

1 Phil. 519

[G.R. No. 571. December 03, 1902]

**THE UNITED STATES, COMPLAINANT AND APPELLANT, VS. THOMAS E. KEPNER,
DEFENDANT AND APPELLEE.**

D E C I S I O N

SMITH, J.:

Thomas E. Kepner, an attorney-at-law, was charged in the Court of First Instance of the city of Manila with the crime of *estafa*, alleged to have been committed by him by indorsing a warrant of the Insular Government made payable to his client, Aun Tan, and collecting and appropriating to his own use the amount due thereon without the authority or consent of the latter.

The accused was tried on the charge and after hearing the evidence of both sides the trial judge was of the opinion that there was evidence tending to show that the appropriation of the amount of the warrant was made under a bona fide claim of right. He therefore acquitted the defendant and the fiscal appealed.

Wong Cheong and Aun Tan, Chinese bakers, were charged before a military commission with illegally having in their possession some four hundred sacks of commissary flour, the property of the United States, against the statute and military regulations in such cases made and provided. On March 24, 1901, while they were in confinement, O. C. Hing, a Chinese friend of the parties, retained Kepner to obtain their release on bail and to defend them before the military court. It was agreed that the attorney should receive for his professional services \$300, Mexican, cash, and \$700, Mexican, additional on condition that he save Wong Cheong and Aun Tan from fine or imprisonment, and secured the release of the flour which had been seized by the authorities. After obtaining the release of his clients on \$3,000, Mexican, bail and taking their statements, Kepner came to the conclusion on the 1st of May, 1901, that both were guilty of the offense with which they were charged and that in no event would he be able to procure a release of the flour. He therefore told the

accused Chinamen as well as Hing “that it was absolutely out of the question to stand by the original agreement and offered to return the \$300 which had been already paid. He finally allowed himself, however, to be persuaded to continue with the case for a consideration, which he says was an unconditional fee of \$500 payable on the determination of the cause. Hing says no agreement for an unconditional fee was ever made. His story is that after Aun Tan had been released on bail Kepner declared that he could not get the flour back and proposed that that contingency should be eliminated from their understanding. To this proposition Hing consented and Kepner agreed to secure Wong Cheong and Aun Tan against fine or imprisonment for the sum of \$500 in addition to what he had previously received. The trial of the two men took place about the 4th of May, 1901, and resulted in the acquittal of Wong Cheong and the conviction of Aun Tan, who was fined \$1,000, gold, and paid it.

On the 9th of May Kepner sent Hing a bill “for services in re the United States vs. Wong Cheong and Aun Tan, as per agreement, \$500.” Hing flatly refused to pay the account on the ground that Aun Tan had been fined and that there was nothing due under the terms of the contract. On June 20 Kepner apparently yielded the point, for on that date he borrowed from Hing, his alleged debtor, \$150, which he promised to repay on or before the 20th of July next ensuing. This he would scarcely have done if Hing had been indebted to him at the time in the sum of f 500 for services which he asserted had been then fully completed.

On the 1st of July, 1901, Hing went to the office of Kepner and asked him to make an effort to get the fine remitted and the confiscated flour returned. Hing says Kepner agreed to obtain the restoration of the fine and the flour for the sum of \$1,000, Mexican. Kepner says he agreed to get back the fine for a consideration of \$500, Mexican, and “that no agreement had been reached on the flour proposition” nor anything said on the subject beyond a conversation touching the making of an application for its recovery, and an offer on his part to do the work for \$500. Kepner presented his petition for a remission of the fine, but before it had been acted upon officially, so far as appears from the evidence, he again made a demand on Hing for money, which was refused. Considering, however, that the appellant had obtained the acquittal of Wong Cheong, Hing offered to allow him \$250 in settlement of the second contract, and the offer would appear to have been finally and definitely accepted by Kepner in his letter of the 12th of August, 1901, in which he says:

“Dear Mr. Hing : I am surprised that you should say that you only owe me \$250, *but until the fine is returned I will let it go that way.*”

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| "I have received from you..... | \$150.00 |
| "Clothes | 36.00 |
| "Balance due on collections..... | 21.25 |
| | 207.25 |
| "Balance due me..... | 42.75 |

"Please pay balance of \$42.75 to Mr. Denmark, and oblige,

"Yours, respectfully, etc.,

"THOMAS B. KEPNER."

