REPUBLIC OF LIBERIA, Appellant, v. **EZZAT N. EID et al.**, Appellees.

APPEAL FROM THE CIRCUIT COURT FOR THE FIRST JUDICIAL CIRCUIT, CRIMINAL ASSIZES "B", MONTSERRADO COUNTY.

Heard: October 24, 1994. Decided: February 16, 1995.

1. A defendant charged for the commission of any criminal offense is presumed innocent until the contrary is proven, and that in case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to an acquittal. Criminal Procedure Law, Rev. Code, 2:2.1.

2. The "reasonable doubt" requirement for the acquittal of a defendant, refers to the doubt created in the minds of the jurors who are triers of fact and not the court or judge presiding.

3. The sufficiency of evidence to prove the main fact of guilt, or any evidentiary fact looking thereto, is a matter within the province of the jury.

4. If from the trial, the Court is convinced that the evidence adduced is not relevant and material, and is insufficient to sustain a conviction, it will take the case from the empaneled jury and grant the motion for judgment of acquittal as a matter of law.

5. The State may take an appeal as of right from (a) an order granting a motion by the defendant to dismiss the indictment; or (b) an order granting a motion for judgment of acquittal. Criminal Procedure Law, Rev. Code 2:24.3.

6. It is also held that the testimony of a prosecuting witness may be sufficient to justify a conviction, although it is not corroborated, or is contradicted by other witnesses.

7. Conflicts in the testimony of the prosecuting witness goes to its weight, but not to its sufficiency, to sustain a conviction.

8. An accused, under our statute is presumed innocent until the contrary is proven. He has a privilege not to be called as a witness, and not to testify, and that the enjoyment of such privilege may not draw any adverse inference therefrom. Nevertheless, when the accused in a criminal prosecution fails to explain any incriminating facts and circumstances in evidence on trial that lay peculiarly within his

knowledge, he takes the chance of any reasonable inference of guilt at his peril.

9. The protection afforded an accused against any unfavorable presumption or inference being drawn because of his failure to testify, remains with him until he takes the stand as a witness, is sworn to tell the truth and thereafter testifies in his own behalf. His failure to deny a material fact within his knowledge previously testified to against him, warrants the inference that it was true.

10. The credibility of a witness and the weight and value to be given to his testimony, in a criminal prosecution, is a matter to be determined by the jury, or by the court if it sits without a jury; the court or jury, in making such a determination, may take into consideration any attendant facts or circumstances which tend to throw light on the accuracy, truthfulness, and sincerity of the witness.

11. The mere fact that a witness' testimony is self-contradictory to some extent, or is inconsistent with statements made by him at other times, does not prevent its constituting substantial evidence

12. The fact that a defendant exercises his right not to take the stand, does not render the judgment of acquittal conclusive on the matter.

13. It is the right of the court to decide on the admissibility of evidence; but when it is admitted, it is the right of the jury to decide upon its weight, credibility, and effect.

14. All documentary evidence which are material to the issue of fact raised and which are received and marked by court, should be presented to the jury which has exclusive authority to decide on their weight and credibility.

15. Where an instrument or documentary evidence is admitted by the court to form part of the evidence of the *case,* it becomes the exclusive function of the jury to determine the weight, credibility, and effect to be given to it.

16. It is an invasion of the province of the jury for a court to determine the weight and credibility of an evidence after it has been admitted into evidence.

17. Insufficiency of evidence to support a verdict, or to sustain a conviction means that there is no evidence which ought reasonably to satisfy the empaneled jury that facts to be proved is established, or there is evidence but not enough in the light of the evidence to the contrary to support a verdict.

18. A *"prima facie* case" is one which is established by sufficient evidence and can be overthrown only by rebutting evidence adduced on the other side.

Appellees/defendants were indicted for the crime of theft of property, and were arraigned before the First Judicial Circuit, Criminal Court "C", Montserrado County, where they entered a plea of not guilty. Thereafter trial commenced. When the state rested evidence, the defendants, invoking their rights not to take the stand, and holding that nothing was proved against them by the State, moved the court for judgment of acquittal. The Court heard the motion and granted it and discharged the defendants "without day" and ordered their bonds returned to them. From this ruling, the State appealed to the Supreme Court.

