1 Phil. 696

[G.R. No. 873. February 10, 1903]

THE UNITED STATES, COMPLAINANT AND APPELLANT, VS. SECUNDINO MENDEZONA, DEFENDANT AND APPELLEE.

D E C I S I O N

TORRES, J.:

On the 14th of January, 1902, counsel for the bank (Spanish-Philippine Bank) filed a complaint charging Don Secundino Mendezona with the crime of *estafa* upon the ground that he, as manager of the firm of Mendezona & Co., on the 5th day of January, 1900,, received from said Spanish-Philippine Bank the sum of $300,000, offering as security among other property the building known as the procuration house of the Franciscan Friars, this offer being contained in a letter addressed to the management of the bank; that on the 19th of February following, of the same year, Mendezona by another letter asked and obtained a further credit of $300,000 as an extension of the former credit, offering as security the same property; that demand having been made upon the accused for the execution of the corresponding mortgage deed which he had verbally undertaken to execute, he stated that the notary public, Mr. Barrera, had the title deeds or papers of the property, and thus fraudulently succeeded in putting off the execution of the mortgage deed up to the 6th day of August, 1902, on which date Mendezona as such manager sold the said procuration building for the sum of $400,000, subject to the right of redemption, to Messrs1. Juan Martinez Ybanez, Manuel Ybeas, Felipe Garcia, and Jorge Romanillos, the vendor having declared in the deed of sale that the property was free from all charges and incumbrances, these acts having been committed against the form of the statute made and provided and to the damage of the bank in the sum of at least $150,000.

The complaint was admitted and the Court of First Instance conducted the corresponding preliminary investigation. The proof taken discloses that on the 22d of November, 1899, a verbal contract of sale was entered into between the representatives of the Franciscan

Friars and Don Secundino Mendezona, manager of the firm of Mendezona & Co., concerning the said city property situated on Isla de Romero Street and known as the procuration building. The consideration was $190,000, which sum, as a result of a subsequent agreement, was to be left on deposit with the firm of Mendezona & Co., drawing interest at 8 per cent per annum, the purchaser being authorized to take immediate possession of the property and to make such alterations therein as he might deem necessary. This verbal contract appears to have been confirmed by letter. (Record, p. 12.)

It also appears from the record of the preliminary investigation that toward the end of November, 1899, Don Secundino Mendezona took possession of the property sold, and commenced the work of making alterations in the same, and that on the 21st of July, 1900, the corresponding deed of conveyance of the said property was drawn.

It also appears that this procuration building stands on the books of Mendezona & Co. as an asset valued at $250,000, and that the books show as a liability a debit of $190,000 in favor of the Franciscan Friars on the 1st of January, 1900.

It also appears that several demands were made on the accused Mendezona after the month of March of that year for the execution by him of a public deed of mortgage but that this was not done, he simply replying that the papers or title deeds of the property were being prepared for the purpose of delivering them to the notary, Barrera. The contract of sale agreed upon in November, 1899, was not formally executed before Sr. Barrera until the 21st of July, 1900. The notary testifies under oath that the documents connected with the procuration building were delivered to him by the father provincial of the Franciscan Friars on the second or third month before the date of the execution of the deed of sale of the said building, and that the father provincial also delivered to him the draft of the instrument which stipulated that the consideration for the sale of the procuration building to Mendezona & Co. was to remain in the possession of the firm as a deposit.

From the text of the complaint upon which this preliminary investigation was commenced, and which was finally terminated by the appealed order, it is evident that the charge of *estafa* brought against Mendezona consists in the allegation that he, acting fraudulently and in bad faith, delayed the performance of the offer made by him to the Spanish-Philippine Bank to securing the two sums received by him from the latter as a loan on the 5th of January and the 19th February, 1900, by eluding the execution of the mortgage of the so-called procuration building of the Franciscans up to the 6th of August, 1900, on which day he sold the same to the Augustinian Fathers for the sum of $400,000, having declared in the

instrument of conveyance executed to that effect that this property was free from all incumbrance or gravamen.

So that the facts set forth in the complaint and alleged to constitute the crime of *estafa* are two: (1) That of having failed to perform the promise to give a mortgage on the said procuration building for the purpose of securing the payment of the |600,000 received from the bank, he availing himself of subterfuge and deceitful means to avoid the execution of the mortgage deed, and (2) that of having declared in the deed of sale to the Augustinian Fathers that the said building was free from all incumbrance or gravamen, when as a matter of fact it had been offered in mortgage, and that these facts constituted a violation of the Penal Law.

