

THE UNITED STATES, PLAINTIFF AND APPELLEE, VS. NICOMEDES MORALES AND CRISPINA MORCO, DEFENDANTS. – NICOMEDES MORALES, APPELLANT.

G.R. No. 5168. February 19, 1910

Ponente: MORELAND, J.

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MORELAND, J.:

The defendants were accused of the crime of estafa under article 535, subdivision 5, of the Penal Code. Nicomedes Morales was convicted in the court below and condemned to four months and one day of arresto mayor, to indemnify the party injured in the sum of P666.05, to the accessories mentioned in article 61 of the Penal Code, and to pay the costs of the action. Crispina Morco was acquitted, Nicomedes Morales appealed.

It appears that the defendants received from Hatin Cafure to sell on commission certain jewels and jewelry of the value of something more than P1,000. They sold all of said jewels and jewelry, and upon a settlement of their accounts with said Hatin Cafure it was found that there was due to him from the defendants the sum of P666.05. The defendants did not pay him that sum in cash, nor did they return to him the jewels and jewelry which that sum represented.

In receiving the said articles from Hatin Cafure the defendants gave to him a receipt in substantially the following form:

"Received of Mr. Atim Kapuri goods taken on commission which amount to P1,384.10 on account of him who subscribes.

"Legaspi, 14th of March, 1905.

"(Signed) NICOMEDES MORALES."

This receipt constitutes the only written evidence of the terms of the agreement upon which the property was taken by the defendants.

The defendants upon the trial and in their defense introduced in evidence promissory notes amounting to the said sum of P666.05, given to the defendants by persons to whom had been sold the jewels and jewelry amounting to that sum. These notes the defendants had several times tendered to the owner as the proceeds of the jewelry sold. The defendants offered, if the owner would give them time, to collect these notes and pay him the proceeds. It appears undisputed that the sales of the jewelry were made in good faith by the defendants and that the promissory notes taken from the purchasers of said jewelry by the defendants were bona fide in every respect. It does not appear whether the notes were good, bad, or indifferent, collectible or uncollectible. Neither does it appear what they were actually worth. The only evidence produced by the prosecution and, therefore, the only evidence upon which the defendants were convicted, was, as before stated, that they had taken the property in question upon the terms and conditions mentioned in the receipt above quoted and that they had failed to return either jewelry or the value thereof, but, instead, had sold said jewelry on credit and taken promissory notes from

the purchasers for the purchase price.

While the question in this precise form has never heretofore been presented to this court, we are of the opinion that the principles laid down, either expressly or impliedly, in many similar cases, are applicable to this. This court has uniformly required, either expressly or impliedly, that to convict there must be some evidence of conversion of the property to the benefit of the accused or of some other person - that there must be an intention to convert.

A number of cases decided by this court have been cited by the fiscal to sustain the conviction in this case. It may not be amiss to examine them.

In the case of *the United States vs. Pascual* (10 Phil. Rep., 621), this court passed upon the question only of whether or not to constitute estafa within the terms of article 535, subdivision 5, it was necessary that the property be secured from the possession of the owner by deceit or fraud; and it was there held that "deceit with intent to defraud, in obtaining the money or other personal property afterwards misappropriated, is not always an essential requisite."

In the case of *the United States vs. Leano* (6 Phil. Rep., 368), it appeared that a certain ring of the value of P750 was delivered to the defendants on condition that they return the same within a week or pay the value thereof if sold. It was further understood that if the defendants could not sell the ring for more than a certain sum fixed by the contract it should not be sold. The week having elapsed and the defendants having failed to comply with their agreement, the owner sought to obtain possession of it and found that it had been pledged by the defendants with a pawnbroker for the sum of P180. The court held (p. 371) that under the facts of the case;

"The defendants appropriated, misapplied, and converted the said ring to their own use by pledging the same with a pawnbroker, though they had secured the same under the pretext of selling it to a person desiring to buy it."

