1 Phil. 203

[G.R. No. 441. April 09, 1902]

THE UNITED STATES AND MARIA CONCEPCION LUCIA SEBASTIANA, COMPLAINANTS AND APPELLANTS, VS. MATEO PEREZ, DEFENDANT AND APPELLEE.

D E C I S I O N

MAPA, J.:

The complaint upon which this case was instituted charges the crime of *estafa*, and is drawn in the following language: "Mateo Perez, in April, 1901, in Manila, appropriated the sum of 2,247 pesos, received in thecourse of the administration, to the prejudice of Maria Concepcion Lucia Sebastiana, * * * owner of the said money."

The accused demurred to the complaint under section 4 of article 21 of General Orders, No. 58, upon the ground that the facts charged do not constitute an offense. In support of his contention he alleged various facts tending to demonstrate that the sum of 2,247 pesos mentioned in the complaint had been embezzled by the Chinaman Calixto Santos, by means of the negotiation of a check which the defendant accepted as good in exchange for that amount of money, which check subsequently turned out to be a forgery, and that on this account the said Chinaman has been criminally prosecuted on relation of the defendant for the crime of *estafa* with falsification; that the loss of the said sum which thus occurred constitutes a loss chargeable to the business of the Hotel de Espana, which the defendant was at that time managing, and which should properly be borne by the complaining witness as. owner of the hotel business; that this view being taken by the complainant herself, whom he had informed of what had occurred, she approved the accounts of his management presented to her in November, 1900; that thenceforth their relations and accounts were terminated, to the complete satisfaction of both, as shown by the fact that the complainant in that month took charge of the management of the hotel, and that she sold the hotel to the accused himself in January, 1901, and gave him a complete acquittance for the purchase money, without reservation or protest of any kind; that it was consequently false that he had

appropriated the sum above mentioned as stated in the complaint. For the purpose of proving these allegations the accused presented various documents, which we do not consider it necessary to examine at this time.

Upon the facts alleged and the documents presented by the accused, the court below, by order of July 12, 1901, sustained the demurrer, declaring that the facts charged did not constitute a crime. Against this order the complaining witness appealed.

The counsel for the Government before this court asks that the order appealed be reversed, upon the ground that the facts charged do constitute the crime defined in paragraph 5 of article 535 of the Penal Code.

We concur in this opinion of counsel for the Government. The article cited punishes as guilty of *estafa* those who *appropriate* or misapply *money*, goods, or any other personal property received on deposit or on commission or administration, or by any other title which produces the obligation of delivering or returning the same. It is sufficient to read the complaint to reach the conclusion that upon its face the act charged is literally included within this provision of law. If the accused really received the money in question in the course of administration, and appropriated it, to the damage of the complainant—which is precisely the fact charged—it is evident that none of the elements constituting the crime of *estafa* charged in the complaint is missing; and it is therefore evident also that the facts charged as they appear from the complaint constitute a crime under the law.

We are unable to see how the contrary proposition could be maintained. The accused has not shown it, nor has he even endeavored to show it. What he did was to allege new facts not only different but diametrically opposed to those alleged in the complaint, thereby essentially altering the terms of the question. His allegations tend to show that he did not appropriate the money which the complainant alleges and insists that he did appropriate. It is evident that if this appropriation did not really take place the crime charged does not exist. But that is not the question. At this stage of the case there can be no discussion or demonstration as to the truth or falsity of the appropriation, as this will be the purpose of the evidence taken at the trial. The only question is whether this appropriation, taking it for granted as charged in the complaint, does or does not constitute a crime.

The demurrer of the defendant merely raises a question of law with respect to the criminal character of the facts charged. For the purpose of showing that the demurrer should be sustained the accused should limit himself to these facts, admitting them as the basis of the

discussion just as they appear from the complaint or information, and should demonstrate that even though these facts be true, nevertheless they would not be punishable under the law. Every allegation which tends to deny them or modify them is and must of necessity be irrelevant, because it tends to raise a question of fact, which is not admissible under the peculiar nature of the exception. Consequently, such allegations can not be considered in passing upon the demurrer. We are therefore of the opinion that the order appealed does not conform to the law, because it is based upon facts which not only do not appear from the complaint but which completely alter and destroy its terms.

Counsel for the defendant has expressly prayed in this instance that we declare that the appeal of the complaining witness was improperly allowed, upon the ground that section 23 of General Orders, No. 58, provides that an order sustaining a demurrer by the accused ends the case, and is a bar to another prosecution for the same offense, and that section 44 grants the United States only the right to appeal against such an order. We consider this contention to be wholly unfounded. Section 23 does not deal with appeals, which are specially dealt with in other sections of the general order which determine in what cases an appeal may be allowed. It is unquestionable that the order in question is not unappealable, as the accused appears to contend, because section 44 cited says expressly that it may be appealed against by the United States. With respect to the private individual injured by the offense, as is the complainant in this case, the right to appeal from such an order is recognized in section 107, which, after providing that "the privileges now secured by law to the person claiming to be injured by the commission of an offense to take part in the prosecution * * * shall not be held to be abridged by the provisions of this order," expressly declares that such person, that is, the party injured, may appeal against any decision denying him a legal right. It is unnecessary to add that an order sustaining a demurrer by the accused is such an order, because it tends to make unavailing the rights which the injured party attempts to exercise by means of the complaint. It is evident that it has this effect, because such an order, when final,. constitutes a bar to a continuation of the case or a subsequent prosecution for the same offense charged in the complaint. This order, therefore, being appealable, not only by the United States but also by the party injured, it is evident that the effects of the order must be subordinated to the result of the appeal taken by the latter, and the allowance of the appeal by the court below was perfectly legal and strictly in accordance with the statute.

The allegation of the accused that the order appealed produces jeopardy under the provisions of sections 26 and 28 of General Orders, No. 58, is no less unfounded. The first of these articles is applicable solely to cases in which the accused has been convicted or

acquitted, which can not take place except when a prosecution has been carried through all its stages and a final judgment of conviction or acquittal rendered therein. Section 28 refers to orders if dismissal entered before final judgment, but after the accused has pleaded to a good complaint or information upon which a conviction might be sustained. In this case the accused not only has been neither convicted nor acquitted, but he has not even pleaded to the charge, precisely because he has put in issue, by means of his demurrer, the sufficiency of the complaint as a basis for a criminal proceeding. Furthermore, this being an appealable order against which an appeal has been taken, it is wholly improper to invoke such an order for the purpose of claiming the benefit of jeopardy thereunder, because such an order can not be regarded as final and executory, nor as producing any effect whatsoever until affirmed by the superior tribunal. At all events, the plea of jeopardy should be made before a judge of competent jurisdiction to try a case against the accused, and not before this court, whose jurisdiction in the present case is limited by law to passing upon the appeal taken by the complaining witness.

We therefore decide that the demurrer filed by the accused should have been overruled. The order below is consequently reversed, with the costs of this instance *de oficio.*

Arellano, C J., Cooper, Willard, and *Ladd, JJ.,* concur.

Torres, J., did not sit in this case.

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