The sum of \$42.75 was paid by Hing as directed by this letter, and on the 12th of August, 1901, all sums then due from Hing to Kepner had been paid, and Hing so understood it.

Two days later, namely, on the 14th of August, 1901, although he had not yet received the return of the fine, Kepner notified Hing that the military authorities had remitted the fine and requested him to call the next day "*and pay his bill in this case, amounting as per agreement to \$750, Mexican currency,*" apparently reviving his claim under the second contract and adding \$500 for an alleged completion of the third contract. Hing refused to pay, saying that nothing was due or would become due until the fine and the flour were recovered.

On the 24th of August Kepner received \$200 from Hing as a loan, according to the latter, as a payment on the second contract, according to the former. How anything could have become due in view of the settlement of August 12, 1901, and in view of the fact that the fine had not been repaid, does not appear.

Although the fine was remitted and an order made for its return, Kepner found that the money had been turned into the Insular Treasury, and that he could not get it without an act of the Commission authorizing its payment. The mere fact that this formal act of the Commission was required to get money out of the Treasury caused Kepner, if he is to be believed, to despair of ever recovering the fine, and he threw up the case. According to his account he was induced to take it up again, however, for a consideration, to wit, 50 per cent of the amount recovered, which he says Hing agreed to pay. Hing says he did nothing of the

kind. However that may be, the appellant wrote a letter to General Chaffee, asking to refer the matter to the Commission for an appropriation bill, and on the 20th of September a warrant in favor of Aun Tan for \$1,000, gold, was drawn on the Insular Treasury by the Civil Governor and countersigned by the Auditor. The Treasurer, on the face of the warrant, executed an order to the Chartered Bank of India, Australia and China to pay the warrant, and the same was then delivered to Kepner. Kepner requested Aun Tan to either indorse it or give him power to cash it, and Aun Tan positively refused to comply. Kepner then told Hing that he would put the warrant in his safe until they could reach some agreement. On the 23d of September the following letter was written to Hing by Kepner :

“Mr. O. C. HING,

“*Calle Magallanes, No. 19, Intramuros.*

“MY DEAR SIR: I have to inform you that if you do not settle your account with me before Tuesday noon (September 24) or indorse the draft I hold *I shall sue you and foreclose my lien on the draft.*

“Yours respectfully, etc.,

“Thomas E. Kepner.”

On the very same day, September 23, without waiting until the following day, as indicated in his letter, Kepner, in the very teeth of Aun Tan’s refusal to indorse the draft or to authorize its collection, wrote Aun Tan’s name on the back of it by himself as attorney, presented it to the bank, represented that he had a power of attorney to make the indorsement, and had the full amount of the warrant credited to his account. He would not say that this account then amounted to more than \$5.40.

On the very same 23d day of September, exclusive of the check to Hing, he drew checks against the \$1,000, gold, or \$2,000, Mexican, so credited to him, for more than \$1,217.50, Mexican, to pay personal bills, so that on the 24th of September, when he handed Hing a check for \$450, Mexican, and his receipted bill for \$1,550, Mexican, the whole \$2,000, Mexican, had not only been actually appropriated but more than \$1,200, Mexican, of the sum had been actually expended by Kepner in payment of personal accounts.

The sums paid by Hing to Kepner were \$300 retainer on the first contract, \$250 for the

acquittal of Wong Cheong under the second contract, and \$200 advanced on the third contract for the return of the fine and the flour—\$750 in all. According to Kepner there accrued to him \$300 for his retainer on the first contract, \$500 under the second contract which he claims was unconditional, \$1,000 for having secured the return of the fine, and \$500 for having attempted to obtain the redelivery of the flour, which feat, he says, he knew could not be accomplished, and for the doing of which, he says, he never had any understanding whatever with either Hing, Wong Cheong or Aun Tan—\$2,300 in all. He admits receiving from Hing the sum of \$750, leaving a balance of \$1,550, which he paid to himself by cashing the warrant and crediting the entire proceeds to his account. That is to say, Kepner's charges for services amounted to \$300 more than the whole amount of the fine.