In the case of *the United States vs. Alabanza* (11 Phil. Rep., 475), it appeared that Mercedes Alabanza received from one named Aquino a gold rosary, valued at P100, for sale on commission, with the obligation to sell the rosary and to account for the value of the same; that, notwithstanding the fact that the time within which the agreement was to be performed had elapsed and in spite of repeated demands made for the return of the rosary or the payment of its value, the accused did nothing; that the accused claimed in explanation of her refusal to comply with the agreement that she delivered the rosary to another person for sale on commission and that the latter took it to Cagayan to be sold there and that it had not been returned. It was clearly proved on the trial that the person to whom the accused claimed she had given the rosary for sale on commission had died of cholera in Vigan four years prior to the date of the alleged delivery. In that case the court said (p. 479):

"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."

The evidence here was very clear that the accused intended to convert the rosary to her own use and that she actually did do so. The court further said in that case (p. 478):

"That in the behavior of the accused the elements which constitute the crime of estafa are present, i. e., the deceit by which it was intended to defraud, * * *."

In the case of *the United States vs. Zamora* (2 Phil. Rep., 682), it appeared that on the 10th day of July, 1901, the defendant received from the complaining witness for sale on commission the jewelry mentioned in the complaint, and, although repeatedly requested by the owner to return the same, failed to do so. In discussing the question the court said (p. 583):

"It is contended for the defense that no time was fixed within which the defendant was to make sale of or return the property. It was proven that it is the custom, when jewelry is take[^]out for sale, that if taken in the morning it is to be returned in the evening, or at least within two or three days. Independent of any such custom, and in the absence of any time fixed for its return, it was the duty of the party so receiving it to return it upon the demand of the owner.

"The complaining witness testified that upon several occasions she demanded of the defendant the return of the jewelry; that the defendant failed to comply, on each occasion asking for two or three days longer, and up to the date of the trial, which was over one year from the date of the delivery of the property, he had failed to make a return of the jewelry or to give any account thereof.

"We think the evidence in this respect entirely sufficient to show the conversion of the property by the defendant to his own use."

In this case the defendant made no effort to explain what he had done with the property or to give any account thereof or of the proceeds thereof. The evidence of conversion to his own use was clear.

In the case of the United States vs. Ongtengco (4 Phil. Rep., 144) it appeared that the defendant received from the complainant jewelry of the value of P1,510; that it was delivered on the condition that the defendant sell it on commission and if not sold to return the same or, if sold, the value thereof on the 31st day of July of the same year; that the defendant willfully and feloniously misapplied, embezzled, and appropriated to himself the said jewelry and the value thereof without the consent and to the prejudice of the complainant. In that case the court held (p. 146):

"Instead of doing this he appropriated to himself the said jewelry by false pretenses and in bad faith, thus deceiving the owner of the jewelry, to her prejudice.

"The guilt of the accused is evident, since up to the time the complaint was filed he had neither returned the jewelry nor given any account of the same or of the price thereof. The fact that he pleaded not guilty; that he gave the owner of the jewelry part of what he embezzled, 300 pesos; that he delivered some jewelry (which was afterwards returned to him) as a guaranty for his obligation; and, finally, the fact that he made a third person offer to reimburse the amount embezzled, do not exempt him from liability, since neither the jewelry was returned nor the price thereof was paid to the owner of the same, and whatever acts the defendant did, they all prove that he embezzled the jewelry or the value thereof,"

Here again the conversion of the property to the use of the accused was clearly proved.

In the case of the United States vs. Ramirez (9 Phil. Rep., 67) it appeared that the defendant received from George W. Walker the sum of P65 for the purpose of investing the same in the business of buying and selling fish in this city, with the obligation to account for and deliver the said sum of P65 or the proceeds thereof, either in money or property of the said business, to the 'said Walker; that, notwithstanding the lapse of seven months and twenty-seven days, the accused did not account for the money received nor produce the fish which he ought to have bought with the P65; that the defendant made no explanation whatever of what became of the P65 or, if used, what became of the fish bought therewith. The court held that under the circumstances of the case there was sufficient evidence to hold that the defendant had converted the said money to her own use and that she was therefore guilty of estafa.

