

under them, the land known as Fannim, in Saporelong Village on Fefan Island, Truk District, is owned by the defendant Inekis.

2. This judgment shall not affect any rights of way there may be over the land in question.

3. No costs are assessed against any party.

ERMES PAUL, Appellant

v.

TRUST TERRITORY OF THE PACIFIC ISLANDS, Appellee

Criminal Case No. 124

Trial Division of the High Court

Truk District

October 5, 1961

See, also, 2 T.T.R. 603

Appeal from conviction in Truk District Court of embezzlement in violation of T.T.C., Sec. 393. Appellant contends that prosecution failed to show that he carried away money with intent to permanently convert it to his own use. The Trial Division of the High Court, Chief Justice E. P. Furber, held that where evidence is sufficient to establish embezzlement, accused's intention to return money to owner is not valid defense.

Affirmed.

1. Embezzlement—Generally

Evidence of failure to report cash disbursements, and of unaccountable shortage from special and petty cash funds, is sufficient to establish intent to defraud government and to permanently convert money so withheld to accused's own use. (T.T.C., Sec. 393)

2. Embezzlement—Generally

In criminal prosecution for embezzlement, it is not necessary for government to prove exact amount alleged in information has been embezzled. (T.T.C., Sec. 393)

3. Embezzlement—Sentence

Although maximum penalty which is imposed for embezzlement depends on whether amount involved is less than or greater than fifty dollars, actual amount beyond fifty dollars is matter for court to consider in exercising discretion as to punishment to be imposed within limits of law. (T.T.C., Sec. 393)

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4. Embezzlement—Intent

Fact that person accused of embezzlement may have intended to replace amounts taken, or may have received no personal profit nor have intended to profit from taking, is not valid defense. (T.T.C., Sec. 393)

5. Criminal Law—Sentence—Modification

Appellate court will not overrule discretion of trial judge in sentencing and restitution requirements made within limits provided by law.

FURBER, *Chief Justice*

OPINION

This is an appeal from a conviction of embezzlement in the Truk District Court on the ground, "That the prosecution failed to prove that appellant did take and carry away the amount of money alleged in the information *with the intent to permanently* convert it to his own use."

This appeal appears based on a misconception as to the extent of the burden resting on the prosecution in an embezzlement case.

The accused had been an employee of the Agriculture Department of the Truk District Administration for approximately six (6) months, extending over five full calendar months, part of a month at the beginning and part of another month at the end of his employment. During this time one of his duties was to handle the department's cash and records in connection with it and to turn in to the District Finance Officer monthly all funds due the Trust Territory which he had collected. He also had custody of what might be called special funds in the hands of the department which were kept in two separate envelopes—one for receipts from sale of certain lumber, the other for receipts from sale of certain coconut string—and a petty cash fund for making change.

Upon the accused's discharge because of reduction in force and a check of his cash in that connection, it was discovered that his cash was short and, upon an audit by

the Internal Auditor of the Trust Territory, this shortage was determined to be at least one hundred three dollars and thirty cents (\$103.30), which was the amount alleged in the information. In addition to this all copies of three individual pre-numbered receipt blanks which had been entrusted to him for use were completely missing (as well as the copies of a block of receipt blanks from "the old receipt book", alleged to have been lost on a particular weekend) without indication for what, if anything, they were used.

The evidence clearly showed that, in making his monthly reports and remittances to the Finance Officer for three of the seven months (or parts of months) involved, the accused had failed to turn in copies of one or more receipts and had failed to turn in the amounts covered by those receipts. The accused was required to use a system of pre-numbered receipts made out in triplicate, that is, with two carbon copies, one of which copies was to be turned in to the Finance Officer. In each instance receipts for which copies were not turned in, as well as the three individual receipts of which all copies were missing were those used, or which should have been used, at either the beginning or end of the period for which he was accounting so that no individual gap appeared in the numbers of the copies of the receipts he was submitting for a particular month. Both of the special funds referred to above, and the petty cash fund, were short.

[1-3] The circumstances shown by the evidence with regard to the money not turned in to the Finance Officer and covered by receipts, copies of which the accused withheld, are clearly sufficient to establish an intent to defraud the government and to permanently convert the money so withheld to the accused's own use within the meaning of Trust Territory Code, Section 393. The amounts so withheld, disregarding all other items, amounted to over fifty

dollars (\$50.00) and the proof with regard to them alone is sufficient to support the conviction. In a trial for embezzlement it is not necessary for the government to prove that the exact amount alleged in the information has been embezzled. It is sufficient for conviction to prove the embezzlement of any part of the amount alleged. 18 Am. Jur., Embezzlement, § 53, note 11. The maximum penalty which may be imposed under Section 393 does depend on whether the amount involved is fifty dollars (\$50.00) or more on the one hand, or less than fifty dollars (\$50.00) on the other hand, but how much beyond fifty dollars (\$50.00) has been embezzled is just a matter for the court's consideration in exercising its discretion as to the punishment to be imposed within the limits of the law.

[4] Furthermore, the accused admitted he had "borrowed" five dollars (\$5.00) from the petty cash fund and had taken sixteen dollars fifty cents (\$16.50)—presumably from the envelope containing the coconut string money—to pay persons who had brought in produce that had been sold on credit and didn't want to wait until payment for the produce was received, thus in effect making them loans although it clearly appeared this was no part of his duty. Neither the fact that the accused may honestly have intended to replace these amounts nor the fact that he may not have profited, or hoped to profit, from the taking of the sixteen dollars fifty cents (\$16.50) he says he took to pay persons bringing in produce, is a defense even as to those items.

"To appropriate 'to one's own use' does not necessarily mean to one's personal advantage. Every attempt by one person to dispose of the goods of another, without right, as if they were his own is a conversion to his own use." 18 Am. Jur., Embezzlement, § 21. (See especially note 4.)

"It is well established that when one wrongfully and intentionally misappropriates the property of another lawfully in his possession

to his own use, the offense of embezzlement is complete, so that the fact that he at the same time intends subsequently to return the property or to make restitution to its rightful owner does not relieve his wrongful act of its criminal nature, excuse him, or make his offense any the less embezzlement." 18 Am. Jur., Embezzlement, § 26.

The evidence with regard to six dollars (\$6.00) of the shortage, which the accused implies was due to honest errors, and thirty dollars (\$30.00) of the lumber money, which the accused claims was taken by someone without his knowledge, standing alone, would be somewhat inconclusive, but the trial court was entitled to consider in connection with these, the evidence of the accused's whole course of conduct in the handling of funds entrusted to him as part of his employment.

[5] The sentence was moderate for the offense shown without these last two items mentioned above, and well within the discretion of the trial court. Under all the circumstances there was nothing unfair or unjust about the court's including these two items in the restitution ordered. The accused might well have been fined more than that in addition to the imprisonment ordered.

JUDGMENT

The finding, sentence, and order for restitution of the District Court for the Truk District in its Criminal Case No. 961 are affirmed.