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[G.R. No. 1722. July 15, 1905]

THE UNITED STATES, PLAINTIFF AND APPELLEE, VS. THOMAS P. COATES, DEFENDANT AND APPELLANT.

D E C I S I O N

WILLARD, J.:

The defendant, Coates, was coast district inspector in the customs service of the Philippine Islands from June 28, 1900, until July 5,1903, and was stationed at San Fernando, in the Province of La Union. As such officer he received and disbursed public money. On the 10th day of June, 1903, a special agent of the customs service commenced an examination of the accounts of Coates's office. This examination continued through several days. The examiner found on hand in the cash box $111.41, United States money, 185.90 pesos, and a check for 6,000 pesos drawn by Tompkins, the treasurer of the Province of La Union, upon the Hongkong and Shanghai Banking Corporation, to the order of the defendant. The defendant exhibited this check to the examiner at the time of the examination and stated to him that he had this money on deposit with Tompkins, adding that, as his safe was very small, he did not feel like keeping large amounts of money in it, and that as he collected money he turned it in to Tompkins, taking a receipt. The inspector accepted this check as cash, and, taking it as cash, the accounts of the defendant balanced with an overplus of $12.72,United States money. It was admitted by Coates in his testimony at the trial that this check was false; that it represented no actual transaction ; that he did not have that money or any part of it on deposit with Tompkins, and that the check was given to him by Tompkins for the purpose of enabling him to get through the examination with the inspector. The check was afterwards returned and canceled. If this

check had not been received as cash, there would have been a deficit in his accounts of more than 5,900 pesos.

Coates was removed from office on the 5th of July, 1903, and an examination of his accounts as of that date, in which he assisted, showed a deficit of 1,990.22 pesos. A complaint was filed against him on the 8th of August, 1903, for misappropriation of public money, which complaint was replaced by an amended complaint presented on the 28th of August, 1903, in which he was charged with the misappropriation of the aforesaid sum of 1,990.22 pesos.

He was tried upon that charge, convicted, and was sentenced to eight years and one day of *presidio mayor,* and was perpetually disqualified from holding any position in the civil service of the Philippine Islands. From this judgment he appealed.

That this deficit in his accounts, and to the amount stated in the complaint, existed, was clearly proved. He claims in his brief in this court that he was not given credit, as he should have been, for $319.34, United States money, but his evidence upon this point, as appears from his cross-examination, was too vague and uncertain to overcome the positive testimony of the witnesses for the Government

It is further claimed that, admitting the existence of this deficit, there is no evidence to show that the defendant himself appropriated money; that there is no evidence to show that it may not have been lost or taken without any fault on his part. Upon this point the case is ruled by the decision in United States *vs.* Osborn,[1] filed March 29, 1905. In that case Osborn made use of a false check to conceal a deficit in his accounts in exactly the same way in which Coates made use of the check for 6,000 pesos in this case. In fact, the two cases in this respect, and perhaps in all other respects except one, are almost identical. Osborn was also a public officer charged with the receipt and disbursement of money, and stationed at San Fernando, the same town in which Coates was stationed. Each made use of a false check furnished them by Tompkins, the treasurer of the province, for the purpose of concealing a deficit in his accounts. It

was held in the Osborn case that such use of the check proved conclusively that the money was not lost or stolen without the fault or negligence of the officer. As has been said, that decision is conclusive against the defendant here upon this branch of the case.

In the case of Osborn the money misappropriated was not returned, and it consequently made no difference whether his offense fell under article 390 of the Penal Code or under article 392, as the punishment in either case would have been the same. In this case, however, the money has been returned. At some time after the defendant was arrested and before the trial commenced, but at what exact day does not appear, the defendant paid into court the said sum of 1,990.22 pesos, the amount of the deficit alleged against him. A written offer accompanied this payment in which the defendant stated that he was totally unaware of any deficit in his accounts, and he protested that if any such deficit existed he was absolutely unaware of the cause of the same, and that he had never appropriated to his own use any sum or sums of money whatever belonging to the Government of the Philippine Islands. This money was afterwards paid into the Insular Treasury. Although this payment was made after the defendant had been arrested, and although it was made under the protest that he had not misappropriated any money, yet we think and so hold that it was a sufficient repayment within the meaning of article 392 of the Penal Code. It therefore becomes necessary to decide whether the offense committed by the defendant falls under article 390 or under article 392. We agree with the court below and with the Attorney-General, that if the case does fall within article 390, no repayment afterward made by the defendant can relieve him of the penalty imposed upon him by the provisions of that section, but the question still remains whether the acts done by Coates show the commission of the offense defined in 390 or the commission of the offense denned in 392. Those articles are as follows:

“390. The public official who by reason of his duties has in his charge public funds or property, and who should abstract (*sustraigan*) or consent that others should abstract (*sustraigan*) the same, shall be punished:

"1. With the penalty of *arresto mayor* in its maximum degree to *presidio correccional* in its minimum degree, if the amount abstracted should not exceed 125 pesetas.

"2. With that of *presidio correccional* in its medium and maximum degrees, if it should have exceeded 125 and did not exceed 6,250 pesetas.

"3. With that of *presidio mayor*, if it exceeded 6,250 and did not exceed 125,000 pesetas,

"4. With that of *cadena temporal*, if it exceeded 125,000 pesetas."

* * * * *

"392.
The official who, to the detriment or hindrance of the public service, shall apply to his own or to foreign purposes the money or property placed under his charge, shall be punished with the penalties of temporary special disqualification and a line of from 20 to 50 per cent of the amount diverted.

"If restitution be not made, the penalties prescribed in article 390 shall be imposed on him.

"If
such unlawful use of the funds were without detriment to or hindrance of the public service, he shall incur the penalties of suspension and a fine of from 5 to 25 per cent of the amount diverted."

The Attorney-General, in his brief in this case, makes the following statement:

"In this case the Government funds were withdrawn by the appellant and used in the payment of personal expenses and in advancing the expenses of balls, entertainments, etc., and for which he was not always reimbursed by the other interested parties; and the proof shows beyond a reasonable doubt that the appellant became involved in a shortage in that way about November, 1902, and he

> testified to having loaned Government funds to private individuals, commencing about March, 1903, but that he could not remember of any instance where the money had not been returned to him."

We accept this as a true statement of what the evidence shows in the case, although the defendant claimed at the trial that he did not know that he had used any of the public money. The above facts bring the case directly within the terms of article 392. They show that he appropriated public money to his own use or to the use of other persons. The question is, Do these facts also show that he committed what is called in article 390 *sustraccion* in reference to these funds? Undoubtedly every misappropriation under article 390 would also amount to a misappropriation under article 392, but the converse of that proposition is not true. Every misapplication under article 392 does not amount to a *sustraccion* under article 390. In order to show such *sustraccion* the Government must prove something more than a use by the defendant of the public money for his own purposes or the purposes of others. Just what evidence is necessary in order to prove this is not made clear by the authorities. Many cases have been decided by the supreme court of Spain upon this subject.

In the judgment of the 8th of November, 1889, cited by the court below in its decision, it appeared that an estimate for certain public work having been made, and the work having been completed, there remained of the estimate 45 pesetas as an excess of the cost of the work over its estimated cost. This money the councilors of the Ayuntamiento divided among themselves, each one receiving 7 pesetas and 50 centimos. The Audiencia convicted the defendants of the violation of article 407 of the Penal Code of the Peninsula, corresponding to our article 392. The supreme court reversed this judgment holding that they should have been convicted under article 405, which corresponds to our article 390, saying that the responsibility of the defendants under article 405 could in no way be modified by any subsequent repayment which they may have made of the amount *sustraida*. It is stated in one of the conclusions in this judgment that the amount had not been repaid to the municipal funds. This is also stated in one of

the assignments of error made by the counsel for the government in the supreme court. It would seem, therefore, that it made no difference under the facts in this case under which article the offense was placed, because in either case the punishment would be the same, the money not having been returned. But the facts do probably show a true case of *sustraccion* because it is evident that the councilors, when they took this money, considered it as their own property. If the test lies in the existence of an intention to return the property in one case and not to return it in the other, it is apparent that in this particular case there was no intention on the part of these defendants to make any such return when they took the money.

