

THE UNITED STATES, PLAINTIFF AND APPELLEE, VS. JOSE KERR, DEFENDANT AND APPELLANT.

G.R. No. 4683. September 07, 1908

Ponente: CARSON, J.

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CARSON, J.:

The accused is charged with applying to his own use property of the provincial government of Pampanga, to the detriment and hindrance of the public service, this property having been placed under his charge as an official of that government.

The evidence discloses that the accused did in fact make temporary use of some 26 pieces of galvanized iron and some barb wire and netting, for personal purposes, and carried away and stored in his house for his personal use paint, linseed oil, and other property of the province, which the witnesses for the prosecution estimated to be worth in all P155.48; that complaint having been filed against the accused charging him with the misappropriation of this property, he immediately returned the same to the possession of its proper owner, and at or about the same time paid over to the provincial treasurer the sum of P155.48, being the total estimated value of the property which it was alleged he had misappropriated.

The accused himself admitted on the witness stand that he made temporary use of some 20 pieces of galvanized iron, property of the provincial government, for the purpose of covering some cement work which he was having done at or near his own house. It appears further that he admitted to one of the government's witnesses, Mr. James, chief clerk of the provincial treasurer of Pampanga, that he had taken the property which he is charged with having misappropriated, "for his own use;" on the witness stand, however, he insisted that he brought some of this property to his own house for safe-keeping. We think that the record clearly discloses that the accused, did in fact take the property which he is charged with having misappropriated, for his own use, but we think the weight of the evidence tends to support his statement that he was making but temporary use of the indestructible property such as galvanized iron, wire netting, and barb wire, and that he believed the other property which, he took to his house, including the paint and linseed oil, was practically worthless, having been condemned for public use, and only retained with the property of the province because no definite steps had been taken by a proper official for its destruction.

There can be no doubt that the accused, in carrying away and using this government property for his private personal purposes, violated the express provisions of article 392, but we are satisfied from all the circumstances that the accused did not believe that in taking the indestructible property for temporary use, and in taking the expendable property for his own permanent purposes, he was doing the province any practical injury or taking from it anything of practical value.

The witness James testified that the misappropriation of this property caused prejudice or damage to the public service since "such property might have been used" by the province if it had not been carried off by the accused.

We do not think, however, that this testimony is conclusive, because upon further examination, the witness

admitted that he was unable to state in what this detriment or hindrance consisted other than the mere fact that the goods had been misappropriated, and in the case of *U. S. vs. Duran* (2 Phil. Rep., 604), this court held, in accordance with the judgment of the supreme court of Spain of March 20, 1884, that (p. 605)—

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.

There is some contention by counsel for the appellant that because it appears that the property misappropriated was not carried upon the regular property account of the province, this property was not placed under the official charge of the accused. We are satisfied, however, both from the testimony of the witness himself and from the testimony of Mr. James, chief clerk of the provincial treasurer, that all of this property was placed under the charge of the accused as property clerk of the provincial government of Pampanga.

It appears from the record that not only did the accused make full restitution of the identical property of the government which he took for his own use, but that he paid over to the provincial government of Pampanga the total alleged value thereof. Counsel for appellant prays that the province be directed to make a refund of this payment Which the accused testified was made merely to save his official bondsmen from anxiety or trouble. While from the facts before us, it would appear that the province was not entitled to have both the restitution of the property and payment therefor, and that the accused should have said payment returned to him, this question can not properly be decided in this proceeding wherein the province is not a party, and has had no opportunity to be heard.

The trial court found the accused guilty of misappropriation of property of the provincial government of Pampanga, "to the detriment or hindrance of the public service," as alleged, and imposed the penalty prescribed in the second paragraph of article 392. This judgment should be and is hereby reversed, and instead thereof, we find the accused guilty of the offense of misappropriation of public property, as defined and penalized in the third paragraph of article 392 of the Penal Code, there being no proof of prejudice or damage to the public service, and in view of all the circumstances, we impose upon him the penalty of suspension for a period of two years and one day, and a fine of P7.27, being five per cent of the value of the property misappropriated, the minimum penalty which we are authorized to impose under the law. The costs of the proceeding in the trial court to be against the accused, and in this court de oficio. So ordered.

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

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