

THE UNITED STATES, PLAINTIFF AND APPELLEE, VS. LINO EGUIA LIM BUANCO (ALIAS LIM BUANCO) AND LUCIANO DE LOS REYES, DEFENDANTS AND APPELLANTS.

G.R. No. 5240. November 19, 1909

Ponente: ELLIOTT, J.

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ELLIOTT, J.:

The defendants, Lino Eguia Lim Buanco, (alias Lim Buanco) and Luciano de los Reyes, were charged jointly with the crime of estafa. Demurrers to the information were interposed and overruled. Separate trials were then demanded by the defendants and granted. Both defendants were found guilty as charged, and each was sentenced to two years and ten months of presidio correccional in the public carcel of Bilibid, in the city of Manila; to jointly and separately indemnify the Banco Español-Filipino in the sum of P2,273, Philippine currency, and in the event of insolvency, to suffer subsidiary imprisonment for the time and in the manner and place prescribed by law.

The information charged:

"That on or about the 6th day of October, 1906, in the city of Manila, Philippine Islands, the said Lino Eguia Lim Buanco (alias Lim Buanco) and Luciano de los Reyes, conspiring and confederating together, did then and there, willfully, unlawfully and feloniously, and with intent of gain, defraud El Banco Español-Filipino, a corporation then and there duly organized, existing and doing a general banking business in the city of Manila, Philippine Islands, of and in the sum of two thousand (P2,000) pesos, Philippine currency, by then and there pretending and representing that the said Lino Eguia Lim Buanco (alias Lim Buanco) did then and there possess property and credit which the said Lino Eguia Lim Buanco (alias Lim Buanco) did not possess and the use of other similar deceit, in this, to wit: That on or about the said 6th day of October, 1906, the said Lino Eguia Lim Buanco (alias Lim Buanco) then and there prepared, drew, executed, signed, presented, and caused to be presented for payment to the said El Banco Español-Filipino his personal check upon the said El Banco Español-Filipino, then and there doing a general banking business in the city of Manila, Philippine Islands, as aforesaid, for the sum of two thousand (P2,000) pesos, Philippine currency, a true copy of which check, together with all the indorsements and notations thereon, made both before and after the same was paid by the said El Banco Español-Filipino, is hereto attached, marked 'Exhibit A,' and made a part hereof, and the said Lino Eguia Lim Buanco (alias Lim Buanco) and Luciano de los Reyes, each well knowing that the said Lino Eguia Lim Buanco (alias Lim Buanco) did not then and there have any funds to his credit in said bank, and conniving, conspiring and concerting together to defraud said bank as aforesaid, did then and there falsely and fraudulently state and represent to said bank and its agents, and particularly to Lino Eguia, one of the agents and the cashier of said bank; that the said Lino Eguia Lim Buanco (alias Lim Buanco) then and there had sufficient funds deposited to his credit in said bank to meet and pay said check and that the said Lino Eguia Lim Buanco (alias Lim Buanco) was then and there a creditor of said bank in an amount more than equal to said check and that the said bank was obligated to pay and should then and there pay to the said Lino Eguia Lim Buanco (alias Lim Buanco) the amount of said check; that the said Luciano de los Reyes was then and there a clerk in the banking institution of 'El Banco Español-Filipino' and as such was in charge of the book containing the entry and record of the account of the said Lino Eguia Lim Buanco (alias Lim Buanco) with

