

1 **FOR PUBLICATION**

2
3 **IN THE SUPERIOR COURT**
4 **FOR THE**
5 **COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS**

6 **COMMONWEALTH OF THE**)
7 **NORTHERN MARIANA ISLANDS,**)
8 **Plaintiff,**)

9 **vs.**)

10 **EDGARDO DE DIOS MACABALO,**)
11 **(d.o.b. 03/11/1962)**)
12 **Defendant.**)

) **CRIMINAL CASE NO. 06-0110B**
) **DPS NO: 06-02487**
)

) **JUDGMENT OF ACQUITTAL**
) **PURSUANT TO COM.R.CR.P. 29(c)**
)

13 **PROCEDURAL BACKGROUND**

14 On Monday, December 3, 2007, the criminal jury trial in this case began against the Defendant,
15 Edgardo De Dios Macabalo, on the thirteen (13) counts charged in the Information of **Theft by Unlawful**
16 **Taking or Disposition**, in violation of 6 CMC § 1602(a), made punishable by 6 CMC § 1601(b)(2) and
17 4101(b). The charges are based upon a series of transactions that occurred over a period from December,
18 2004 through January, 2005.

19 The Commonwealth presented testimonial evidence from five witnesses in their case in chief:
20 Mr. Felipe T. Mendiola, Ms. Angelina (“Angie”) Borja, and Mr. Thomas (“Tom”) Shimizu, all
21 employees of the victim company Marianas Pacific Distributors, Inc. aka “MarPac,” as well as from Mr.
22 Ming Chang Liang, the owner of Ming Li Store, and Detective Daniel R. Suel.

23 The Commonwealth also presented three sets of documents into evidence: a warehouse sales
24 tracking daily report for six different days in December, 2004; thirteen original MarPac invoices issued

1 for sales made to Ming Li Store on the six different days consistent with the dates shown in the
2 warehouse tracking report; and three pages of MarPac's computer generated statement of transactions for
3 only Ming Li's account from December 1, 2004 through June 6, 2005.

4 On Thursday, December 6, 2007, the Commonwealth closed its case, and the Defendant made a
5 Rule 29(a) motion for judgment of acquittal which this Court denied on the record. The Court took a
6 long recess and resumed the jury trial on Wednesday, December 12th. The defense presented one
7 witness, the Defendant, and various MarPac invoices and reports into evidence. After the close of
8 evidence from the defense, the Defendant again made a Rule 29 motion for judgment of acquittal. The
9 Court reserved its decision on the motion pursuant to Rule 29(b) and submitted the case to the jury for a
10 decision.

11 On Thursday morning, December 13, 2007, the jury began deliberations and at the end of the day
12 rendered a verdict of guilty on all thirteen counts. After entering the jury's verdict on the record, the
13 Court discharged the jury and continued the matter to Friday, December 14th.

14 On December 14, 2007, the Defendant made an oral motion for judgment of acquittal under
15 Com.R.Cr.P. Rule 29(c). Plaintiff orally opposed the motion and both parties were allowed to present
16 further oral argument on the motion at that time. The Court took a brief recess to review the exhibits
17 admitted into evidence, the Court's own notes of the trial testimony, and the applicable law, and returned
18 to the bench to issue its decision to grant Defendant's motion for judgment of acquittal for the reasons
19 thoroughly explained from the bench and as set forth in this written judgment.

20 **COM. R. CRIM. P. 29(C) STANDARD FOR JUDGMENT OF ACQUITTAL**

21 The Court applies a "sufficiency of the evidence" standard to determine whether a defendant is
22 entitled to a judgment of acquittal under Rule 29 of the Commonwealth Rules of Criminal Procedure.
23 This standard requires the Court to consider all direct and circumstantial evidence in the light most
24 favorable to the government, and thereupon to determine "whether any rational trier of fact could have

1 found the essential elements of the crime in question beyond a reasonable doubt.” *Commonwealth v.*
2 *Ramangmau*, 4 N.M.I. 227, 237 (1995). The Commonwealth Supreme Court has explained the
3 application of this standard in the context of a Rule 29(c) motion as follows:

4 A trial court should deny a motion for a judgment of acquittal under Com.R.Cr.P. 29(a)
5 unless the government's evidence “is insufficient to sustain a conviction.” In other words,
6 the motion for acquittal must be granted only if “there is no evidence upon which a
7 reasonable mind might fairly conclude guilt beyond a reasonable doubt...” In making this
8 assessment, the court may not weigh or draw inferences from the evidence, or assess
9 witness' credibility; these are functions of the jury. The existence of conflicting testimony
10 does not, in itself, merit a judgment of acquittal.

11 *Ramangmau*, 4 N.M.I. at 237, quoting *Curley v. United States*, 160 F.2d 229, 232-33 (D.C.Cir.), cert.
12 denied, 331 U.S. 837 (1947) (other citations omitted).

13 The standard under Commonwealth law is the same as that under the counterpart Federal Rule of
14 Criminal Procedure 29, the formulation of which was ultimately settled by the U.S. Supreme Court in
15 *Jackson v. Virginia*, 443 U.S. 307, 319-320, 99 S.Ct. 2781, 2789-90, 61 L.Ed.2d 560 (1979). Although
16 given various expressions by the federal appellate courts, the bedrock of the rule requires that on a
17 motion for judgment of acquittal the court may not substitute its judgment for that of the jury as to the
18 defendant’s guilt or innocence, but that at the same time the jury cannot be permitted to speculate if the
19 evidence is such that reasonable jurors must have a reasonable doubt. *Id.*; *See, also*, 2A C. WRIGHT, *ET*
20 *AL.*, FED. PRAC. & PROC. CRIM. 3D. § 467 (West Supp. 2007). There is nothing subjective in the
21 standard; the court’s determination that the state of the evidence requires a “reasonable juror” to have a
22 “reasonable doubt” is made without weighing the evidence and “does not require scrutiny of the
23 reasoning process actually used by the factfinder – if known.” *Jackson*, 443 U.S. at 319, n. 13, 99 S.Ct.
24 at 2789, n. 13.

25 The government bears the burden of proving each element of an offense beyond a reasonable
26 doubt. *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1072, 25 L.Ed.2d 368 (1970); *Commonwealth v.*
27 *Saimon*, 3 N.M.I. 365, 387 (1992). “In order for a criminal defendant to be lawfully convicted, a jury
28 must find that the government carried that burden with respect to each of the elements of the crime with

1 which he is charged.” *U.S. v. Nguyen*, 73 F.3d 887, 894 (9th Cir. 1995). “To be sufficient, the evidence
2 must be substantial; that is, it must do more than raise a mere suspicion of guilt.” *U.S. v. Ortiz*, 445 F.2d
3 1100, 1103 (10th Cir. 1971). The jury may not speculate as to matters not in evidence and a conviction
4 cannot be based upon evidence which is consistent in reason with both innocence and guilt. *U.S. v.*
5 *Cartwright*, 359 F.3d 281, 291 (3d Cir. 2004); *See, Commonwealth v. Andrew*, 2007 MP 25, ¶ 4 (Slip.
6 Op. Nov. 15, 2007).

7 Each count stated in the Commonwealth’s information is based upon each of thirteen separate
8 MarPac sales invoices. The instructions that were given to the jury to follow state that the government
9 must prove each of the following elements beyond a reasonable doubt, as stated in Instruction No. 10:

- 10 First, Mr. Macabalo unlawfully took \$4,000.00 paid on MarPac Invoice No. 137704.
11 Second, the \$4,000.00 belonged to MarPac;
12 Third, the defendant intended to permanently deprive MarPac of the \$4,000.00.

13 Instruction Nos. 11 through 22 repeated the substance of this instruction for the remaining twelve
14 counts of unlawful taking and the jury was further instructed to consider each count separately.

