

IMADA S. KABUA and JERKAN JENWOR, Defendants-
Appellants

v.

TRUST TERRITORY OF THE PACIFIC ISLANDS, Plaintiff-
Appellee

Criminal Appeal No. 57

Appellate Division of the High Court

Marshall Islands District

June 21, 1977

Appeals from embezzlement convictions. The Appellate Division of the High Court reversed for lack of evidence.

Appeal and Error—Reversal—Insufficient Evidence

Embezzlement convictions would be reversed where the record, viewed in a light most favorable to the government, was totally lacking in evidence sufficient to support the elements of embezzlement.

*Counsel for the
Appellants:*

JOHNSON TORIBIONG, *Public De-
fender's Office, Palau;* and
HERBERT D. SOLL, *Chief, Public
Defender, Marianas*

*Counsel for the
Appellee:*

JAMES GRIZZARD, *Asst. Attorney
General, Office of the Attorney
General, TTPI*

BURNETT, *Chief Justice*, HEFNER, *Associate Justice*,
WILLIAMS, *Associate Justice*

The appellants were tried by the Trial Division of the High Court in the Marshalls District on an information containing six counts of alleged criminal conduct. Defendant Imada S. Kabua was charged individually in Count I and Count III with the crimes of forgery and embezzlement respectively. Defendant Jerkan Jenwor was charged in Count II and Count IV with the crimes of forgery and

embezzlement respectively. The defendants were charged jointly in Counts V and VI with the crimes of Possession or Removal of Government Property and Misconduct in Public Office respectively.

After a trial Defendant Imada S. Kabua was found guilty of the crime of embezzlement as set forth in Count III and not guilty of the other crimes charged. Defendant Jerkan Jenwor was also found guilty of embezzlement as set forth in Count IV and not guilty of all other charges. Both Defendants have appealed from the judgment of the Court.

The appellants' principal assertion of error on this appeal is that the facts are insufficient to support the findings of the trial court.

In reviewing the sufficiency of the evidence this Court recognizes its obligation under the Trust Territory Code as expressed in 6 TTC § 355(2) and the general principles of law on criminal appeals to consider the evidence in a light most favorable to the Government. *Uchel v. Trust Territory*, 3 T.T.R. 578 (App. Div. 1965).

The record in this case is quite confusing but even viewing the record in a light most favorable to the Government we find it to be totally lacking as to evidence sufficient to support the elements of the crime of embezzlement against either of the appellants. Therefore the convictions of the Defendants are reversed.

HEFNER, *Associate Justice*, concurring

I concur in the Court's opinion but feel that there must be added the following comments.

The handling of this appeal by counsel for both the appellants and appellee is an example of how not to represent a client.

The appellants' counsel, Public Defender's Office, failed to file its brief pursuant to the rules on appeal and an order of dismissal of the appeal was entered, and the defendants were incarcerated.

The protests of the defendants apparently were heard and pushed the Public Defender's Office into motion after its many months of inactivity. The office was successful in releasing the defendants from custody after several days in prison and thereafter obtained an order reinstating the appeal.

In light of the outcome of this appeal, the conduct of the case by the Public Defender's Office would indeed be hard to explain to the defendants who should never have had to spend one minute in jail.

The example set by the Public Defender's Office was to be equalled by the Attorney General's Office.

After the appellants' brief was filed, the government failed to file any brief and no reason or excuse has been offered.

Either the government knew it was riding a losing horse or the attorney handling the matter intentionally or negligently failed to perform the basic task in defending an appeal.¹

In any event, I cannot ignore what I consider to be a serious violation on the part of the Attorney General's Office of its duties and responsibilities as counsel for the government and to assure that speedy justice is done.

If the government felt it could not prevail on appeal or wished to abandon the matter, it should have notified appellants' counsel and the Court and had the matter submitted for disposition. The threat of incarceration and the stigma of a criminal conviction upon the defendants cannot be blithely ignored or callously disregarded.

Yet this threat of incarceration and, in fact, actual incarceration, as well the stigma of being convicted felons

¹No criticism is intended or directed to Mr. Grizzard, Assistant Attorney General who was given the chore of showing up for the argument on appeal without a brief from which to argue. Pursuant to the order of the Appellate Division, with which I concur, no argument is allowed when no brief is filed.

was something the defendants had to endure for over a year.

It is sincerely hoped that such poor examples of representation or non-representation not be seen again in this Court.