The Supreme Court held that while it was true that under our statute an accused is presumed innocent until the contrary is proven, and that he has a privilege not to be called as a witness, and not to testify, and that the enjoyment of such privilege may not draw any adverse inference therefrom, nevertheless, when the accused in a criminal prosecution fails to explain any incriminating facts and circumstances in evidence on trial that lay peculiarly within his knowledge, he takes the chance of any reasonable inference of guilt at his peril. The Supreme Court upon review of the records, found that the evidence adduced by the State contained incriminating facts and circumstances which were testified to, and which were not rebutted or denied, and which under our law warrants the inference that they were true. The Supreme Court therefore held that the trial court invaded the province of the jury when it granted the motion of acquittal without allowing the jury to determine the weight and credibility of the evidence which had been admitted for their consideration. Accordingly, the judgment of acquittal was *reversed* and the case remanded for re-trial.

Farmere Stubblefield, John L. Greaves and McDonald J Krakue appeared for plaintiff/appellant. *Varney G. Sherman, T. C. Gould and Francis Korkpor* appeared for appellee.

MR. JUSTICE SMITH delivered the opinion of the Court.

Our Criminal Procedure Law provides for rights of a defendant charged for the commission of any criminal offense and one of these rights is that he is presumed innocent until the contrary is proven, and that in case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to an Acquittal. Criminal Procedure Law,

Rev. Code, 2:2.1. However, the reasonable doubt must have been created in the minds of the jurors who are triers of fact and not the court or judge presiding. According to law writers, ordinarily, the sufficiency of evidence to prove the main fact of guilt, or any evidentiary fact looking thereto, is a matter within the province of the jury. They are the triers of fact, the sole judges of the weight and worth of the evidence and the credibility of witnesses. The law prescribes certain rules for the guidance of juries in dealing with the evidence. It accords to them full and unrestricted power to determine what facts are proven; and what not proven when there is substantial evidence tending to establish them, or when the evidence *pro et con* is conflicting, and is not controlled by some fact or circumstances so clearly and fully established as to leave no possible doubt of its existence, and of such character as makes it necessarily rule the whole case; and the credibility is for jury determination, and no other, when any link or fact depends upon that question. Its duty is to determine, from all the facts and circumstances, the question of the defendants guilt or innocence. In other words, when all the evidence is in, the jury is to weigh it and determine whether or not the guilt of the accused has been established beyond a reasonable doubt. 2 WHARTON'S CRIMINAL EVIDENCE, 867 (11' ed).

Our Criminal Procedure Law provides, however, for judgment of acquittal on motion of the defendant to be decided by the court where the evidence presented is sufficient to sustain a conviction. If from the evidence, the Court is convinced that such evidence is not relevant, material, and insufficient to sustain a conviction, it will take the case from the empaneled jury and grant the motion for judgment of acquittal as a matter of law. The statute reads thus: "The Court on motion of the defendant, or on its own motion, shall order the entry of judgment of acquittal of one or more offenses charged in the indictment after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses. If a defendant's motion for judgment of acquittal at the close of the evidence offered by the Republic is not granted the defendant may offer evidence without having reserved the right". Criminal Procedure Law, Rev. Code 2: 20.10.

The defendants in this case, Ezzat Eid, Char Gaugin, alias Chung, and Ghazi Kammand, were indicted for the crime of theft of property. Under our Penal Law, theft of property is defined as follows:

"A person is guilty of theft if he:

(a) Knowingly takes, misappropriates, converts, or unauthorized control over, or makes an unauthorized transfer of any interest in the property of another with the

purpose of depriving the owner thereof;

(b) Knowingly obtains the property of another by deception or by threat with the purpose of depriving the owner thereof, or purposely deprives another of his property by deception or by threat; or

(c) Knowingly receives, retains or disposes of property of another which has been stolen, with the purpose of depriving the owner thereof'. Penal Law, Rev. Code 26:15.51.

The defendants were arraigned before the Criminal Court "C" of the First Judicial Circuit, Montserrado County, during its May, 1994 term, presided over by Her Honour Frances Johnson-Morris; they pleaded not guilty, which plea shifted the burden of proof on the prosecution to establish the guilt of the defendants. The State thereupon produced six(6) witnesses and rested. The defendants then invoked the right not to take the stand holding that nothing was proved against them by the State and there-fore, moved the court for judgment of acquittal. The court heard the motion and granted it and discharged the defendants "without day" and their bonds were ordered returned to them. This determination not being conclusive, the State, in the exercise of her right of appeal in such cases, excepted to the ruling of the court and announced an appeal to this Court of last re-sort for review of the ruling. The State does not usually appeal in criminal cases under our law, but the statute allows the State to appeal from certain determinations and we read the relevant statute:

"An appeal may be taken as a right by the Republic from:

(a) An order granting a motion by the defendant to dismiss the indictment; or

(b) An order granting a motion for judgment of "acquittal". Criminal Procedure Law, Rev. Code 2:24.3

In order to determine whether or not the evidence adduced by the State is insufficient to sustain a conviction, thereby justifying the granting of the motion of acquittal, we must review the evidence presented by the prosecution.

