

THE UNITED STATES, PLAINTIFF AND APPELLEE, VS. EMILIANO J. TORRES, DEFENDANT AND APPELLANT.*G.R. No. 4671. November 21, 1908*

Ponente: CARSON, J.

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The accused in this case was charged with the crime of misappropriation of public funds, as defined and penalized in article 390 of the Penal Code. The information alleges that, between the 1st day of March, 1904, and the 14th day of June, 1906, the defendant, being then the municipal treasurer of the municipality of Baybay, Province of Leyte, and the deputy of the provincial treasurer, did embezzle and appropriate to his own use the sum of P1,162.84, the property of the municipality. To this information the defendant pleaded not guilty, but during the trial expressly admitted that he had applied to his own use funds of the municipality placed under his charge, claiming at the same time that he had made restitution thereof before the commencement of criminal proceedings against him, which claim was admitted by the prosecution. The trial court was of opinion that the evidence failed to sustain a finding of the guilt of the accused of misappropriation of funds as defined and penalized in article 390, as charged in the information, but that the admission of the defendant, together with the testimony of the witnesses of the prosecution, fully established the guilt of the accused of the less and included offense of misappropriation of funds, as defined and penalized in article 392 hi the Penal Code.

We think that the trial court properly found that the offense committed was that defined in article 392, and not that defined in article 390; but we are of opinion that the court erred in imposing the penalty prescribed in the first rather than the third paragraph of that article, the penalty prescribed in the first paragraph being reserved for cases wherein the misappropriation was to the detriment to or hindrance of the public service, while the penalty prescribed in the third paragraph is applicable in cases where the unlawful use of public funds was without detriment to or hindrance of the public service.

It was proven at the trial that the district auditor who examined the books and records of the accused incurred certain expenses and occupied several days' time in doing so; and further that, during the course of the examination of the books of the accused, the district auditor suspended payment of municipal accounts. The trial judge, while reserving his opinion as to whether the expense incurred by the auditor and the time occupied by him in making the examination and filling the Vacancy caused by the removal of the accused, was of opinion that the suspension of payments was a "detriment to or hindrance of the public service," due directly to the act of the defendant in having made away with the municipal funds.

In the case of *United States vs. Duran*,^[1] this court held, in accordance with the doctrine laid down by the supreme court of Spain in its sentence of March 20, 1884, that it is well settled that—

"The contents and mutual relation of the paragraphs of article 392/(407 of the Spanish Code) in addition to the express terms of the first paragraph, require for the infliction of the penalties prescribed therein, evidence of the existence of the characteristic circumstance, which must be fully proven and can not be presumed, that the service has suffered some irregularity by reason of the malversation—not the malversation itself, but some other

detriment derived therefrom or some irregularity which is distinctly prejudicial to the good order, policy, and regular course of the public administration."

It is clear from this ruling' that the "detriment to or hindrance of the public service," mentioned in the first paragraph of article 392, can not be held to contemplate the public expense or loss of time involved in the discovery and prosecution of the offense. Indeed such a "detriment to or hindrance of the public service" is always and necessarily involved in the discovery and prosecution of a case of misappropriation of public funds and might therefore be presumed in every case where a conviction is had, and it would be superfluous to provide a special penalty in cases where such a "detriment to or hindrance of the public service" exists, and absurd to provide a distinct penalty where it does not exist.

But the trial court relied especially upon the suspension of payment by the auditor of the. municipal accounts, pending his examination of the accounts and records of the accused, and in support of this holding cites the case of *United States vs. Ejercito* (6 Phil. Rep., 80), wherein we held that the offense committed was a violation of the first paragraph of article 392, it appearing that—

"On account of the embezzlement of the said funds by the accused, some of the school-teachers, and other municipal officials were unable to receive their salaries for several months, to the detriment and hindrance of the public service and to the prejudice of the said officials."

In that case, however, the reason for the failure to pay the salary of the school-teachers and other provincial officials was because there were no funds available for that purpose, as a result of the misappropriation. In this case, it appears that, at the time when the auditor suspended payment of the municipal accounts pending his examination of the office and records of the accused, restitution had already been made of the funds misappropriated, and the failure to pay the municipal accounts was not, therefore, a direct consequence of misappropriation of the funds, since the auditor, had he desired so to do, could have made payment without suspension.

It is true that it may be said that, in a certain sense, the failure of the auditor to pay was an indirect consequence of the misappropriation of the municipal funds by the accused, and that the suspension of the payment of the municipal accounts might not have occurred had the municipal treasurer not been guilty of the crime of misappropriation. We do not think, however, that the detriment to or hindrance of the public service contemplated in article 392;should be construed so as to include any such detriment or hindrance not necessarily consequent upon the act of the accused. To hold otherwise would put it in the hands of third persons or of the prosecution or the prosecuting officer to bring the offense of the accused person within the provisions of paragraph 1 of article 392 in all cases of a misappropriation of funds, by making an excuse of the facts that such misappropriation had taken place to produce some detriment or hindrance that need not have occurred but for the intervention of such third person.

It does not affirmatively appear from the record in this case that suspension of payment by the auditor was a necessary consequence of the misappropriation of public funds by the accused. On the contrary, it does appear that there was nothing to prevent the auditor from paying the accounts of the municipality had he desired to do so and that the failure was a consequence rather of the exercise of his discretion, for his own convenience, in postponing such payments.

The trial court also erred in imposing subsidiary imprisonment in a case where the principal penalty prescribed is not confinement in a penal institution, or censure, fine, or caution, instead of subsidiary deprivation of the same kind as that of which the principal penalty consists, as prescribed in section 2 of article 50 of the Penal Code.

The judgment and sentence of the trial court should therefore be reversed, and this court should and does hereby

find the accused guilty of a misappropriation of public funds, as defined in paragraph 3 of article 392, and should and does hereby impose upon the accused the penalty of suspension for a period of two years and one day, together with a fine of P58.14, being five per cent of the amount misappropriated, and, in case of insolvency and failure to pay the fine, subsidiary suspension at the rate of one day for every P2.50 of the fine unpaid, such subsidiary suspension not to exceed one-third of the principal penalty; and the payment of the costs in both instances. So ordered.

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

[1] 2 Phil. Rep., 604.

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