In the case of the United States vs. Anacleto (3 Phil. Rep., 172), it appeared that the defendant asked one Modesto for some jewelry to sell, giving as a reason for that request that she knew of some prospective purchasers. The woman Modesto thereupon delivered them to the accused on the 10th of June. She never recovered either the jewels or their valuer She attempted to do so continuously for more than four months. The defendant refused and

failed to give any account whatever of the jewels or what had become of them other than to say, that she had sold them, neglecting to state to whom she had sold them, for what price she had sold them, or whether or not she had received the pay for them. The court in that case said (p. 174):

"The crime was committed by fraud and deceit, on the pretext that the defendants had some prospective purchasers for the jewelry. Relying upon this statement the owner delivered the jewels."

Here the evidence of conversion to the use of the accused was entirely clear. It should be noted also that the defendant denied having received the jewelry.

In the case of the United States vs. Singuimuto (3 Phil Rep., 176) it appeared that the defendant received 300 sacks of rice for sale on commission and was to deliver their value to Lieut. William H. Bell, and that he denied ever having received the said 300 sacks of rice. He was convicted because of his denial as well as for having sold the same and converted the proceeds to his own use.

In the case of the United States vs. Guzman (1 Phil. Rep., 138) it appeared that on October 16, 1900, the defendant went to the house of another woman in the district of Santa Cruz and, on the pretext that she had a purchaser who wished to see the jewels, took from the latter several pieces of gold jewelry, set with diamonds, of the total value of P730. These the defendant promised to return or in case they were sold to pay over their value on the afternoon of the same day. As she did not do so, the son of the owner of the jewelry went next day in search of the defendant. He was unable to find her until after some days had passed. Then the defendant pleaded with the owner of the jewels that she be given an extension of time for their return. She failed, however, upon various pretexts to return the jewels. In explanation of what became of the jewels the defendant asserted that she had delivered them to a broker, who stated that she either lost them or that they were stolen from her. The court held upon this evidence that the defendant was guilty of estafa. The evidence of misappropriation or conversion to the use of defendant or of some other person was clear.

In the case of the United States vs. Ner (4 Phil. Rep., 131) it appeared that the defendant received from another certain jewelry belonging to the latter, consisting of four rings, three pairs of earrings, and two breastpins, all set with diamonds, of the total value of P869; that this jewelry had been given to the defendant to be sold by him on commission ; that instead of doing so the defendant, with the intention of profiting thereby, misapplied and embezzled the value of said jewelry to the prejudice of the owner thereof. The court found the defendant guilty, predicating that decision upon the foregoing facts and upon the further fact that the defendant "did not give any account as to the whereabouts of the jewelry or the value thereof,"

In the case of the United States vs. Jockers (7 Phil Rep., 464) it appeared, as stated by the court, that "the accused was employed by Weingarten Brothers to peddle on commission in the city of Manila cheap jewelry, collars, cuffs, underwear, and other articles of like nature. On the 16th of February, 1906, he informed his employers that he had a special opportunity to make a sale to two Turks who were to meet him that evening at the Waldorf Hotel. Upon this representation he was intrusted with goods valued at P267.18 Philippine currency, for which it was understood he would render an account the following day, the terms of his commission obligating him to return the goods intrusted or the money received therefor, less his commission."

The court said (p. 465):

"It does not appear whether this representation was or was not made in good faith, but the accused failed to return on the following morning as agreed, and he left the city of Manila, taking the goods intrusted to him to some of the outlying barrios and municipalities, where he remained until the 24th of February, when he was arrested at the instance of his employers.

"During his absence he sold various articles from his stock amounting to P37.77 Philippine currency, for which he failed to make an accounting, the rest of the goods being found in his possession and being returned to his employers.

"The information charges the accused with estafa of all the goods intrusted to him, but we are of opinion that, as to the goods unsold and which were returned to the owners, the charge of estafa can not be maintained. The evidence of record strongly tends to establish the fact that in taking the goods intrusted to him outside of the city of Manila he was merely seeking a better field for his peddling operations and that it was not his intention to appropriate these goods to his own use or to make away with the proceeds after selling them. The fact that he did not return at the time stipulated, and the fact that he went beyond the limits of the city of Manila without the permission of his employers, taken by themselves and without any other evidence as to his motive, might and probably would be sufficient to raise the presumption that it was the accused's intention to make away with all the goods intrusted to him, but his conduct during his absence appears to have been wholly inconsistent with such an intention, and we think in view of all the circumstances that it affirmatively appears that he at no time entertained such a plan."