In the judgment of the 24th of February, 1880, the sum of 7,500 reales was deposited in court in the hands of the clerk, the defendant. He made no report of this sum to the court, and attempted to conceal its misappropriation by him by falsifying certain documents intending to show that the amount had not been so deposited. He afterwards confessed to the receipt of the money and the falsification of the documents, claiming that the money had been lost upon its removal from the house in which he was then living. He was convicted in the court below under the article which corresponds to article 390, and also convicted of falsification. In his appeal he assigned as error his conviction under article 405, claiming that he should have been convicted under article 407. The supreme court sustained this contention and reversed the judgment below, holding that defendant had not, in fact, committed the crime of *sustraccion* mentioned in article 405, but that of *distraccion* mentioned in article 407, because what he did was to apply to his own use the said sum of 7,500 reales.

In the judgment of the 11th of December, 1897, a case arising in the Island of Cuba, it appeared that the sum of 8 pesos and 50 centavos had been delivered to the secretary of the Audiencia of Santiago do Cuba as the proceeds of the sale of a horse which had been levied upon in an action therein pending; that the defendant, the secretary, did not turn over this money with the cause, but appropriated it to his own use. It appeared that he had not repaid the money, and he was convicted under

article 401 of the code there in force, corresponding to our article 390. Upon appeal the court held that this conviction was proper because he had not repaid the money, although the offense might not be considered as *sustraccion*.

In the judgment of the 31st of December, 1873, it appeared that Ferrer, one of the defendants, was the depositary of municipal funds, having in his hands 600 pesetas belonging to these funds, and used them in the payment of his taxes. It was held that the offense fell under paragraph 407, corresponding to our paragraph 392.

In the judgment of the 29th of April, 1872, it appeared that 1,282 reales, the amount of certain costs, were delivered to the defendant, clerk of the court of Bejar, and when the defendant was called upon for this money, he answered that on account of the political disturbances in 1867 he had disposed of from 900 to 1,000 reales which Martinez Diaz delivered to him. He was convicted under article 407 and was sentenced to three years of suspension of his office as clerk and the payment of 50 pesetas as a fine. Upon his appeal from this judgment it was affirmed by the supreme court. It appeared that he had repaid this money, but not until after the criminal proceeding had been commenced.

In the judgment of the 23d of June, 1886, the facts are more similar to the facts in the case at bar than in any other of the cases cited. The defendant was an officer of the treasury, having under his control stamps and other articles of public property, and an examination of his accounts showed a deficit of 12,867 pesetas and 66 centimos, which the defendant confessed that he had employed in the expenses of his house and family. He was sentenced by the trial court to three years six months and one day of *prision correccional*. The supreme court, upon his appeal, held that the offense fell under article 407, saying that it clearly and evidently appeared that in using the money for the expenses of his house and family he had committed *distraccion* in reference to the above-mentioned sum. The court also stated that the amount had been almost entirely repaid, and reversed the judgment of conviction.

It will be noticed that of the cases cited, in only one, that of the councilors of the Ayuntamiento, was the defendant convicted under article 390. In all of the others, where nothing more appeared than the fact that the defendant had taken the money and used it, he was convicted under article 392, and in some of the cases he was so convicted although it appeared that, after the misappropriation of the money by him, he attempted to conceal such misappropriation by false statements or other fraudulent devices.

This same question has come before this court on several occasions. An examination of the record remaining in the clerk's office of this court in the case of the United States *vs.* Duran[1] (1 Off. Gaz., 888) shows that the defendant had in his hands certain money which he was required to turn over to the provincial treasurer. He failed to do this, and when a deputy of the provincial treasurer went to the place where he lived for the purpose of demanding it, he falsely pretended that he had remitted the amount three or four days before through his commercial correspondents in Legaspi. Two weeks after that the deputy again went to the defendant's residence with an officer of the Constabulary, who arrested the defendant upon another charge. While under arrest the deputy again demanded of the defendant the money which he had received for transmission to the provincial treasurer, to which the defendant responded that he did not have it, saying at the same time that as soon as he arrived in Albay he could obtain it. The deputy, however, insisted upon immediate payment, and after two days the defendant, by means of a sale of a piece of land which belonged to his wife, succeeded in raising enough money to discharge the debt. Upon these facts this court held that the defendant was guilty under article 392 and not under article 390.