The complaint uses the generic term of *estafa* as the classification of the crimes with which the accused is charged but without determining the species of fraud committed, or citing the article of the Penal Code violated, although this was subsequently done in the printed briefs filed by the complainant, asking that articles 535, section 1, and 537, and 541 of the Penal Code be applied.

The first of these two facts charged in the complaint, if proven, would fall within article 541 as constituting an estafa not penalized by the preceding articles which define and punish such crimes.

The second of the facts charged, if proven, would fall under the sanction of section 2 of article 537 of the Code, because in such case the accused would have disposed of the property, selling it as unencumbered, knowing at the time that it was subject to a gravamen.

The mere fact of the nonperformance of the offer or (promise to give a mortgage as agreed upon between the contracting parties does not constitute the crime of *estafa* or any other crime, unless the party bound has acted fraudulently and in bad faith when contracting the principal obligation and when making the promise to give security. Can it be concluded from an examination of the preliminary investigation that when the two contracts of loan of $300,000 each were made between the manager of the bank, Seffor Balbas, and the accused Mendezona, that the latter acted deceitfully and with the malicious intent to defraud the bank, and with the intent to break his promise to give the said procuration building, among other property, as security for the performance of the obligation? The result of an examination of the record is a negative answer.

Article 1862 of the Civil Code provides that the promise to mortgage or pledge only

produces a personal action between the contracting parties, without prejudice to the criminal liability incurred by him who defrauds another offering in pledge or mortgage, as unencumbered, things which lie knew to be encumbered or pretending to be the owners of things which do not belong to him. It is evident, therefore, that the promisor may be compelled by the proper personal action to perform his promise; but the mere breach of the contract or nonperformance of the promise does not result in a violation of the Penal Law.

The article cited provides that criminal liability attaches to the defrauder in the cases expressed, none of which are applicable to the accused because he has not offered things which he knew to be encumbered, nor has he pretended to be the owner of property which did not belong to him. Mendezona had a perfect right to offer this building as security, inasmuch as it was not the property of another nor was it encumbered; and the subsequent disappearance of the promised security by the sale of the property to the Augustinian Friars does not constitute the commission of the crime of *estafa* because it does not appear that a deceitful intent existed at the time that the loan was made and the security was offered. The obligations contracted were merely personal, subject to all the eventualities which are common to those of its class, and which should be met by prudence and foresight on the part of creditors.

The unusual facility with which the accused Mendezona obtained from the management of the bank two sums of $300,000 on two different occasions at an interval of forty-five days is a circumstance which should be explained not only by the person to whom the money was lent but also by the management of the bank.

In order to form a judgment as to the action of Mendezona with respect to the offer to secure the money borrowed and in order to determine whether he delayed the execution of the mortgage deed fraudulently and in bad faith, it is necessary to hold in view that the deed of sale of the property was only executed by the vendors on the 21st of July, 1900, and it is self-evident that without the deed of sale it would have been impossible to have executed the mortgage or to have had it recorded in the Registry of Property. The record shows that the title deeds to the procuration building sold were in the possession of the Franciscan friars, the former owners, as it was the father superior of the latter who delivered them to the notary, Barrera. This was two or three months prior to the date of the deed of sale, July 21. Hence it is evident that the delay which occurred in the drafting and execution of the deed is not chargeable to the accused. This delay, not imputable to him, can not be made to constitute evidence of fraudulent acts committed by deceit on the part of the accused himself, who, according to his testimony in the record, had not even seen the title deeds to

the property sold by him. The delay, if any, was doubtless on the part on the provincial of the Franciscan friars and the notary, Barrera, who took two or three months to draw the deed of sale of the property. The record contains no evidence whatsoever to controvert or overcome this result of the preliminary investigation, and as it does not appear that the Franciscan friars delivered the old title deeds of the building to the purchaser after the verbal sale stipulated in November, 1899, it is to be presumed that Mendezona's affirmation was true even, though it be a fact that demand was made on him for the execution of the deed by the agents of the bank, because in the ordinary course of events the vendor holds the title deeds of the property until the execution of the deed of conveyance, and no evidence to the contrary has been offered in this case to overcome the presumption. Sixteen days after the execution of the deed of sale of the procuration building to the accused, the latter sold it in turn to the Augustinian friars for $400,000, subject to the right of redemption, and by this operation the accused put it absolutely out of his power to secure the credit of the Spanish-Philippine Bank by a mortgage on the said property. Was the crime of *estafa* committed by this proceeding, by selling the property which had been promised as security for the large amount loaned? We think not, because the accused when he offered the property as security for the loan was in possession thereof as owner, and therefore when he contracted the personal obligation he did not act in bad faith nor did he practice deceit. The mere nonperformance of this obligation does not constitute the crime of *estafa*. The deceit, in cases of fraud, nmst be antecedent to the obligation in which it originates, and be the cause of the latter and not supervenient thereto. This is the doctrine established by the supreme court of Spain in its judgments of the 7th of January, 14th of March, and 23d of June, 1888, and the 18th of December, 1889, which we think proper to cite in the interpretation and application of the precepts of the Penal Code of Spanish origin. With reference to the status of the property sold it is unquestionable that it was unencumbered on the 6th of August, 1900, and can not be regarded as having been encumbered or mortgaged merely by its having been offered or promised as security for the money loaned. The promise made by a borrower to give a mortgage upon his property does not result in the attachment of the mortgage offered. In order that a mortgage may be regarded as existing and productive of legal effects it is indispensable that the formalities prescribed by articles 1857 and 1874 et seq. of the Civil Code, and articles 105 et seq. of the Mortgage Law, applicable to the case, be complied with. The doctrine established by the Supreme Court of Spain with respect to the interpretation and proper application of article 550 of the Penal Code of Spain, which is the equivalent of article 537 of the Code now in force in these Islands, confirms the doctrine above laid down and is not overruled by any subsequent judgment. The judgment of October 29,1888, among other things holds that the simple