said 'El Banco Español-Filipino' and the said Luciano de los Reyes, cooperating, as aforesaid, with the said Lino Eguia Lim Buanco (alias Lim Buanco) to defraud the said 'El Banco Español-Filipino,' at the request and in cooperation with the said Lino Eguia Lim Buanco (alias Lim Buanco), did then and there falsely state and cause it to appear upon the books of the said bank and in the account of the said Lino Eguia Lim Buanco (alias Lim Buanco) that the said Lino Eguia Lim Buanco, (alias Lim Buanco) had to his credit in said bank more than enough to pay the said check of two thousand (P2,000) pesos, and was then and there a creditor of said bank in more than the amount of said check; and did further then and there, falsely and fraudulently in combination with the said Lino Eguia Lim Buanco (alias Lim Buanco), as afore-said place upon the back of said check over his signature the word 'corriente,' thereby stating and causing it to appear and be understood by the said 'El Banco Español-Filipino' and its agents, and particularly the said Lino Eguia, agent and cashier of said bank, that the said Lino Eguia Lim Buanco (alias Lim Buanco) had then and there deposited to his credit in said bank funds more than sufficient to pay the amount of said check and that the said 'El Banco Español-Filipino' was obligated then and there to pay and should pay to the said Lino Eguia Lim Buanco (alias Lim Buanco), the amount of said check; that relying on the false and fraudulent representations, as aforesaid, of the said Lino Eguia Lim Buanco (alias Lim Buanco), and Luciano de los Reyes the said 'El Banco Español-Filipino' was induced to pay and did pay to the said Lino Eguia Lim Buanco (alias Lim Buanco) and his order the said sum of two thousand (P2,000) pesos, Philippine currency, which said sum the said Lino Eguia Lim Buanco (alias Lim Buanco), and the said Luciano de los Reyes then and there converted to their own use, to the damage and prejudice of the said 'El Banco Español-Filipino' in the said sum of two thousand (P2,000) pesos, Philippine currency, equivalent to and of the value of ten thousand pesetas, Philippine currency.

"All contrary to law."

The evidence shows conclusively that for at least three and a half years prior to the 6th day of October, 1906, Luciano de los Reyes was employed in the Banco Español-Filipino, and there served and acted as bookkeeper and check registry clerk. During that time he was in charge of certain current account-books of the bank, and it was his duty to inspect certain checks presented to the bank for payment, including those drawn by Lim Buanco; to examine the account of the maker of said checks, and determine whether or not the drawer of the check had a sufficient balance to his credit to justify the payment of the check. In the performance of these duties, Reyes was required to indorse upon each check, if it was entitled to payment, the words "Corriente. P. O. Luciano de los Reyes." After the check was marked in this manner it was passed to the cashier of the bank, who in reliance upon the indorsement, paid or ordered the same to be paid.

During the period referred to the defendant Lim Buanco had an account with the bank, and drew large sums of money therefrom by means of checks signed by him, and inspected and indorsed as above by Reyes.

During this time a conspiracy existed between the defendants Lim Buanco and Reyes for the withdrawal of funds from the bank by Lim Buanco, regardless of whether he had any funds in the bank to his credit, and in furtherance of this conspiracy the entries in the account of Lim Buanco on the books of the bank were fraudulently and illegally manipulated by Reyes in such a manner as to make the books show an apparent credit balance, when in fact Lim Buanco was owing the bank a large amount of money.

On the 6th day of October, 1906, Lim Buanco drew a check on the Banco Español-Filipino for the sum of P2,000, and this check was through the agency of another bank in which it was deposited by Lim Buanco, presented in due course of business to and paid by the Banco Español-Filipino. Before the check was thus paid, Reyes, acting in his capacity as an employee of the bank, indorsed thereon the words "Corriente. P. O. Luciano de los Reyes," although at the time when this indorsement was made Lim Buanco had no actual credit balance in the bank, and no permission had been given him by any officer or officers in authority of said bank to overdraw his account. In this manner the defendants Lim Buanco and Reyes, in furtherance of the conspiracy to cheat, deceive, and defraud the bank, secured the payment of the check, although they both knew at the time that the defendant Lim Buanco

had no credit balance in said bank, but was in fact indebted to the bank in the sum of more than 300,000 pesos, which had previously been withdrawn from the bank by means of similar checks drawn by Lim Buanco and fraudulently indorsed as correct by Reyes.

