

2 Phil. 582

[G.R. No. 1319. October 09, 1903]

**THE UNITED STATES, COMPLAINANT AND APPELLEE, VS. TOMAS ZAMOUA,
DEFENDANT AND APPELLANT.**

D E C I S I O N

COOPER, J.:

The information in this case charges the defendant, Tomas Zamora, with the crime of *estafa*, committed in the following manner:

On the 9th day of November, 1901, in the city of Manila, there came into the possession, care, and custody of the defendant, as a deposit on commission, for administration, and to sell for the account of Dona Gregoria Covarrubias, certain personal property consisting of jewelry of the value of \$1,772.50, the defendant being under the obligation to return or account for the same; that the defendant, between the said 9th day of November, 1901, and the 14th day of October, 1902, wrongfully, illegally, and without the consent of the owner, converted said property to his own use, to the prejudice of the said Gregoria Covarrubias.

The defendant plead not guilty, and was, on the 5th day of December, 1902, tried in the Court of First Instance of the city of Manila, found guilty as charged, and sentenced to imprisonment for two years of *presidio correccional*. An appeal was taken to this court.

The evidence in the case shows that on the 10th day of July, 1901, the defendant received from the complaining witness the jewelry mentioned in the complaint, for sale on commission, and though repeatedly requested by the owner to return the same, failed so to do. These facts are proven by the complaining witness and Juliana Espinosa.

It is contended for the defense that no time was fixed within which the defendant was to make sale of or return the property. It was proven that it is the custom, when jewelry is taken out for sale, that if taken in the morning it is to be returned in the evening; or at least

within two or three days. Independent of any such custom, and in the absence of any time fixed for its return, it was the duty of the party so receiving it to return it upon the demand of the owner.

The complaining witness testified that upon several occasions she demanded of the defendant the return of the jewelry; that the defendant failed to comply, on each occasion asking for two or three days longer, and up to the date of the trial, which was over one year from the date of the delivery of the property, he had failed to make a return of the jewelry or to give any account thereof.

We think the evidence in this respect entirely sufficient to show the conversion of the property by the defendant to his own use.

It is also contended that a certain receipt bearing date November 11, 1901, in which the defendant acknowledged to have received from the complaining witness \$1,772.50, "value received in various jewels," was a novation of the contract, and had the effect of converting the transaction into *compraventa*.

We do not think the receipt can be construed as having any such effect. It is signed by the defendant and specifies the particular pieces of jewelry delivered. It does not indicate in any way a sale of the property or novation of the original contract. While it was taken four months after the delivery of the property, this is explained by the complaining witness, who states that, after having made repeated demands upon the defendant for the return of the property, or its price, she, distrusting defendant, took the receipt as evidence of the original delivery of the property, having at the time of the delivery given over the same to defendant without taking a receipt.

On the 9th day of September, 1903, after the submission of this case, the defendant filed in this court, under the provisions of section 42 of General Orders, No. 58, a motion for a new trial, supported by the affidavits of Daniel Nonato and Gregoria Covarrubias. There was attached to the motion a receipt dated on the 5th day of November, 1901, signed by Daniel Nonato, in which is set forth the list of the jewelry, and in which it is recited that the defendant, Tomas Zamora, on that day delivered to Daniel Nonato the property for sale on commission. This receipt comprises the same articles shown on the trial to have been intrusted by the complaining witness, Gregoria Covarrubias, to the defendant for sale.

It is alleged in the motion for a new trial that it was the understanding of the defendant that the complaining witness, Gregoria Covarrubias, had conferred upon him the power to sell

on time the jewelry which she had delivered to him, and that in turn he delivered to Daniel Nonato the same articles of jewelry for sale on the same terms, taking from the latter the receipt above mentioned; that upon the filing of the information upon which the prosecution is based defendant sought many times for this receipt, all of his searches proving unsuccessful; that he did not make this defense at the time of the trial because he had nothing to prove the existence of such contract with Nonato, nor did he at the time know of the whereabouts of Nonato; that after the submission of the case to this court, Nonato had paid over the entire amount of the price for which the jewelry was sold to the defendant, and the latter paid it over to Gregoria Oovarrubias, as shown in her attached affidavit; that the receipt from Nona to the defendant came into the possession of Nonato in the following manner: That on the 6th day of November, 1901, Nonato paid defendant on account a certain sum, and defendant took out the document for the purpose of making and signing the corresponding entry of the receipt of this sum, afterwards delivering the document to Nonato as evidence of the payment, instead of issuing a receipt on account; that in the course of time he forgot completely what had occurred, and on searching for the document and not finding it he supposed it was lost.