14 **EVIDENCE AT TRIAL**

15 At trial, the Commonwealth’s witnesses and exhibits established that cases of beer were in fact
16 delivered from the MarPac warehouse to Ming Li or its designee on each of the thirteen invoices on the
17 dates contained therein. Pl.’s Ex. 1 to 14. Although all thirteen invoices were written on cash terms,
18 which the witnesses explained would ordinarily require payment from the customer upon delivery, a
19 special procedure was established for Ming Li’s account. Because Ming Li always paid with a bundle of
20 cash and third-party checks and the delivery men were sometimes required to make more delivery stops
21 after Ming Li, the payments from Ming Li were not collected by the delivery men upon delivery, but
22 were instead picked up by a MarPac employee usually a few days after the delivery.

23 For these thirteen invoices, the employee who was sent for the payment pickups, or the collector,
24 was identified on the warehouse log sheets as “Jobbie,” the nickname of the Defendant. Ming Li’s owner

1 testified that he either personally paid Jobbie or he witnessed his wife tender the payments from Ming Li
2 to Jobbie, and each of Ming Li's yellow customer copies of the invoices showed the Defendant's initials
3 and a handwritten date by the word PAID. Pl.'s Ex. 2-14. MarPac's employees testified that Jobbie had
4 actually picked up payments from Ming Li and other MarPac customers months before the dates on these
5 thirteen invoices.

6 With respect to the thirteen charges of theft, the Government's evidence shows that the Defendant
7 made the first payment pickup from Ming Li on December 8, 2004 for one invoice in the amount of
8 \$12,000. Pl.'s Ex. 13.

9 Defendant's second payment pickup from Ming Li was on December 27, 2004, for five invoices
10 dated December 24th. Pl.'s Ex. 2,3,4,5,6. The amount on these five invoices total \$44,400.

11 The Defendant's next payment pickup was for one invoice on December 30, 2004 in the amount
12 of \$16,000. Pl.'s Ex. 7.

13 The next day, on December 31, 2004, Defendant again picked up the payment for five invoices,
14 one dated December 28th and four dated December 29th. Pl.'s Ex. 9,10,11,12, 14. The amount on these
15 five invoices total \$32,354.75.

16 The Defendant's fifth and last payment pickup from Ming Li was on January 5, 2005, for the
17 amount of \$16,000 for one invoice. Pl.'s Ex. 8.

18 MarPac's accounts receivables accountant and sometimes cashier, Ms. Angie Borja, testified that
19 she handled the cash, the invoices, and the deposits at MarPac. She explained that when the delivery
20 men come back from their delivery, they give the money and invoices to Mr. Mendiola, who was the
21 supervisor for the operations section. The next morning, Ms. Borja would receive the money and
22 invoices. After she reconciles the invoices with the money, she prepares the bank deposit slips for the
23 money but does not actually go to the bank. As for the invoices without payments, she would give them
24 to the Defendant for collections, even though the Defendant was officially working as the accounts

1 payable accountant. Furthermore, the Defendant was the person who decided who would actually go out
2 to collect the money on the invoices that she gave him. When shown the computer generated accounts
3 receivable trial balance sheet for CYA Kobler Market, one of MarPac's customers, Ms. Borja was unable
4 to explain why it showed two invoice numbers that were the same numbers shown as Ming Li's invoices,
5 i.e., Invoice Numbers 137704 and 137715, but for different amounts. Def.'s Ex. A; Pl.'s Ex. 2, 10. Ms.
6 Borja, the person at MarPac responsible for receiving the money and invoices for reconciliation, and for
7 preparing bank deposits, never testified whether she or any other MarPac employee actually received, or
8 did not receive from the Defendant any of the five payment pickups he was supposed to collect for these
9 specific thirteen Ming Li invoices.

10 The only Commonwealth witness that testified as to whether or not the payments from Ming Li
11 for the thirteen invoices were received by MarPac was Mr. Tom Shimizu, the general manager for
12 Ambrose Incorporated in Guam. MarPac is a wholly owned subsidiary of Ambrose, so his role as
13 general manager for Ambrose includes his overall responsibility for MarPac in Saipan. Mr. Shimizu
14 previously lived on Saipan for two years when he worked as the local manager of MarPac.