In this case the defendant was declared not guilty of the conversion of the goods unsold because of the lack of intention to convert to his own use, but he was held to be guilty of converting the proceeds resulting from the sale of the remaining merchandise, amounting to P37.77.

It is apparent that the cases above set forth do not sustain the contention of the prosecution that the defendants in the case at bar are guilty of the crime of estafa. In all those cases there was present evidence of the conversion of the goods by the defendant to his own use or to the use of some other person.

Paragraph 5 of article 535 of the Penal Code is as follows:

"Art. 535. The following shall incur the penalties of the preceding articles:

* * * * *

"5. 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 for administration or in any other character producing the obligation to deliver or return the same, or who shall deny having received it."

Commenting upon that subdivision, Groizard, volume 5, page 16, says:

"Other classes of estafa:

"A new type now presents itself for study. In the four numbers which we have just commented upon the acts therein punished have deceit, artifice, machination, or cunning employed by the agent to obtain and defeat the confidence of the passive subject of the crime as a common factor and prevailing circumstance. With regard to the persons accused in the present case such fraudulent activity as is employed by the guilty in order to obtain possession of a thing, or to effect a fraud, does not exist, or exists in but few cases and in limited proportions. Impudence, barefacedness, covetousness, and disloyalty employed in taking advantage of an opportunity take here the place formerly occupied by deceit. It has been rightly stated by the Supreme Court 'that if the crime of estafa generally contains the element of deceit, the one specially (fennel in paragraph 5 of article 548 of the Penal Code (equivalent to No. 5 of article 535 of that for the Philippines) implies on the part of the person committing it a more or less serious abuse of confidence, it being the purpose of the criminal to obtain and benefit, to the prejudice or fraud of third persons, availing himself of any of the means specified in the code.' (Decision of November 26, 1884.)"

Viada, discussing this same subdivision, says in his Commentaries on the Penal Code (vol. 3, 4th ed., p. 514) :[1]

"In the matter of estafa, this is unquestionably the article which is most frequently applied in practice, it being

also the one that presents the most difficulties. It is therefore advisable to take carefully into consideration the essential elements of the same. The fact of having received a thing constitutes the first element, and in this the said crime differs from that of theft, the first element of which is the taking of the thing. It is important to bear in mind such an essential circumstance so as not to mistake the one crime for the other. In Question 11 of the commentary on article 533, we have already seen that, by reason of having overlooked such an important distinction, the appeal in *casación* interposed by the public prosecutor in the case therein dealt with was rejected. The second requisite consists in that the thing received be money, goods, or any other personal property, in a word, anything which, owing to its value, may be an article of trade, among which we think are deeds and documents the appropriation or misappropriation of which might cause a material prejudice as, for example, a deed of sale, a promissory note, a receipt for money, etc. The third element of this crime consists in that the above-stated things may have been received by virtue of deposit, on commission, or for administration, or under any other title producing the obligation to deliver or return them; that is, to deliver or return the same thing that was received (not an equivalent thereto in kind or quality), as happens with the deposit, commission, and administration specially dealt with in said article, and also, for example, in the contract of commodatum by which the bailee is required to return the same thing that he received for a stated use. Finally, the fourth and last requisite essential to the crime defined in this number consists in the appropriation or misappropriation of the thing by whoever received it under such a title and which obliges him to make restitution thereof, or denying the fact that he received it."