The prosecution's first witness, George E. Bejany substantially testified among other things, that in 1992, he learned about an auction sale of some assets belonging to the Chinese government left in the warehouse at the SKD Sports Complex and so he started negotiation with one Mr. Liu YU Ling, the representative of the Chinese

Government and the construction company for him to purchase the assets. The negotiation having concluded, Mr. Ling invited Mr.' George Bejany in the law offices of Counsellor Toye C. Bernard, where the bill of sale was drawn up and signed by him and Mr. Ling on the 11`h. day of August, 1992. Mr. Bejany purchased in bulk all that the Chinese left in the warehouse at the sports complex, except two or three heavy duty equipment and medical equipment which Mr. Ling identified as not belonging to the Chinese Company. Mr. Bejany said that the value of the items purchased as reflected in the bill of sale is US$40,000.00 for which he issued and paid to Mr. Ling two (2) checks. For fear of some mismanagement on part of the caretakers, whom Mr. Ling left at the Complex, Mr. Bejany put a stop payment order on one of the checks. When Mr. Ling departed Liberia, he said, Mr. George Haddad was left in care of the company and he (Bejany) also left the country. On his return to Liberia in 1993, he discovered that many of the items he bought and left in the warehouse at the sport complex were missing. He thereupon approached Mr. Haddad who went along with him to the sports complex warehouse to verify the loss of the items. On arrival, they asked the watchman, Mr. Logan and the Chinese man, Mr. Chung, as to what has become of the missing items. He said that when they asked Mr. Chung, he took them immediately to the International Aluminum's office on United Nations Drive where they met co-defendant Ezzat Eid, who he said had purchased the items from him, Mr. Chung. He said that Mr. Eid admitted purchasing the items from Mr. Chung, but added that he did not know that Mr. Chung was not the representative of the Chinese government. However, Mr. Eid expressed willingness to return the items provided the bill of sale signed by Mr. Ling and Mr. Bejany, the purchaser, was presented to him as evidence. Mr. Haddad, there and them advised Mr. Chung to return the money he received from Mr. Eid for the ten (10) bales of cables. He said, Mr. Haddad also advised Mr. Eid to return the cables which he promised to do after the showing of evidence of the bill of sales, and the sizes and dimension of the cables. Mr. Bejany said that when he sent his technicians to Mr. Eid for the cables, he refused to allow them to take delivery of them. He said when he himself went to Mr. Eid on the issue, Mr. Eid explained to him that he had some partners who and him purchased the electric cables and that he would try to convince them and pending that, the cables will be kept safely by him until he Bejany, who was about to go out of the country, returns. He therefore did not receive the ten (10) rolls of cables when he left the country in the middle of June, 1993. When he was leaving, he said, he left another six (6) big rolls of electric cables at the sports complex warehouse, and removed only some of those items which the custom officer had assessed the value in accordance with the bill of sales and checked all what remained in the warehouse. The ten (10) rolls of cables were with Mr. Eid in his aluminum factory. He said Mr. Eid told him that the cables in his possession were in tack and that he will resolve the

matter with his partners before his return from the two weeks trip out of the country, and will thereafter receive them.

Continuing his testimony, Mr. Bejany said that on his return to the country in December, 1993, and upon checking the inventory items at the sports complex, he again discovered that the six (6) big rolls of cables he left there were again missing along with other items of the inventory. He thereupon questioned Mr. Chung and Mr. Logan, the care-taker and watchman about the disappearance of the six (6) rolls of cables and the other items; but they did not disclose anything to him. This led him to visit the Chinese Embassy along with Mr. Chung, where he reported the matter but Mr. Chung still denied knowledge of the missing items. That it was at this point that he reported the matter to the county attorney's office. It was in the county attorney's office that Mr. Chung called the name of Mr. Kammand, one of the co-defendants in this case as knowing something about the missing cables. The county attorney requested him for his driver to take Mr. Chung to where Mr. Kammand was and bring him to his office. Mr. Chung went with the driver and they returned to the county attorney's office with the said Mr. Kammand. When the county attorney inquired about the cables, they both argued that the checks that Bejany had paid for the materials, which were left over at the sports complex were not correct. The county attorney exhibited the check to them signed and stamped at the back by Mr. Liu Yu Ling who received them and issued the bill of sale. A writ of arrest was thereupon issued by the county attorney on the two defendants, Chung and Kammand. During the investigation in his Office, the County Attorney told Mr. Bejany that it was Mr. Kammand who bought the six (6) big rolls of cables from the Capital Electrical Company according to a letter from Counsellor Findley, and that the owner of the Company, Mr. Eid, was out of the country and when he returns, the matter would be looked into. The County Attorney also told him that Mr: Chung and Mr. Kammand were under bond and were therefore temporarily released.

