the complaint was filed in August, 1907, the defendant was unable to return the rosary to the aggrieved person, or to pay the money value thereof, for the reason that, without the latter's knowledge or consent, she had delivered the jewel to another person.

These facts, which were acknowledged by the accused, constitute the crime of estafa inasmuch as, acting with fraud and bad faith, she disposed of the jewel that she had received, and delivered it to another person without the knowledge or authority of its owner, and contrary to the obligation that she contracted to return the jewel if not sold or to pay its value if the sale was effected. With this alternative obligation she was unable to comply, in spite of the demands made upon her.

Notwithstanding the agreement as to certain facts entered into between the provincial fiscal and the counsel for the accused herein, a usual proceeding in the courts of Ilocos which is sometimes practiced in violation of the law of procedure, the fact is that, in the behavior of the accused, the elements which constitute the crime of estafa are present, i. e., the deceit by which was intended to defraud, because Alabanza took the rosary from the hands of its owner, Aquino, in order to sell it, under the obligation to return it or pay the price thereof, and, without the knowledge or authority, of the latter, she delivered it to another person; this last fact, however, was admitted billy by the fiscal without previous agreement with the injured party and without her knowledge; and, further, the damage caused to the latter on account of the deceitful and malicious acts of the accused, inasmuch as, once the rosary was delivered to Maria Reototar without a limit of time having been fixed, it can not be doubted that, under the said agreement of facts, the injured party, Juliana Aquino, was deprived of her jewel, perhaps forever. Facts similar or analogous to those at issue in this case have been defined, classified, and tried as crimes of estafa, among others, in the decisions of this court rendered in the cases of *United States vs. Zamora*(2 Phil. Rep., 582); *United States vs. Ongtengco* (4 Phil. Rep., 144); and *United States vs. Leano and Gonzalez* (6 Phil. Rep., 368).

It should be observed, on the other hand, that the Penal Code punishes not only the appropriation but also the conversion of property received under the obligation to return it, as in the present case. (Art. 535, par. 5.)

Moreover, once the crime of estafa has been consummated, neither the repair of the damage caused, nor the payment of the value of the thing misappropriated, nor any agreement that may subsequently be entered upon, can efface the crime or exempt the guilty person from the penalty incurred, according to the constant and uniform practice of the courts. And this conclusion is unavoidably reached in view of the merits of the case, without taking in any way into consideration the statements contained in the affidavits improperly offered and admitted in evidence; such documents only prove that a due investigation was not made by the representative of the Government before the said agreement was entered upon.

In the commission of this crime neither an aggravating nor a mitigating circumstance is present, and, in view of the value of the rosary which is the subject of the fraud committed, the penalty imposed by the court below is within the medium degree, as is prescribed by article 534, paragraph 2, of the code.

Therefore, it is our opinion that the judgment appealed from should be and the same is hereby affirmed, as well as the order of court of the 30th of September, 1907, with costs against the accused. So ordered.

Johnson and Willard, JJ., concur.

Carson, J., concurs in the result.

Arellano, C. J., Mapa and Tracey, JJ., dissent.

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