The amount of money thus fraudulently obtained from the bank by means of the check as aforesaid, with interest thereon at the rate of 6 per cent per annum from the date of the check to the date of the decision in the court below, to wit, January 16, 1909, amounted to the sum of P2,273, Philippine currency, equivalent to 11,365 pesetas, which the court determined to be the damage occasioned to and suffered by the bank by reason of the aforesaid fraudulent conduct of the defendants, acting together in furtherance of said conspiracy. No part of the said sum has been returned or paid back to the Banco Español-Filipino by Lim Buanco, or by Reyes, or by any person acting for or in his or their behalf. The trial court also found that Lim Buanco and Reyes each had voluntarily admitted the crime as charged against him.

Separate trials were granted to the defendants, but the court, after both were convicted, embodied its findings of facts and conclusions in one decision, and one joint sentence was pronounced upon the defendants. Thereafter each defendant separately moved for a new trial, which was denied, and an appeal was taken to this court, where, as in the court below, they appear by separate attorneys. Although separate briefs are filed, the various assignments of errors raise essentially the same questions.

1. It appears that the court in fact granted the motion of the defendants for separate trials, and that Lim Buanco was tried on January 7 and 12, 1909. This trial was followed immediately by that of Reyes, and on January 16, after both trials were completed, the court announced its findings of facts and conclusions in each, case in one decision, and imposed one sentence which included both defendants. The practice of entering one sentence against several defendants thus jointly charged and separately tried is not that which prevails in the United States, but it was approved by this court in *United States vs. Fernandez* (9 Phil. Rep., 269), and in the recent case of *United States vs. Raymundo*, No. 4947.[1]

It appears clearly that the sentence as to each defendant was based upon the evidence submitted upon the separate trial of his case. Every right intended to be protected, and every purpose sought to be effected by the privilege of a separate trial were effectually preserved. No rights which accrue to a defendant after the decision and sentence can be prejudicially affected by the fact that another defendant is included in that sentence. The right of each to move for a new trial, and to appeal and have his appeal considered upon the record made in his case is preserved unimpaired, and in its entirety. The practice is convenient, and saves much time and labor, and as it can in no way prejudice the rights of a defendant, there is no reason why it should not be approved.

2. In the statement preliminary to the findings, and by way of recital, the trial court stated that neither of the defendants testified as a witness in his own behalf. The defendants contend that this was a violation of their constitutional right. In proceedings under the jury system it is generally provided by statute that the court must not in the presence of the jury refer to the fact that the defendant has availed himself of the right to decline to be a witness, but much of the importance of the matter disappears when the case is tried by a court without a jury. The judge is necessarily in possession of the fact that the defendant has a right to testify or not, as he may be advised, and this statutory prohibition is upon the court drawing any inference of guilt from the fact that the defendant elects not to testify. Under the Code of Criminal Procedure, a defendant has the right to appear and defend in person or by counsel, and if he offers himself as a witness he may be cross-examined as any other witness, but "his neglect or refusal to be a witness shall in no manner prejudice or be used against him." The question under this statute is not whether the court referred to the fact that the defendant did not testify, but whether his failure to testify was used to his prejudice. The reference here is in the preliminary statements and it is very clear from the entire proceedings and the sentence that this circumstance was not considered as an evidential fact, and that it in

no manner affected the conclusion reached by the court upon the question of the guilt of the defendants or either of them.

3. It is urged that the complaint does not allege facts sufficient to constitute the crime of estafa, because it does not allege specifically that Lim Buanco did not at the time when the check was drawn have funds to his credit in the bank sufficient to pay the check. The position is without merit, because the complaint does in fact allege that the check was drawn by Lim Buanco, and "that the said Lino Eguia Lim Buanco (alias Lim Buanco), and Luciano de los Reyes, each well knowing that the said Lim Buanco did not then and there have any funds to his credit in said bank, and conniving, conspiring and concerting together to defraud the bank, etc." Under the liberal rule of construction prescribed by General Orders, No. 58, and frequently approved by this court, this, when read in connection with the rest of the complaint, must be construed as a sufficient allegation that both Lim Buanco and Reyes when the check was drawn knew that Lim Buanco did not have sufficient money in the bank to pay the same. (See *U. S. vs. Cajayon*, 2 Phil. Rep., 570.)