When the State, by permission of court, recalled Mr. Bejany, the prosecuting witness, to the stand, he testified word for word, in answer to a question on the direct to establish the identity of some communications; he stated as follows:

"On June 2"d, the Toye C. Bernard Law Offices, who drew the bill of sales on behalf of the China National Sport Company, through Mr. Ling, and the Liberia Engineering, represented by me, the same Law Office wrote a letter to Mr. Ezzat Eid requesting him to return the cables and other materials bought from the Sports Complex through one Mr. Chung. The second letter is an answer from the Sherman Law Office to Counsellor Toye C. Bernard explaining that his client, Mr. Ezzat Eid purchased electric cables with good faith thinking that Mr. Chung has the authority to

sell items left over at the SKD "sports complex; and that Mr. Eid bought those cables from State Builders, Inc., and not directly from Mr. Chung.
When I brought the matter to the County Attorney's office that I am missing more building materials and six (6) rolls of the big electric cables, in addition to the first ten (10) rolls of electric cables, the Joe Findley and Associates wrote the County Attorney claiming that their client, the State Builders Incorporated bought the six (6) rolls of cables from the Capital Electrical Comply of Mr. Ezzat Eid.

The last letter is from the Sherman and Sherman Law office through the County Attorney admitting the fact that the ten(10) rolls of cables are in the possession of Mr. Ezzat Eid and awaiting evidence from Counsellor Toye C. Bernard that George E. Bejany was in fact the owner of the materials left over at the SKD Sports Complex by the China National Plant Deport Company.

The duty entry prepared by the Ministry of Finance covers complete itemization of the bulk of materials purchased by the Liberia Engineering Enterprises from the China National Complete Deport Company. This entry is dated June 5, 1985; also a receipt in the amount of $17,028.00 attached to this entry was paid in the Revenue as duty to the Republic of Liberia.

This testimony of the private prosecutor contains several allegations which in the mind of the Court could have been addressed by the defendants. For instance, it is alleged in the statement that some of the missing properties were found in the possession of co-defendant Ezzat Eid who admitted purchasing them from co-defendant Chung,

According to Counsellor Sherman's letter testified to and admitted into evidence, his client Ezzat Eid, bought the cables directly from the State Builders Inc. and not from Mr. Chung. Yet, the letter from Counselor Findley, Counsel for the State Builders Inc. which was also admitted into evidence, states that States Builders, Inc., his client bought the six (6) rolls of cables from the Capital Electrical Company of Mr. Eid.

According to law writers, the credibility of a witness and the weight and value to be given to his testimony in a criminal prosecution is a matter to be determined by the jury, or by the court if it sits without a jury. 23 CJS, *Criminal Law,* ∫ 903. In this case, the court was sitting with a jury duly empaneled to try the issue joined between the State and the defendants charged with the commission of the crime "theft of property".

It is also held that the testimony of a prosecuting witness may be sufficient to justify a conviction, although it is not corroborated, or is contradicted by other witnesses. The jury, however, need not accept the prosecuting witness' version of the crime but may consider all the surrounding facts and circumstances. Conflicts in the testimony of the prosecuting witness goes to its weight, but not to its sufficiency, to sustain a conviction. *Id*.,§ 903.

Let us however go to the testimonies of few other witnesses to see whether or not there was no corroboration of the prosecuting witness' testimony to sustain a conviction for which a judgment of acquittal could be granted.