The appellant's account of his transactions with his clients is such that his credit as a witness is wholly destroyed as to the disputed facts of the case. His own story shows him to be a man lacking in principle and wholly unworthy of the honorable profession to which he unfortunately belongs. He may have been entirely right in canceling his first contract to defend the accused Chinamen for a retainer of \$300 and \$700 additional, contingent on the result. But why did he wait from March 24 until May 1, the eve of the trial, before doing so? Was it to diminish the chance of the engagement of other counsel and so force his clients to accept such terms as he might offer? He may not have been actuated by any such motive, but in view of his subsequent conduct it smacks of it. The circumstances may have justified his agreeing for a fee of \$500 to obtain a return of the fine which had been justly imposed on Aun Tan, whom he knew to be guilty, but what is his justification for breaking his agreement in the very moment of success and forcing his clients to agree to pay double his fee for the very same service? Why did he state to Hing after the fine had been remitted by competent authority that he could not recover the money when all that remained to be done was a mere authorization of the Commission which would have been conceded, as it Avas, for the bare asking? Was it to give him an excuse to extort from his clients an additional fee of \$500 for the very trivial service of writing a letter to General Chaffee asking him to notify the Commission that the fine had been remitted in order that an appropriation bill might be passed enabling¹ the withdrawal of the money from the Insular Treasury? What right did he have to collect \$500 for endeavoring to obtain a return of the confiscated flour, a charge which he admits was for a service impossible of accomplishment and wholly unwarranted by any understanding whatever with his clients? But if he can fairly explain all this, under what rule of law or morals does he justify his act of representing to the bank that he had authority from Aun Tan to collect the insular warrant when he knew that such authority had been

definitely, positively, and expressly refused?

Kepner's own testimony justifies the court in concluding that he sought to take a grossly unfair advantage of a confidential relation, and that he is unworthy of credence. The second agreement, as testified to by Hing, is therefore accepted by the court and Kepner's account as to that agreement and the subsequent agreements is rejected. Considering that all he accomplished for his clients was to save them from fine or imprisonment in conformity with the second contract, and considering that he was paid \$750 for the service, there only remained \$50 due him at the time he cashed the warrant. He therefore unlawfully misappropriated \$1,500, viewing the case from the standpoint that the money was the money of Aun Tan and giving Kepner credit for the \$450 check delivered to Hing. But if we admit the truth of all that the accused says, if we forget that he took out of the warrant \$500 for services rendered to secure the flour without either contract, agreement, or understanding with his clients to justify it, if we concede that in all his transactions with Aun Tan he acted in good faith, he is nevertheless guilty of the crime of *estafa*.

The warrant delivered into his hands, drawn by the Insular Government in favor of Aun Tan on the Chartered Bank, was the property of Aun Tan, but the money which it represented was not, until it had been delivered to the bank for payment, properly and legally indorsed by Aun Tan, or by his authority. Aun Tan had no money in the bank and no monetary loss was inflicted on him by illegally cashing his warrant. The injury to him was the delay, annoyance, and damage caused by the unlawful misappropriation of the warrant. In a word, the bank would have been compelled to pay Aun Tan the amount of the warrant, notwithstanding a previous payment to Kepner.

If this be so, on the undisputed facts in the case the defendant withdrew from the Chartered Bank and appropriated to his own use \$2,000, Mexican, of its funds by representing to the bank that he had a power and authority which he did not possess, and that constitutes the crime of *estafa* under the provisions of article 535, subdivision 1, of the Penal Code.

The allegation of the complaint that the unlawful misappropriation of the proceeds of the warrant was to the prejudice of Aun Tan may be disregarded by virtue of section 7 of General Orders, No. 58, which declares that when an offense shall have been described in the complaint with sufficient certainty to identify the act, an erroneous allegation as to the person injured shall be deemed immaterial. In any event the defect, if defect it was, was one of form which did not tend to prejudice any substantial right of the defendant on the merits, and can not, therefore, under the provisions of section 10 of the same order, affect the

present proceeding.