In the case of the United States *vs.* Bunagan[1] (May 1, 1905, No. 2053) it appeared that the defendant, a municipal treasurer, used 732 pesos and 72 cents for his private purposes. He afterwards repaid this amount and was convicted under article 392.

In the case of the United States *vs.* Francisco Licas[2] (No. 2052 of April 25, 1905) it appeared that the defendant, a

municipal treasurer, used the public money, investing it in the lumber business in which he was interested. The money was repaid by the bondsmen of the defendant upon the demand of the provincial treasurer, or, as claimed by the defendant, at his, the defendant's, request. Such repayment was made before any criminal proceedings were commenced, but after the deficit had been discovered. The court below convicted him under article 390. This court reversed the judgment and held that he should be convicted under article 392.

In the case of the United States *vs.* Ramon Melencio[3] (No. 1214, 3 Off. Gaz., 300) the defendant was convicted under article 390, the court saying that in view of the fact that the entire amount misappropriated had not been returned, it was not necessary to decide whether the case fell under article 390 or under article 392. The same declaration was made in this court in the case of the United States *vs.* Osborn, above cited.

The court below seems to have based its judgment in the case at bar upon the proposition that the offense fell under article 390, because the defendant "lost control" of the money used by him, and this seems to be the position taken also by the Attorney-General in this court. We do not, however, find any authorities in support of this proposition, and we do not believe it to be sound in principle. Whenever an official uses for his own purposes or the purposes of others any public money, he necessarily, and by the very act of so using it, loses control of it. That particular money has passed out of his hands and he has no longer control over it, and the fact that he may or may not be able to recover the money depends entirely upon the financial responsibility of the person to whom he has loaned it, if he has applied it to the use of others, or to his own financial responsibility if he has used it himself. We find nothing in the authorities which indicates that the financial ability of the defendant to repay the money which he has used determines the degree of his guilt. We think that the true rule is this: If there is no intention to repay the money when it is taken, the crime denned in article 390 has been committed. It is, however, necessary for the Government to prove that no such intent existed, and we think the authorities both in the supreme court of Spain and in this court support the proposition that the mere use of public money by a

public official does not prove such intent, although he may not, at the time of the misappropriation, have had sufficient resources of his own with which to repay the amount so used. The evidence in this case falls short of showing that the defendant did not intend, to repay the money when he took it. To our mind it is a case of a young man (the evidence shows that Coates was 23 years of age at the time) living beyond his means, and taking from the public moneys from time to time amounts of which he for this reason stood in need, with the probable intention, as almost always happens in such cases, of replacing the money, and certainly with no intention then formed of never repaying it. We do not attach any importance to the fact that at the time Coates paid the money into the court he protested that there was no deficit at all. This, to our mind, had no tendency to prove what his intention was when he originally misappropriated the funds of the Government,

The assignments of error made by the defendant, Nos. 1, 2, 3, and 4, relate to the admission of evidence during the trial below, and the refusal to allow the defendant to fully cross-examine a witness offered by the Government. As to the last assignment of error, we think that such error was corrected because later in the trial the defendant was allowed to fully cross-examine the witness upon the point in question, and in no event could this error, or any other of the errors so assigned, in any way have prejudiced the rights of the defendant, because, excluding all the evidence objected to, and excluding the testimony of this witness whom the defendant was not allowed to cross-examine in regard to the confession as to which the defendant desired to make such cross-examination, there still remains in the case abundant evidence upon which to convict the defendant of the crime denied in article 392.

The judgment of the court below is reversed, and the defendant is convicted of the crime defined and punished in article 392 of the Penal Code, and there having been no injury to the public service, and he having repaid to the Government the amount of money misappropriated by him, he is sentenced to pay a fine of P350, Philippine currency, such amount being more than 5 per cent and less than 25 per cent of the sum so misappropriated. He is also sentenced to four years of suspension, and to pay the costs of both instances.

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

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[1] Page 352, *supra.*

[1] 2 Phil. Rep., 604.

[1] Page 526, *supra.* [2] Page 458, *supra*.
[3] Page 331, *supra*.

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