The proposition that an accused may not be convicted of *estafa* without proof of the misappropriation or improper diversion of the property intrusted to his care to his own use or to the use of another, sanctioned as we have seen by the supreme court of Spain and by the great commentators on the Penal Code, and by the decisions of this court, is supported by the American authorities also. (*Pullan vs. State*, 78 Ala., 31, 56 Am. Rep., 21; *Ex Parte Hedley*, 31 Cal., 109; *Lycan vs. People*, 107 111., 423; *State vs. Snell*, 9 R. I., 112; *Webb vs. State*, 8 Tex. App., 310; *Griffin vs. State*, 4 Tex. App., 390; *State vs. Hill*, 47 Neb., 456; *Chaplin vs. Lee*, 18 Neb., 440; *State vs. Adams*, 108 Mo., 208; *State vs. O'Kean*, 35 La. Ann., 901; *Ker vs. People*, 110 111., 627; *U. S. vs. Sander*, 6 McLean (U. S.), 598; *Commonwealth vs. Smith*, 129 Mass., 104; *State vs. Baumhager*, 28 Minn., 226; *Calkins vs. State*, 18 Ohio State, 366; *People vs. Gray*, 66 Cal., 271; *People vs. Treadwell*, 69 Cal., 226; *Spalding vs. People*, 172 111., 40; *State vs. Smith*, 47 La. Ann., 432; *Commonwealth vs. Tuckerman*, 10 Gray (Mass.), 173; *People vs. Hurst*, 62 Mich., 276; *People vs. Galland*, 55 Mich., 628; *People vs. Wadsworth*, 63 Mich., 500; *State vs. Fritchler*, 54 Mo., 424; *State vs. Noland*, 111 Mo., 473; *People vs. Wyman*, 102 Cal., 552; *U. S. vs. Fish*, 24 Fed. Rep., 585; *Ross vs. Innis*, 35 111., 487; *People vs. Lapique*, 120 Cal., 25.)

This court has held that the mere failure to return the goods is not sufficient proof of conversion.

In the case of the *United States vs. Dominguez* (2 Phil. Rep., 580) the court says (p. 581) :

"We find it necessary to pass upon only one of the questions presented by the record. The appellant makes the following statement in his brief in this court:

"There is no doubt that the defendant has the character of a receiver, consequently it is his duty to return what he has received in trust. This being the case, the punishable act involved in a refusal to so return implies a damage to the depositor or his assignee, inasmuch as the latter is illegally deprived of something which belongs to him; and this refusal and damage is covered by the fifth clause of article 535 of the Penal Code."

"This is not the law. The paragraph cited from the Penal Code says that the depositary shall be guilty of *estafa*, not if he refuses to return the thing deposited but if he denies that he ever received it. In this case the defendant has never denied that he received the rice as a deposit; on the contrary, when the demand was made upon him by the private prosecutor on December 7, 1901, he said that he had delivered it to Alejandro Cornejo a few days before the death of Borrás, the bailor, by the written order of the latter. The defendant never having denied that he received the deposit, he can not be convicted unless it is proved that he has appropriated or

diverted it. The mere refusal to return the article is not in itself sufficient to prove this. In addition to this refusal, there must be evidence in the case from which the court can see that the depository has appropriated it to his own use or to that of another. There is no such evidence. On the contrary, it is entirely probable that, after the departure of the defendant from Libmanan" on September 20, 1898, two days after the uprising of the civil guard in Nueva Caceres, the rice was seized by the revolutionists and appropriated to their own uses."

This court has held also that a sale of goods, taken to be sold on commission, for a less price than that agreed upon is not a conversion, misappropriation, or diversion of the property.

In the case of the United States vs. Torres et al. (11 Phil. Rep., 606) it was held that when an agent who has been intrusted with goods to be sold at a price fixed by the owner sells them at less than the price fixed and appropriates to his own use the money realized, the crime of estafa which he thereby commits consists in the misappropriation and not in the wrongful sale. In that case Ramona R. Evangelista delivered certain jewels to Juliana Torres under the obligation on the part of Juliana Torres to sell them at a fixed price for each jewel or in case she could not sell them at that price to return them on a certain date. She sold a ring for P300 for which the selling price was fixed by her agreement at P600. She also sold a pair of earrings for P100 for which the price fixed in the agreement was P200. The question before the court was, Did the act of the commission agent in selling goods received for less than the price fixed by the contract of commission constitute the crime of estafa? In discussing this question, the court said (p. 608) :

"If the act of selling the goods received on commission at a price lower than the one fixed constitutes the crime of estafa, then the owner of the thing sold has not lost its legal possession, and it should be restored to him either by the guilty person or by the third person who, in an illegal manner, obtained the possession of the thing illegally sold; and in that case the articles of the Penal Code above cited are applicable, and the thing misappropriated should be returned either by the guilty person or by the third person who unlawfully retains it in his possession as the object of an estafa committed by the one who sold it to him.

