

HANS WILLIANTER, Appellant
v.
TRUST TERRITORY OF THE PACIFIC ISLANDS, Appellee
Criminal Case No. 194
Trial Division of the High Court
Truk District
December 20, 1966

Appeal from conviction in Truk District Court of embezzlement in violation of T.T.C., Sec. 393. Appellant contends that complaint failed to alleged essential elements of embezzlement. The Trial Division of the High Court, Associate Justice Joseph W. Goss, held that failure to state essential elements of crime is substantial error requiring new trial with amended complaint. Reversed and remanded.

1. Criminal Law-Complaint

Information in criminal prosecution must allege all essential elements of crime charged in order to fully apprise accused of nature of accusation.

2. Embezzlement-Generally

Essential elements of crime of embezzlement are taking and carrying away without owner's knowledge or consent the personal property of another with intent to permanently convert it to one's own use. (T.T.C., Sec. 393)

3. Criminal Law-Appeals-Prejudicial Error

Finding of trial court will not be set aside for error or omission occurring during proceedings unless appellate court determines error has resulted in injustice to accused. (T.T.C., Sec. 497)

4. Criminal Law-Appeals-Prejudicial Error

Trust Territory statute providing that criminal conviction will be reversed only where injustice to accused results from error committed during proceedings, is designed to afford full protection to accused and prevent guilty from escaping punishments. (T.T.C., Sec. 497)

5. Criminal Law-Statutes-Construction

Sufficient statement of essential ingredients of criminal offense is matter of substance, not of form, and want of such statement is beyond protection of curative statutes.

6. Criminal Law-Complaint-Defect

Appellate court may order new trial and direct trial court to permit amendment of complaint where complaint does not allege essential elements of offense. (T.T.C., Sec. 200)

Assessor: JUDGE OLAF WELE
Interpreter: SEBASTIAN FRANK
Counsel for Appellant: ANDON L. AMARAICH
Counsel for Appellee: FUJITA PETER

GOSS, Associate Justice

The Appellant, Hans Willianter, was on June 21, 1965, convicted of the offense of embezzlement in violation of Section 393 of the Trust Territory Code.

The Appellant was granted a Stay of Execution, and he filed a Notice of Appeal on June 22, 1965. On April 26, 1966, the Appellant's Brief was filed. No brief has been filed on behalf of the Appellee, Trust Territory of the Pacific Islands. Arguments were presented on October 11, 1966, at request of the Court, upon the District Prosecutor's return from Japan.

OPINION

[1] Fundamental in any criminal prosecution is that an information allege all of the essential elements of the crime charged, in order that the accused will be fully apprised of the complete nature of the accusation against him. Vol. 27 Am. Jur., p. 735.

In the Information filed herein, the accusation is worded in the following manner:-

"Embezzlement. That on or about between 19th day of March 1964 and August 16, 1964, at Moen Island, Truk District, Hans Willianter of Tol Island committed the crime of Embezzlement by after having lawfully obtained and possessed the personal property of the said Faichuk Co-op having the value of more than fifty (\$50.00) dollars, and convert it to his own use without the owners' knowledge, in violation of T.T.C. Sec. 393."

[2] In the drafting of a criminal complaint or information, the particular statute should be analyzed to be certain that each element of the offense is included. The

essential elements of the offense of Embezzlement, Trust Territory Code, Section 393, are as follows:-

1. On or about _____ (date).
2. At _____ Island, _____ District.
3. .. _____ (the defendant)
4. after having lawfully obtained
5. the personal property (describe)
6. of..... (name)
7. shall take and carry away said property
8. without the owner's knowledge
9. and consent,
10. and with the intent to permanently
11. convert it to his own use.

It will be noted that it was not alleged in the Information against the Appellant that he has ever committed those parts of the offense of Embezzlement which are set forth in essential elements 7, 9 and 10 above.