The affidavit of Daniel Nonato states that some time in November of the year 1901 the defendant, Zamora, intrusted to him certain articles of jewelry for sale on commission, a list of which is attached to the affidavit; that he sold said jewelry in the provinces, but on account of the scarcity of money there he was unable to make the collection of the price until a few days ago, and that it was only on yesterday, September 8, 1903, that he paid to defendant the amount of \$1,772, which he owed the defendant for said property.

The affidavit of Gregoria Covarrubias states that she, on the 9th day of September, 1903, received from the defendant, Zamora, the sum of \$1,772.50, which Zamora was indebted to her for the jewelry, the same being in full satisfaction of the account.

A motion for a new trial under the provisions of General Orders, No. 58, should show both the materiality of the testimony and the exercise of due diligence on the part of the defendant to obtain the newly discovered testimony. We think the application is defective in both these particulars. The trial must have resulted in the conviction of the defendant, even if the proof alleged to be newly discovered and mentioned in the motion had been introduced at the trial. The conversion of the property by the defendant was shown to have occurred before the 5th day of November, 1901, the date on which the defendant claims that he turned over to Nona to the property received from Gregoria Oovarrubias. It was shown on the trial that where there is a delivery of such property under like circumstances,

according to the customs of the place, it should be accounted for within two or three days' time after its delivery. As before stated, independent of any such custom, and in the absence of any time fixed for its return, it was the duty of the defendant to return the property upon demand of the owner.

The complaining witness testified that several times prior to taking the receipt of November 9, 1901, she had made demand upon the defendant for the return of the property, and that the defendant had under one excuse and another failed to comply with the request.

The testimony of Juliana Espinosa was that she had gone to the house of the defendant on many occasions between the date of the delivery of the jewelry to the defendant on the 10th day of July, 1901, and the date of the taking of the receipt by witness from defendant on November 9, 1901, and that the defendant always met her. with many excuses, and on one occasion said that he would go in person and deliver the jewelry to Gregoria Covarrubias, or give her the money; that on account of these various pretexts and promises unfulfilled, Senora Covarrubias distrusted the defendant, and, finally, on the 9th day of November, 1901, took the receipt from him which contained a list of the jewelry.

There is no proof in the case to sustain the contention of defendant to the effect that the jewelry was consigned to him to sell on time. In view of the fact that the demand made upon defendant by the complaining witness for the return of the jewelry was sufficient to put him in default and to require him to return the property to plaintiff, on his failure to do so he became guilty of the conversion. Subsequent accounting to the complaining witness and payment to her of the money could not have the effect of absolving him from the crime which had already been committed.

The application is insufficient in not showing the use of diligence in procuring the testimony. It is stated that the defendant had made many searches for the receipt of November 5, 1901, taken from Nonato upon the delivery of the jewelry by him to Nonato. If after due search made for the document it could not be found, parol evidence of its contents would have been admissible. It is not stated in the application for a new trial that this proof could not have been made.

It seems from the affidavit that Nonato was a resident of this city. The defendant should have applied for process to issue to procure the attendance of this witness, and, if upon return of the process it was shown that Nonato was absent and could not be found, he

should have made application for the continuance of the case, based upon such facts. The court would doubtless have extended to him a postponement until such time as he could have procured the attendance of the witness.

It is a strange circumstance, and seems entirely improbable, that the defendant should have delivered over to Nonato the receipt, the only evidence he had against Nonato of the delivery to the latter of the property in question, simply because he had indorsed thereon a receipt for the payment of 100 pesos, instead of executing to Nonato a separate receipt for this sum on account.

For the reasons stated the application for a new trial should be overruled, which is accordingly done.

The Court of First Instance properly found the defendant guilty of *estafa* under clause 5 of article 535 of the Penal Code, and has properly assessed the penalty for the offense.

The judgment of the Court of First Instance is affirmed, and the costs of this appeal are adjudged against the defendant.

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

Johnson, J., did not sit in this case.