15 Mr. Shimizu testified that he reviewed the warehouse log sheets, the individual manual invoices
16 of customers, and MarPac's computer database of individual customer accounts for the period beginning
17 in 2004 through 2005. When he reviewed the Ming Li account, he discovered that the thirteen invoices
18 shown on the warehouse log sheets for Ming Li deliveries in December, 2004 (Pl.'s Ex. 2-14) were never
19 entered into the computer's database. He printed the information contained in MarPac's computer on
20 Ming Li's account for the period from December 1, 2004 to June 6, 2005. Pl.'s Ex. 15 (3 pages). Mr.
21 Shimizu asserted that all the postings in the computer are based on legitimate transactions because he
22 was able to verify them with the manual invoices. Based on all of this information, he concluded that
23 because the thirteen Ming Li invoices were never inputted into the computer, the payments were never
24 received by MarPac. The MarPac employees that had control over money received included the

1 Defendant, Ms. Borja, and former MarPac general manager Joe Santos. Santos has already pled guilty in
2 the federal court for stealing over half a million dollars from MarPac while employed as its general
3 manager. Santos' plea still leaves MarPac unable to account for over half a million dollars in missing
4 receipts.

5 On cross-examination, Shimizu acknowledged that his computer printout (Pl.'s Ex. 15, Inv.
6 137702) shows an invoice number for \$20,000 as a charge item of Ming Li, whereas the same invoice
7 number as Plaintiff's Exhibit 6 shows \$6,400 as a cash item amount. Similarly, MarPac's Accounts
8 Receivable Trial Balance as of 12/31/04 (Def.'s Ex. C, Inv.137701) shows an invoice number is listed as
9 a credit sale to Downtown Market, another MarPac customer, for \$21,000, whereas Plaintiff's Exhibit 5
10 bears the same invoice number but shows Ming Li as the customer for a \$20,000 cash sale. He explained
11 that the company does allow the same invoice number to be inputted into their computer, so long as there
12 is at least one item of information about the invoice that is different.

13 Shimizu was then shown MarPac A/R (Accounts Receivable) Trial Balance computer printouts
14 for December 31, 2004 through January 31, 2005 for customers other than Ming Li. Def.'s Ex. D (7
15 pages). The computer printout shows the account information for three, possibly four MarPac customers:
16 Big Bargain Center, CYA Koblerville, and Ming Li. (The customer name for invoice numbers 137702,
17 137714, and 137718 was not identified.) Def.'s Ex. D, p. 7. All seven of the amounts identified in the
18 A/R Trial Balance printouts were different from the amounts in Plaintiff's seven yellow invoices, with
19 four of them belonging to a different customer. Shimizu nevertheless relied on the information in the
20 computer printouts and considered them legitimate transactions because they were in the computer
21 system and on record. Shimizu then produced ten of the thirteen manual invoices that were inputted into
22 the computer and had the same invoice number as the Ming Li invoices for which the Defendant is being
23 criminally charged. Def.'s Ex. E to N. (MarPac was unable to find three of the manual invoices for the
24 other transactions appearing in the computer system.)

1 Upon careful review of the ten duplicate invoices (Def.'s Ex. E to N) that matched the computer's
2 information, and after a thorough comparison to the warehouse delivery log sheet, it was discovered and
3 shown during the trial that the beer indicated on these duplicate invoices had never been delivered.
4 However, these ten duplicate manual invoices (Def's Ex. E-N) were all listed in the computer system as
5 charge items. Shimizu recognized the writing on these invoices, and testified that they were written by
6 Joe Santos, the former general manager, and that three of these duplicate invoices were initialed by the
7 Defendant as paid, even though beer was never delivered. (Def's Ex. H, I, N).

8 Shimizu also acknowledged that Joe Santos forged MarPac documents.

9 On re-direct, Shimizu again testified that the three sets of documents that he reviewed show that
10 their product was delivered, the customer received their product, and the funds for the product are not at
11 MarPac.