[3-5] Whenever there is a defect in criminal court proceedings, the question of the applicability of Trust Territory Code, Section 497, must be considered:-

"Sec. 497. Effect of irregularities. The proceedings before a court or an official authorized to issue a warrant shall not be invalidated, nor any finding, order, or sentence set aside for any error or omission, technical or otherwise, occurring in such proceedings, unless in the opinion of the reviewing authority or a court hearing the case on appeal or otherwise it shall appear that the error or omission has resulted in injustice to the accused."

It is not necessary to rule on whether the contents of an Information are a part of a "proceeding before Court or Official authorized to issue a warrant". Such curative statutes are designed to afford full protection to the accused, and, at the same time, to prevent the guilty from escaping punishment through mere imperfections of pleadings. Somewhat similar statutes in other jurisdic-

tions have been construed liberally, but with the following important qualification : —

"However, while curative statutes of this character are to be liberally construed, they only authorize the court to disregard objections to matters of form or to inartificial forms of averments, and do not permit the courts to disregard objections to matters of substance. An omission of any sufficient charge of every substantive fact necessary to constitute the offense is not cured thereby. Such statutes are not intended to encourage laxity in criminal pleading in matters of substance; they dispense with mere formality and technicality, A sufficient statement of the essential ingredients of the offense is a matter of substance, not of form, and the want of such a statement is beyond the protection of such curative statutes." (Vol. 27, Am. Jur., p. 740-741. See also *Trust Territory of the Pacific Islands v. Johannes Ngeskbei*, Palau District Criminal Case No. 28, 1952, (reported in Rulings and Remarks of (what is now) the Trial Division of the High Court, February 28, 1956).

[6] Since the Information does not allege each of the essential elements of the offense, the Information is insufficient to support a conviction. From a review of the record, it appears that a more exhaustive presentation of evidence at a new trial is indicated in the interest of justice. *Benedicta S. Decena v. Trust Territory*, 3 T.T.R. 60. Where a Defendant has appealed, the Appellate Court may order a new trial under Trust Territory Code, Section 200, and direct the Trial Court to permit a timely and proper amendment of the complaint. Vol. 5, Am. Jur., p. 397. It would seem particularly desirable for additional evidence to be presented as to the responsibility of the Appellant for the funds alleged to have been stolen and as to whether they could have been diverted to other purposes of the Faichuk Co-op, or diverted illegally by another person.

JUDGMENT

The finding and sentence of the Truk District Court in its Criminal Case No. 1970 are therefore set aside and the

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case remanded to the District Court for a new trial or other proceedings not inconsistent with the holding set forth above. The Trial Court is directed to permit a timely and proper amendment of the complaint. The bail heretofore posted will remain in effect until further order of the Truk District Court.

ULUDONG UMIICH, Appellant

v.

TRUST TERRITORY OF THE PACIFIC ISLANDS, Appellee

Criminal Case No. 284

Trial Division of the High Court

Palau District

January 11, 1967

Defendant was convicted in Palau District Court of bigamy, in violation of T.T.C., Sec. 406. On appeal, defendant contends that cohabitation does not constitute bigamy when there has been no marriage between the parties under Palau customary law. The Trial Division of the High Court, Chief Justice E. P. Furber, held that appearance of marriage under local custom is sufficient to constitute "marrying" within meaning of Trust Territory law defining bigamy.

Affirmed.

1. Bigamy-Appearance of Marriage

Word "marry" in bigamy statutes is used in peculiar sense and, as applied to second or bigamous marriage, does not mean to effect legal marriage, but merely to appear to marry. (T.T.C., Sec. 406)

2. Bigamy-Generally

To constitute bigamous marriage, it is immaterial whether alleged marriage is illegal or defective for some other reason in addition to prior and still-existing marriage of accused. (T.T.C., Sec. 406)

3. Bigamy-Appearance of Marriage

Appearance of common law marriage not involving any ceremony is sufficient to constitute appearance of marriage for purposes of bigamy statutes, in jurisdictions which still recognize common-law marriages. (T.T.C., Sec. 406)