

THE UNITED STATES, PLAINTIFF AND APPELLEE, VS. RAFAEL MELAD, DEFENDANT AND APPELLANT.

G.R. No. 9603. August 07, 1914

Ponente: MORELAND, J.

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MORELAND, J.:

This is an appeal from a judgment of the Court of First Instance of Cagayan Province convicting the accused of the crime of estafa and sentencing him to one year one month and eleven days of imprisonment, to pay the costs, and to indemnify Fernando Molina Martell in the sum of P130, with subsidiary imprisonment in case same is not paid.

It is the undisputed evidence that on the 19th of April, 1913, the accused was an employee of Fernando Molina Martell and that, on said date, he was dispatched by his employer to Tuguegarao to get P130 from the manager of the Tabacalera Company at that place; that the money was delivered to the accused by the Tabacalera Company to be handed to Fernando Molina Martell; that the accused never delivered the money to Martell.

The witness Julian Domingo testified in behalf of the prosecution that the defendant stated to him on the 27th of April, "I brought money, but I lost it in the game," and "I have to wait until the head of Senor Molina gets cold."

Feliciano Villaflor, a Constabulary soldier, a witness in behalf of the prosecution, testified that on April 20, 1913, he saw the defendant in the cockpit of Tuguegarao and that the defendant bet and lost P30 on cockfights.

The accused admitted that he had received the money with the obligation to deliver it to Martell and that he did not deliver it, giving as his reason therefor that on April 19 he tied the money, which was all in silver, in a bag and fastened it behind him on the saddle of his horse. From thence it was lost on the journey. He denied that he lost the money in gambling but claimed that it disappeared together with a bundle of his clothing while he was riding his horse as aforesaid.

Appellant's counsel states in his brief:

"The whole case hinges upon the question whether the story told by the witness who says he saw the accused in the cockpit on April 20, and of the witness who says the accused stated he lost the money 'in the game,' shall be believed, or whether the story of the defendant is accepted."

The trial court, in its decision upon which the judgment of conviction is based, states that the defendant's "explanation of the loss of the money is not credible and that his acts in connection with the loss of same as alleged by him were inconsistent with the theory of innocence." The trial court had all of the witnesses before it and was, therefore, in some ways, in a better position to judge the relative value of their declarations than are we, who see merely the typewritten questions and answers. There is nothing in the record which would intimate, much less demonstrate, that the court failed to take into consideration some material fact or circumstance, or did not weigh accurately the evidence presented, or failed to perform some duty to the accused laid upon him by the law.

While we are of the opinion that the judgment of conviction is well founded, it is our judgment that the court erred

in imposing the maximum penalty. Abuse of confidence, which the learned trial court used as an aggravating circumstance in order to impose the maximum penalty, is one of the essential elements of the crime charged and, therefore, cannot be used as an aggravating circumstance. The medium degree of the penalty should have been imposed.

The judgment of conviction is affirmed, it being understood that the criminal penalty imposed is four months and one day of *arresto mayor*. As so modified, the judgment is affirmed, with costs against the appellant.

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

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