6 Phil. 393

[G.R. No. 2732. August 23, 1906]

THE UNITED STATES, COMPLAINANT AND APPELLEE, VS. F. W. WEBSTER, DEFENDANT AND APPELLANT.

D E C I S I O N

TRACEY, J.:

The defendant was forage master, having charge of Government forage in the corral in Manila and in the hay yard at Pandacan, subject to the orders of the quarter-master, who was directly responsible to the United States Government therefor and without whose order no forage could be issued. Upon requisition forwarded by the division quartermaster he issued his orders to the forage master and a dray slip corresponding with it was delivered to the teamster to serve both as his authority to pass the gate and, when signed, as a receipt by the person to whom the forage was to be delivered. The forage master had no authority to receive money from sales or to make any issues except on orders from the, quartermaster's office.

Without orders from the quartermaster or other authority, and upon dray slips made out by himself, the defendant sent out of the corral 186 bales of hay and 138 sacks of oats, of the value of 2,015 pesos, to be delivered to livery stables and individuals, for which the Government received no pay.

The qualified charge of this forage, subject to the orders of a superior, who alone was responsible to the Government for it, without the right on the part of the accused to sell it or to part with the physical custody of it unless on written orders, was not such a possession as to render the abstraction of the property by him malversation instead of theft.

In the month preceding the complaint in this case, the accused, on his plea of guilty, had been sentenced to nine months' imprisonment (*prision correctional* and *prision subsidiaria*) for the theft of 65 bales of hay and 28 sacks of oats of the value of 530 pesos. From the

evidence it is clear that the greater part of the hay and oats did not enter into the quantity for the theft of which he was tried herein, for the reason that the deliveries of the two amounts were proved by Government witnesses, to have been made to different persons and at different places; as to some portion of it, however, there was no such proof. The defendant on his part did not prove the identity of any part of the forage in the two cases nor any connection between them in point of time, place, persons, or plan. The burden of this defense rested upon him and he has failed to establish it.

It is claimed by the accused that oral evidence of the identity of the two offenses was erroneously excluded by the judge. The record reads as follows:

> "Question (by defendant's counsel). I will ask you if your testimony in that case and the facts testified to by you are not the facts about which you have just testified?
>
> "(Objected to as calling for the opinion and conclusion of the witness and as immaterial.)
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> "COUNSEL FOR THE DEFENDANT. I have a plea in this case of former conviction for the same offense charged in this complaint and I propose later to introduce the entire record in the case I am alluding to.
>
> "The Court. I think the record would be the best evidence. The objection is sustained."

Similar questions to other witnesses were ruled out on the same ground.v When the record of the previous conviction was produced it appeared that the accused having pleaded guilty there was no evidence whatever, and the papers contained nothing by which the offense could be identified as to its particulars. In order to avail himself of his exception it was incumbent upon counsel for the accused, either at the time of the original ruling excluding the evidence to have enlightened the judge as to the contents of this record, or else after the production of the record to have had the witnesses recalled and the question put to them anew. The judge was evidently misled by the promise of counsel to produce the record, unaware that it contained no evidence or specifications.

We do not now pass on the objection that the question called for a conclusion rather than a fact.

The defendant was convicted and sentenced to the penalty of five years' imprisonment, with hard labor, and the costs.

The judgment is affirmed with this modification, that the accused is condemned to the penalty of four years nine months and ten days' imprisonment (*presidio correctional*) and the payment to the Government of the value of the property stolen, to wit, 2,015 pesos, and in case of insolvency to suffer corresponding subsidiary imprisonment, not to exceed one year, and also to pay the costs of this appeal. After the expiration of ten days judgment shall be entered in accordance herewith and ten days thereafter the case will be remanded to the court below for execution thereof. So ordered.

Arellano, C. J., Torres, Mapa, Carson, and *Willard, JJ.,* concur.

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