12 In the defense's case, the Defendant himself testified. He admitted that he received the thirteen
13 invoices from Angie Borja and that he collected the payments from Ming Li on each of them. Each of
14 Ming Li's verified invoices was stamped paid, and he initialed and dated the invoices. He also testified
15 that each time he collected the payments from Ming Li Store, which was only about a five minute drive
16 away, he returned directly to the MarPac office to submit the payments. He did not feel comfortable
17 holding on to the payments because they were always very large amounts that were paid in cash and
18 checks. Each time he turned in the payments, he gave a bag containing the white invoice and the
19 payment to either to Angie Borja or Joe Santos. After handing the payments over to Borja or Santos, he
20 did not have any further involvement with the payments. MarPac did not keep any log sheets or make
21 any indications anywhere that the payments the Defendant collected were received at the office. The
22 payments were sometimes kept in a safe located in Joe Santos' office, and usually Borja inputted to the
23 computer that the money had been received. It was undisputed that many people at MarPac had access to
24 the computer. The Defendant identified at least five people who had access and could input data.

1 When asked about his initials on the three duplicate invoices (Def.'s Ex. H, I on Jan. 19, 2005;
2 Def.'s Ex. N on Jan. 25, 2005) that were shown to be illegitimate or unproven transactions, the
3 Defendant acknowledged that he initialed them as paid. He explained that he initialed the invoices only
4 after he was told by either Joe Santos or Angie Borja to do so, even though he in fact did not personally
5 receive or see any payments for the duplicate invoices. He did not initial any of the other seven duplicate
6 invoices produced at trial.

7 ANALYSIS AND CONCLUSION

8 After the jury rendered its verdict, this Court reviewed all the exhibits in detail as well as its own
9 notes on the trial. The Court's reliance on the record is as stated above. Based on the foregoing facts,
10 and viewing these facts in the light most favorable to the government, this Court concludes that no
11 reasonable juror could conclude that the government has met its burden of proving each element of the
12 crime in each of the thirteen counts charged against Defendant beyond a reasonable doubt. *Ramangmau*,
13 *supra*, 4 N.M.I. at 237.

14 Despite the government's insistence at closing argument that the determination of Defendant's
15 guilt or innocence must test the credibility of the Defendant against that of the government's primary
16 witness, Mr. Shimazu, in reality there is no material conflict between the *factual* testimony of the
17 witnesses at trial. The prosecution essentially rests on the theory that the evidence has shown that
18 MarPac is presently missing the money paid by Ming Li that should properly appear in MarPac's
19 account, that Defendant is the last person known with certainty to have had custody of the money, so that
20 Defendant must inevitably be responsible for its disappearance which amounts to an unlawful taking
21 under 6 CMC § 6102(a). Even with the assumption that the evidence is sufficient to support the
22 government's two factual premises; i.e., that the money *from these particular payments* is in fact now
23 missing and that Defendant is the last person known for sure to have held it, these premises neither entail
24

1 nor otherwise support the inference beyond a reasonable doubt that it was the Defendant that committed
2 the offenses charged. *Andrew*, supra, 2007 MP 25, ¶¶ 9-10.

3 These facts, if established, would legitimately serve as grounds to conduct an investigation, but
4 standing alone they are an insufficient basis upon which the government may rest its case. The
5 government has no burden to negate all possible inferences of innocence that may be drawn from the
6 evidence and all reasonable inferences drawn by the jury will be presumed correct, but evidence that at
7 best raises only a suspicion that the Defendant committed the offense impermissibly shifts the burden to
8 the Defendant to prove his innocence and invites the jury to speculate as to the Defendant's innocence or
9 guilt. *Saimon*, supra, 3 N.M.I. at 388; *Cartwright*, supra, 359 F.3d at 291; *U.S. v. Johnson*, 229 F.3d
10 891, 895 (9th Cir. 2000).

