

TRUST TERRITORY OF THE PACIFIC ISLANDS

v.

KYOSHI ANDERSON

Criminal Case No. 352

Trial Division of the High Court

Palau District

May 24, 1971

Criminal case based on four counts of alleged social security violations. The Trial Division of the High Court, Arvin H. Brown, Jr., Associate Justice, acquitted the defendant of all charges, finding that defendant had tendered the precise amount claimed by the government and that the government's refusal to accept the tender was improper.

1. Courts—High Court

The Trial Division of the High Court must, whenever possible, make its decisions without resorting to constitutional interpretation.

2. Taxation—Social Security Act—Failure to Contribute

The term "wilfully" as applied to the Social Security Act requires more than a mere decision not to contribute; it must include in its definition an essence of evil intent.

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3. Tender—Effect of Rejection

The law is clear that tender, if of sufficient amount, when rejected operates as payment so long as it is kept good.

4. Tender—Generally

Tender is the exact equivalent of payment, and it does not need to be repeated.

5. Tender—Generally

To be effective, tender must be unconditional.

Interpreter:

KAZUMOTO H. RENGULBAI

Reporter:

SAM K. SASLAW

Counsel for Prosecution:

JAMES E. WHITE, *District Attorney*, and
BENJAMIN N. OITERONG, *District
Prosecutor*

Counsel for Accused:

WILLIAM E. NORRIS, *Assistant Public
Defender*, and FRANCISCO ARMA-
LUUK, *Public Defender's Representa-
tive*

BROWN, Associate Justice

This case is based upon four counts of alleged Social Security violations. The government claims that the defendant, Kyoshi Anderson, wilfully failed to report and to pay contributions upon his own earnings, as an employer, in violation of Public Law No. 3-40, section 20, as amended by Public Law No. 4-10 and Public Law No. 3-C 48.

The defendant, doing business under the firm name and style of K. and A. Wholesalers, Koror, Palau Islands, was, and now is the employer of more than twenty-five employees. It is clear that proper and timely contributions and deductions for Social Security were made as to those persons, except for the amount of \$9.94 which, because of a clerical or bookkeeping error, was not paid on the date due but was paid upon defendant's discovery of the error.

As an employer, defendant failed to make Social Security contributions for himself. He held to the belief that he neither needed nor desired whatever benefits may be afforded by any program of Social Security; and he elected to protect his financial interests, and those of his dependents, through insurance obtained through private sources. The very concept of Social Security was foreign to him, as it must well be to many persons uninitiated to the concept of financial security enforced by a governmental agency. As a result of defendant's failure to contribute to the program, the government claimed, and rightly claimed, that defendant failed to pay the amount of \$30.00, due as his contribution as a self-employed person. The government demanded payment, and defendant vigorously resisted. As a result of the disagreement, the government sought to enforce payment; and defendant, still not persuaded that payment should be mandatory as to an unwilling self-employed person, sought to preserve what he deemed to be his freedom of choice.

Initially, representatives of the government met with defendant and explained that Public Law No. 3-C 48, passed in January, 1970, did make Social Security coverage mandatory for most self-employed persons, including defendant. Accompanied by an official from Saipan, the Social Security representative stationed on Koror discussed with defendant the latter's delinquency of \$30.00, but defendant, apparently using intemperate language because of his feeling of outrage at being forced to participate in a program which he did not understand and in which he had no confidence, refused to make the contribution demanded of him. Hence the foreseeable impasse developed. On one side stood the government, demanding its due; on the other side stood Kyoshi Anderson, refusing to pay what he felt was an unjust, if not an illegal call upon his assets, admittedly earned by him through his own efforts as a businessman.

As the disagreement hardened, the government determined to utilize its powers to enforce its demand that defendant make the required contribution. After having so determined, on September 23, 1970, the government caused to be served upon defendant a subpoena requiring the latter to appear the following day at the court house, Koror, Palau Islands, to attend a hearing. The defendant did appear, as ordered. A review of the reporter's transcript of the proceedings, which was offered and received in evidence without objection, reveals that defendant first objected to the hearing in that there was no judge present. Next, he urged that the circumstances were such that he needed legal counsel to defend him and to advise him. Although defendant stated twice that he was in need of counsel, his requests were neither heeded nor answered. The hearing continued, although the record reveals that little, if anything, was accomplished. Finally, at the conclusion of the hearing, defendant was ordered to pay the \$30.00 before another two hours had passed. Payment was not made within the time specified.

The government then decided to exercise its right to prosecute, and in so doing followed a most unorthodox and regrettable pattern. Defendant, either upon his own reflection, or following the counsel of another, tendered to the government the precise amount claimed by the government; but the tender was refused. Thereafter, a complaint was issued, filed and served; and then, but only then, the government peculiarly accepted the amount which had theretofore been tendered by defendant.

[1] While certain constitutional questions may arise as a result of the foregoing facts, they need not be determined here; for the case may be decided upon grounds other than constitutional, and this court must, whenever possible, make its decisions without resorting to constitutional interpretation.

[2] Upon the evidence presented, the court finds as a matter of fact that defendant did not act wilfully. While it is true that defendant failed, for a time, to make his required contributions towards his own social security, it appears that this failure to contribute arose out of a bona fide misunderstanding. Neither the Congress of the United States nor the Congress of Micronesia intended that a person who fails to pay a tax should be marked as a criminal because of a bona fide misunderstanding. In this instance, the court finds that the term, "wilfully", as applied to the Social Security Act, requires more than a mere decision not to contribute; it must include in its definition an essence of evil intent, and the evidence produced by the government falls far short of that mark. (35 Am. Jur. 2d Federal Tax Enforcement, § 114.) It is conceded that in the give and take of argument, intemperate language came into play—but neither side has been charged with using abusive words, and the court need not consider that issue, if, indeed, it is an issue.

[3-5] Of paramount importance here is the question of whether or not tender is the equivalent of actual payment when it is in the exact amount claimed by the government; if it is, then the complaint, as drawn, must necessarily fail. The law is clear that tender, if of sufficient amount, when rejected operates as payment so long as it is kept good. It is the exact equivalent of payment, and it does not need to be repeated. To be effective, it must be unconditional; and such was the case here. (*United States v. World's Columbian Exposition*, 56 F. 630, 638; *Brown v. Lawton* 87 Me. 83; *Beatty v. Mutual Reserve Fund Life Ass'n* 75 F. 65). Defendant had tendered the precise amount claimed by the government; the tender was unconditional and was kept open. Further, it was made before the government had filed its complaint. Had the government accepted the tender, then it is clear that it could not

have filed the complaint which charged a wilful refusal to pay. It would be manifestly an injustice to place an onus upon defendant because the government unfortunately refused to accept the tendered sum; but later, and after a complaint had been issued, the government, without explanation, reversed its stand and accepted the sum tendered. The court cannot, and it does not regard this action by the government as a mere coincidence. At best, it can be regarded as imprudence.

Accordingly, it is the judgment of this court that defendant, Kyoshi Anderson, be, and he is hereby acquitted of all charges.