

2 Phil. 507

[G.R. No. 1288. September 17, 1903]

**THE UNITED STATES, COMPLAINANT AND APPELLEE, VS. LEON LIZARDO,
DEFENDANT AND APPELLANT.**

D E C I S I O N

ARELLANO, C.J.:

The Court of First Instance of Abra convicted Leon Lizardo, municipal treasurer of the town of San Jose, upon the charge of malversation of public funds, and condemned him to six months of *arresto mayor* and the payment of costs. The article of the Penal Code applied is not cited, but from the nature of the penalty imposed it can be no other than article 390, paragraph 1.

The Solicitor-General, considering that the evidence does not show that the malversation of the funds in question has caused any damage or prejudice to the public service, asks that the judgment be reversed and that the appellant, Leon Lizardo, be condemned to two years of suspension from office and the payment of a fine of 10 per cent of the funds misapplied, with the accessories and the costs of this instance. Doubtless the article which the Solicitor-General has in mind is No. 392, paragraph 3—that is to say, he considers that the crime herein prosecuted is one merely consisting of the temporary diversion and not the unqualified embezzlement of public funds. But in order that the crime be regarded as a mere temporary diversion, it is absolutely necessary that the funds should be restored, otherwise the money misapplied must be regarded as having been embezzled, and the crime then falls within the provisions of article 390. If the money has been returned, on the other hand, then the crime can only be regarded as a temporary misuse of public funds, but not as an embezzlement of the money. It is only when the money has been restored that it becomes necessary to determine whether, up to the time of the restoration, any damage or detriment was or was not caused the public service by the application of the public funds to improper uses, as a preliminary to determining under which paragraph of article 392 the case falls.

The proper article to be applied, therefore, is No. 390, but as the principal penalty prescribed by paragraph 1 of the article is *arresto mayor* in its maximum grade to *presidio correccional* in its minimum grade, together with special temporary disqualification in its maximum grade, to perpetual absolute disqualification as an accessory penalty established by the second paragraph of the same article, it follows that the decision of the court below is incorrect with respect to the application of the penalty, as in this case, there being no aggravating or mitigating circumstances to consider, the penalty should be imposed in its medium grade.

For these reasons we condemn the defendant, Leon Lizardo, to one year and one day of *presidio correccional*, and furthermore to eleven years and one day of special temporary disqualification, and to the payment of the costs of both instances, thus affirming the decision appealed.

Torres, Cooper, Mapa, and McDonough, JJ., concur.