It is also claimed that the court erred in finding the defendants guilty of the crime of estafa, because the evidence fails to prove the essential elements necessary to constitute this offense. This claim rests upon the assertion that the evidence shows that the money must have been obtained with the consent of the bank; that Lim Buanco never presented the check to the bank, or made any representations to the bank nor any person that he had sufficient money in the bank to pay the check; that he merely used the check in his commercial transactions with the Chartered Bank, of India, Australia, and China, and had it credited to his account in that bank, with the understanding that it would be presented to the Banco Español-Filipino, and if paid, the credit should stand; otherwise it should be canceled. It is true that Lim Buanco drew the check and deposited it to his own credit in the Chartered Bank of India, Australia, and China, by which it was presented for payment to the Banco Español-Filipino, upon which it was drawn. The Chartered Bank of India, Australia, and China was not defrauded, because the check was in fact paid. The implied representation to the Chartered Bank that the check would be paid in the ordinary course of business was made good, and therefore the Chartered Bank suffered no loss, but the argument based on this fact loses sight of the real offense which was committed against the Banco Español-Filipino. That bank never intended to allow Lim Buanco to overdraw his account, although it did intend to pay the check; that is, it intended to perform the physical act of paying the check, but that act was induced by the combined fraudulent act of Lim Buanco and Reyes. Through the fraudulent machinations and devices of these two defendants, the Banco Español-Filipino was induced to part with its money. In order to obtain this result, Lim Buanco drew the check, and Reyes, acting and operating in connection with him, falsified the records of the bank, and thus accomplished their fraudulent purpose. The allegation in the information, and the statement in the findings of the trial court, that the defendants conspired and confederated together to defraud the bank, and that in furtherance of the conspiracy the defendants did defraud the bank, means no more than that they operated together, and so operating succeeded in defrauding the bank.

Counsel for the defendant Reyes contends that the court committed an error in holding that the evidence shows that Reyes is guilty as principal of the crime of estafa. Upon this record we are satisfied that both the defendants are equally guilty. Each performed the part which was necessary to enable them to accomplish the criminal purpose they had in view. Article 535 of the Penal Code says that:

"The following shall incur the penalties of the preceding articles:

"1. He who shall defraud others by using a fictitious name, by assuming fictitious power, influence, or attributes, or by pretending to possess imaginary property, credit, commission, enterprises, or business, or by using any other similar deceit that is not one of those mentioned in the following cases."

Lim Buanco certainly by implication represented to the bank that he possessed a credit to which he was not

entitled, and with the assistance of Reyes he gave that claim the color of truth, and thus deceived the bank. The fact that Reyes falsified the accounts-current of Lim Buanco, making him appear as a creditor when as a matter of fact he was a debtor of the bank, together with the fact that he acted in collusion with Lim Buanco, made him guilty of a deceit under the province of the paragraph above quoted. We can not see that this conclusion is in the least affected by the fact that under the by-laws of the bank it may have been the duty of the directors of the bank to ascertain