promise to constitute a mortgage does not fall within any of the precepts of article 550 of the Spanish Code—the equivalent of article 537 of the Code.of the Philippines—because it is not the same thing to make a promise as to perform the act promised. The decisions of January 7, and March 14, 1888, above cited among other things established the doctrine that for the application of the provisions of the above-cited article of the Penal Code it is necessary that the gravamen imposed on the property be legally constituted by means of the essential formalities prescribed by the law, as otherwise the promise is productive of nothing more than a mere personal obligation. Consequently, unless real property is mortgaged by a public instrument recorded in the Property Register in accordance with the prevailing law the gravamen referred to by article 537 of the Penal Code for the purposes of the application of its precepts can not be considered as existant. (Arts. 1875 and 1880 of the Civil Code.)

These rulings are directly applicable to the facts alleged by counsel for the Spanish-Philippine Bank. In order to bring the case within paragraph 1 of article 537, or paragraph 1 of article 535 of the Penal Code it must appear by the record (1) that Mendezona pretending to be owner of the property without being such owner had offered it as security for the credit of the bank and had subsequently sold it to the Augiistinian friars, or (2) that Mendezona defrauded the bank by pretending to be solvent in a higher degree and to own property which he did not have for the purpose of obtaining the loan of the $600,000.

The preliminary investigation does not show that the accused when offering this property to the bank as security and when selling it to the Augustinian friars was not the owner thereof, or that he was without the right to dispose of it. On the contrary, it appears fully therefrom that Mendezona when he offered the procuration house of the Franciscans as security for the money received from the bank, had purchased it more than a month before, was in possession of the premises, and the consideration paid therefor was in the hands of Mendezona & Co. as, a deposit, drawing interest at the rate of 8 per cent in favor of the vendor friars; and although the corresponding instrument was not drawn until six months afterwards it is nevertheless true that the accused was in possession of the house as owner by virtue of a perfectly valid verbal contract from which rights and obligations of unquestionable legality doubtless arose, and therefore the accused was in a position to transfer his right of ownership in the property to the Augustinian friars, who, on their part, have not made any complaint whatsoever. (Arts. 1450 and 1451 of the Civil Code and others applicable.)

Nor does it appear from the record of the preliminary investigation that the second of the

indicated acts has been committed so as to fall within the provisions of article 555, No. 1, of the Penal Code—that is to say, that Mendezona has defrauded the bank by pretending to be possessed of greater means than he really had at his disposal at the dates of the loans.

Furthermore, it must not be forgotten that in a criminal prosecution the investigation and proof is limited to the facts alleged, that is, to the acts or omissions with which the accused is charged, as he is entitled to be informed of the nature and cause of the accusation. (Arts. 6 and 15, G. 0., 58.)

The two facts falling within the scope of article 535, No. 1, and article 537, No. .1, of the Penal Code, and set up by the complainant in its brief are not alleged in the complaint, and although they are designated in the criminal law as constituting the crime of *estafa* they have not been properly charged, and the complaint has not been amended so as to include them. In view, therefore, of the negative result of the preliminary investigation we hold that the appealed order must be affirmed inasmuch as it does not appear from the record that the accused has committed the acts charged as constituting the crime of *estafa*. The ruling of the court below is sustained and in accordance with sections 13 and 14 of General Orders, No. 58, the appealed order is hereby affirmed with the costs of both instances *de oficio*. So ordered.

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

Ladd, J., disqualified.

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