"But, if the act in question does not constitute estafa, since the act of transferring a thing sold to a third party in such a manner, as it were between principal and agent, is not punished by any statute, although illegal on the part of the latter, yet after all it was not illegal as between the seller and the purchaser, and it is sufficient that it was not illegal (it not proceeding from a crime) in order that the acquisition be legal and the possession be just and lawful. The unlawful conduct of the seller in exceeding the powers of his commission does not affect the purchaser in good faith, who was not proven to have been aware of the illegality of such conduct.

"In deciding this question we hold:

"That the fact of an agent selling the thing received on commission for a lower price than the one fixed does not constitute the crime of estafa, it not being penalized as such in the Penal Code; but the act of the commission agent in misappropriating the price obtained by the sale, whatever it may be, constitutes estafa, because it constitutes an appropriation for his private purposes of the money received on commission, or realized by the commission which he undertook.

* * * * *

"The crime did not consist in the sale of the thing, since the owner thereof delivered it to the seller for that purpose; but it consisted in the seller's misappropriating the proceeds of the sale, * * *."

This latter case goes a long way toward being decisive of the case at bar upon the facts as well as the law. In that case the contract expressly prohibited the sale of the jewelry for a price less than that fixed by the agreement between the parties. If the accused might sell a ring for P300, the selling price of which was fixed by the agreement at not less than P600, and not be guilty of misappropriation or misapplication, at what price would he need to sell before he would be guilty? At P200? At P100? Whether or not he would be guilty does not depend

upon the amount for which he sells, but upon the quality of his act His sale at an unreasonable price may be unwise, unbusinesslike, and ruinous; but it is not criminal. It may be gross neglect of duty, but it is not crime. His civil liability is apparent; but his criminal liability remains yet to be established. Such a sale would be an extremely suspicious circumstance and but little additional evidence would be required to establish the crime; but the point is that more evidence would be required. The important thing is the purpose with which it was done - the intent. It is that which qualifies the act as criminal or not criminal. The amount for which the jewelry was sold does not, of itself, determine the quality of the act from the standpoint of the criminal law. The real question is, Was it done for his own benefit or for the benefit of another? To be sure, such sale injured the other party to the contract. But that is not sufficient. There must be the intent to benefit himself or another. This is the doctrine almost universally recognized, as seen by the authorities above cited.

In the case at bar there is wanting, under the authorities, almost every element of the crime charged. There was no conversion, misappropriation, or diversion of the property for the benefit of the accused or of any other person. No intent to convert, misappropriate, or misapply has been shown. He kept none of the proceeds of the sales. Those, such as they were, he turned over to the owner. The fact that he did not return the jewelry is not sufficient. (U. S. vs. Dominguez, *supra*; State vs. O'Kean, 35 La, Ann., 901; People vs. Hurst, 62 Mich., 276,) The fact that he did not sell in accordance with the terms of the contract (if that is the fact - the only writing between the parties, Exhibit , showing the contrary) is not sufficient. (United States vs. Torres, *supra*.) To permit the accused to sell the property for a sum ridiculously and ruinously (to the owner) below that fixed by the contract is fully as dangerous to the interests of the owner as to permit him to sell on credit. If he is exempt from criminal responsibility in the one case there appears no reason why he should not be in the other.

The proof failing utterly to show a conversion of the property to the use of defendant or of any other person, the defendant should be acquitted.

The judgment of the court below is, therefore, reversed, the defendant acquitted, and his immediate discharge from custody ordered.

Arellano, C. J., Mapa, Johnson, and Carson, JJ., concur.

Torres, J., dissents.

[1] Vol. 5, 3d ed.

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