the correctness of the entries made by Reyes before the payment of the check. The fraudulent conduct of Reyes can not be deprived of its criminal character by the fact that other officers, directors, or employees of the bank may have been careless in the performance of their duties. Whatever may have been the strict duty of the other officers of the bank, the fact remains that Reyes was guilty of fraudulently manipulating the records of the bank, and he can not escape the legal consequences thereof by showing that if others had properly performed their duties he would not have been able to have accomplished anything by his fraudulent acts. We are referred to a judgment of the supreme court of Spain of March 22, 1871, to the effect that one who misstates the boundaries of land upon which he places a mortgage to secure the payment of a loan of money, is not guilty of the crime of estafa, because such misstatement did not amount to a false representation that he owned any property, credits, or business which he did not have. We can not see that this decision is at all applicable to the present case. Here the bank was deceived by the affirmative act of Reyes, acting in conjunction with Lim Buanco. In the case referred to the boundaries of the land were well known, and the creditor had the right to ascertain for himself the superficial area of the property before he accepted the same as security. Had the party by some fraudulent suggestion or device misrepresented the area of the land, and prevented the person to whom he was giving the mortgage from making any examination for himself, it is probable that a different conclusion would have been reached.

It is impossible to accept the contention that this was merely a case of overdraft on the part of Lim Buanco, and that the bank intentionally and in the ordinary course of business permitted the overdraft. All the facts are inconsistent with such a claim, and the evidence fails to justify the conclusion that the bank or its proper authorities ever intended to permit Lim Buanco to overdraw his account. It is somewhat difficult to understand why these irregularities, which extended over many months, were not previously discovered, but the failure earlier to discover the fraud does not deprive the acts of the defendants of criminality.

The defendants contend that the crime charged in the information is conspiracy, and not estafa. As we read the complaint and consider the evidence, the conspiracy referred to therein means no more than an agreement or understanding between the parties that they should work together to accomplish a fraudulent purpose. The crime of conspiracy as known to the common law does not exist under the system embodied in the Penal Code. Under the common law, a combination of two or more persons to do an unlawful act by lawful means, or a lawful act by unlawful means, to the prejudice of an individual or the public, is a distinct offense. The Penal Code defines certain acts as conspiracies and makes them punishable, and the statutes of the Philippine Islands have created certain crimes which are denominated conspiracies. 'Article 4 of the Penal Code says that there is a conspiracy when two or more persons act together for the commission of a crime, and decide to commit it, but it also provides that a conspiracy or proposition to commit a crime is punishable only in the cases in which the law specifically makes them so. A penalty for such conspiracies is provided in but a few instances. Article 137 provides that conspiracies to commit any of the crimes mentioned in the three preceding articles, which relate to the crime of treason, shall be punishable with the penalty of presidio mayor. Article 157 imposes the penalty of reclusion perpetua to death upon any person who shall kill the king, and article 158 provides that a conspiracy to commit such a crime shall be punished with reclusion temporal. Article 164 provides that a conspiracy to kill the immediate successor to the crown, or the regent of the kingdom, shall be punished with the penalty of prision mayor in its medium and maximum degrees. Article 235 provides that conspiracies to commit the crime of

rebellion shall be punished with the penalty of prision correccional in its medium and maximum degrees, and article 240 provides that a conspiracy to commit the crime of sedition shall be punished with the penalty of arresto mayor or prision correccional in its minimum degree. These are the only conspiracies which are made punishable by the Penal Code. (See 3 Alcobilla, 281.) Sections 4, 7, and 8 of Act No. 292, and section 1 of Act No. 1692, declare that certain specified acts shall constitute criminal conspiracies, and provide for their punishment, but the legislature has not yet deemed it advisable to adopt the general common law of conspiracy. It thus appears that when two or more persons act together for the commission of a crime, and proceed to commit the crime of estafa, the act is not a criminal conspiracy under the Penal Code, because no penalty has been provided therefor nor is it within the provisions of Acts Nos. 292 or 1692. No crime of conspiracy is attempted to be charged against the defendants by this information. They are charged with the crime of estafa, committed in the manner described in the information, and upon the evidence they were properly convicted of that crime.

The judgment and sentence of the trial court should be and are therefore affirmed, with the costs of this instance against the appellants. So ordered.

Arellano, C. J., Torres, Johnson, Carson, and Moreland, JJ., concur.

[1] Page 416, *supra*.

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