It has been stipulated between the appellant and the fiscal that certain affidavits may be considered as evidence on the review and examination of the record by this court on appeal. These affidavits show that Kepner on the 12th of October, 1901, after the question of the validity of his indorsement had been called to his attention by the bank, volunteered to make good to the bank any deficiency which might exist between his account and the amount of the warrant, and that to make this amount good he deposited with the bank, after his arrest and on the 30th of October, 1901, \$2,000, Mexican. The affidavits further show that on the 10th of May, 1902, he effected a full, voluntary, and satisfactory settlement with his client of all financial differences.

His promise to return the money about the time he was threatened with arrest, and his subsequent return of it after his arrest, as well as the settlement of his financial differences with his clients, constitute no defense to the crime, which, if committed at all by him, was committed on the 23d of September, 1901. Eestitution m not even an attenuating circumstance under article 9 of the Penal Code. It is a matter to be considered solely by the Executive in the exercise of the pardoning power.

The judgment of the lower court acquitting the defendant is reversed with costs against the respondent.

Taking into consideration all the evidence in the case the court finds:

First. That the defendant received on the 21st of September, 1901, from the Insular Government for the use and benefit and as the property of his client a certain warrant drawn in favor of said Aun Tan for the sum of \$1,000, gold, which the Insular Treasurer, by proper order on its face, directed the Chartered Bank of India, Australia and China to pay to said Aun Tan.

Second. That said defendant, against the will and without the consent of said Aun Tan, wrote the name of Aun Tan by himself as attorney on the back of said warrant and presented the same to the said bank for payment.

Third. That he represented and stated to said bank that he had a power of attorney from Aun Tan to make such indorsement, and that his representation and statement to that effect to the bank was false and untrue, as he, the said defendant, well knew when he made it.

Fourth. That in consequence of said unauthorized indorsement by the defendant and his aforesaid false representation and statement to the bank said warrant was cashed, and the whole amount thereof, \$2,000, Mexican, credited to appellant's personal account in said bank on the 23d of September, 1901.

Fifth. That afterwards, and on said 23d of September, 1901, defendant used of said sum so credited to his said account more than \$1,217.50, Mexican, and possibly |1337.50, Mexican, for the payment of personal bills and expenses.

Sixth. That on the 24th of September, 1901, defendant delivered to O. C. Hing for Aun Tan his personal check on said bank for \$450, and his receipted bill of \$1,550 for services rendered, but that said check was never cashed by Aun Tan nor was said bill for \$1,550 accepted as correct or just.

Seventh. That neither on the 23d of September, 1901, nor on the 24th of the same month and year was any greater sum due from said Aun Tan to said defendant than the sum of \$50, Mexican.

Taking into consideration the provisions of article 534, article 535, Nos. 1 and 5, and article 58 of the Penal Code, the court finds as a conclusion of law from the foregoing facts that the defendant, Thomas E. Kepner willfully, illegally, fraudulently, and feloniously misappropriated and converted to his own use said warrant and the sum of money which he collected thereon, and that he is guilty of the crime *estafa* within the intent and meaning of article 535, subdivisions 1 and 5, of the Penal Code.

Wherefore, by reason of the law in such cases made and provided and the articles of the Penal Code above cited, the court orders and adjudges that the defendant, Thomas E. Kepner, be, and he is hereby, condemned to one year eight months and twenty-one days of *presidio correccional*, and to the suspension from every public office, profession, trade, and right of suffrage, with costs.

Taking into consideration that the amount collected on the warrant was returned to the bank on the 30th of October, 1901, and that all financial differences between the defendant and Aun Tan were finally amicably settled in May, 1902, no judgment for the return of the money is made, but it is ordered and adjudged that the warrant which forms a part of the record herein be returned to Aun Tan and that the clerk attach to the record a duly certified copy of said warrant in lieu thereof. So ordered.

Arellano, C. J., Torres, Cooper, Willard, and Mapa, JJ., concur.

Ladd, J., disqualified.

Date created: April 14, 2014