11 To prove the charges, the government was required to present evidence to prove beyond a
12 reasonable doubt that it was this Defendant that unlawfully took the money paid by Ming Li to MarPac
13 on the designated invoices, that the money belonged to MarPac when it was taken, and that Defendant
14 did this with the intention of permanently depriving MarPac of the money. 6 CMC § 6102(a); Jury
15 Instruction Nos. 10-22. Of the three MarPac employees who testified for the prosecution, Mr. Mendiola
16 and Ms. Borja testified only as to the *standard* procedures used by MarPac to process orders and
17 payments and their familiarity with the documentary evidence. Ms. Borja, who testified that she handled
18 the cash, invoices, and bank deposits in her role as MarPac's accounts receivables accountant and
19 occasional cashier during the relevant period, was never questioned regarding any *direct personal*
20 *knowledge* she may have of whether or not Defendant *actually delivered* each of the five payment
21 pickups he made of Ming Li's payments to her starting on December 8, 2004, or whether the accounts or
22 bank deposits ever came up short on any of the days that Defendant was tasked with collecting and
23 delivering payments. The smallest amount of the five pickup payments Defendant made is \$12,000 on
24

1 December 8th, and the largest amount was on December 27th for \$44,400, with the last payment pickup
2 on January 5, 2005 for \$16,000.

3 Mr. Shimizu's testimony was based upon his interpretation of three sets of documentary
4 evidence: the warehouse log sheets, the individual manual invoices of customers, and MarPac's computer
5 database of individual customer accounts for 2004-2005 period. Mr. Shimizu did not show how the
6 computer database indicates the date when entries to the database are made or who made them. He
7 acknowledged that it presently contains false entries for customer invoices that were fabricated. He also
8 testified that the warehouse log sheets do not contain an indication of when, or by whom, payments on
9 customer invoices are actually delivered to MarPac's office, nor did MarPac utilize any other procedure
10 to record these deliveries of payments. No evidence was introduced to indicate that Mr. Shimizu
11 personally witnessed any of the actual events, conduct or transactions that form the basis of the charges
12 against Defendant, and the computer record he relied upon was proven inaccurate. This evidence is
13 insufficient to support a reasonable inference that Defendant is legally guilty of unlawfully taking money
14 that belonged to MarPac by failing to turn in the specific payments he picked up from Ming Li.
15 Defendant's testimony under oath supports the finding that he did in fact turn in all of the Ming Li
16 payments. As for his initials on the fabricated duplicate invoices, the evidence shows that he signed them
17 on January 19 and 25, 2005, over a month after he made his first payment pickup in this case. He
18 testified that he signed them only after being told by Joe Santos, the person who admitted to taking
19 MarPac's money. There was no evidence presented to show that the money Joe Santos confessed to have
20 stolen is different from these Ming Li payments.

21 CONCLUSION

22 The government elected to prosecute its case based upon circumstantial evidence. No evidence
23 other than that cited above was offered to specifically show that Defendant ever had in his possession or
24 control any money belonging to MarPac on any occasion other than when authorized by his employer.

1 Angie Borja repeatedly gave invoices to the Defendant to pickup payments worth thousands of dollars
2 and she never testified that she had reason to believe the Defendant was not coming back with those
3 payments. With respect to MarPac's missing money, no evidence was offered to show MarPac's deposit
4 record or its daily or weekly ledger for the dates involved to show an absence of receipt of payments.

5 The government's proof consists entirely of the conclusion of Ambrose's general manager that
6 payments tendered by Ming Li on its MarPac account in December and January of 2004-2005 are absent
7 from MarPac's existing record of accounts and must have been stolen, together with Defendant's
8 proximity to Ming Li's payments in 2004. Viewing the totality of the evidence in a light most favorable
9 to the government and indulging all reasonable inferences accordingly, the Court nevertheless concludes
10 that the evidence in this case is insufficient to sustain a verdict of guilty. Defendant's motion for a
11 judgment of acquittal pursuant to Com. R. Cr. P. 29(c) is therefore GRANTED.

12 **SO ORDERED** this 26th day of December, 2007.

13 /S/ _____
14 RAMONA V. MANGLOÑA, Associate Judge