The second witness, Amos Belleh took the stand and confirmed on oath that Mr. Bejany, President of Liberia Engineering Enterprises, bought some materials from China National Complete Deport Corporation, represented by Mr. Liu Yu Zing and he, as technician for Mr. Bejany's company, was sent to take inventory of the materials. Here is a relevant portion of his testimony:

"Sometime in May of 1993, we went back along with the customs officer. When we got on the complex, we found that ten (10) rolls of the wires had been stolen. After that my boss man, Mr. George E. Bejany, decided to find out who stole the cables; and in November of the same year, when we went back, we found also that the remaining four (4) rolls of cables on the outside and the two (2) making it a total of six (6) rolls were also stolen. When we went back with the custom officer, the six (6) rolls were there, but the ten (10) were gone. But in November, the balance six (6) also left. My boss man gave me instruction in the month of June along with Emil and Oldman Scott to go to International Aluminum Factory to collect the ten (10) rolls of cables. But unfortunately for us, we were not allowed entry into the IAF and we came back and reported to the boss man. I rest".

Here again, this witness has testified that besides the ten (10) rolls of cables which were discovered missing when they visited the complex in May, 1993, which Co-defendant Eid's counsel said were purchased in good faith from the State Builders, Inc., the remaining six (6) rolls were again in November, 1993, discovered missing, about six (6) months after the first ten (10) rolls were stolen, which six (6) rolls Counsellor Findley said were bought from the Capital Electrical Company of defendant Eid by his client.

The 3rd witness for the State, Abraham Lakker, also testified and confirmed that Mr. Bejany, the prosecuting witness bought the cables in question and that they were

missing at the
complex.

The fourth witness for the prosecution, John Flomo, testified as follows: "In the year 1992, I saw one Mr. Ling, he came to Mr. George E. Bejany. He said he had some items for sale, so he wants for Mr. George E. Bejany to buy them. Every day he used to come. One day when he came, he took us to the sports complex of the SKD. When we went to the complex, he showed us the items that he wanted to sell to Mr. Bejany. Some of the items were in the ware-house and some were outside, The items that I saw outside were fourteen (14) rolls of cables and small, small ones were in the warehouse. I cannot name all of the items, they were many; so later one in 1993, May, we went there to go look at the items, ten (10) rolls were gone. Through that, we began to understand that the Chinese man went and took some of the item to sell. We went and discovered that some of the cables were sold at the Aluminum Factory on the Gardnersville road. That is all I know and can remember. I rest."

This witness also confirmed the missing of his boss man Bejany's items bought from Mr. Ling at the Sports Complex and that in May, 1993, ten (10) rolls of cables were also discovered missing; and that they were informed that it was the Chinese man at the complex who sold them to the Aluminum Factory of Mr. Eid. on the Gardnersville road. This incriminating statement remains un-rebutted and unchallenged.

Also testifying for the State was Mr. George Haddad. Mr. Haddad told the Court and jury that Mr. Eid did in fact purchase these missing items from Mr. Chung for which he advised Mr. Chung to return Mr. Eid's money and Mr. Eid to return the cables to Mr. Chung. We quote for the benefit of this opinion, Mr. Haddad's statement, as follows:

"Your Honour, what I know about this case is from the time I was acting on behalf of Mr. Liu Yu Ling. In 1991, when I returned to the country after the civil crisis, I met with both Mr. Eid and Mr. Bejany and informed them that these cables belong to the Chinese government. Mr. Eid promised to return the cables from the complex and Mr. Chung promised to give the money back to Mr. Eid. As for Mr. Bejany, I told him that I cannot allow him to take any more goods from the complex for two reasons: (1) for his failure to receive the goods within the time given him by my predecessor, Mr. Liu Yu Ling; (2) because he imposed a stop payment on a check without even in-forming me and I consider that as if he gave up his right".

But what is not explained, and which could have been made clear, if the three defendants, Dr. Chung, Mr. Eid and Mr. Kammand, had taken the stand is how did co-defendant Ezzat Eid get to know about the properties of the Chinese company in the warehouse at the SKD sports complex in Paynesville in the care of co-defendant Chung to have gone there to purchase them and whether his vendor, Mr. Chung had authority to sell the items he bought. In our opinion the evidence of the prosecution clearly pointed to the fact that in deed Mr. Bej any's properties that were bought from Mr. Ling and kept at the Sports Complex under the care of Co-defendant Chung, were missing and found to be in the possession of the defendants even till now.

The last letter written to the county attorney by Counsellor Sherman on behalf of his client admits that the ten (10) rolls in question were in the possession of his client, Mr. Eid awaiting evidence from Counsellor Bernard that in fact Mr. Bejany is the owner of the ten (10) rolls of cables. But there is evidence presented at the trial showing a bill of sale and a duty entry prepared by the Ministry of Finance covering a complete itemization of the bulk of materials purchased by the prosecuting witness from the China National Complete Export Company. These facts brought in evidence by the State were so incriminating, that in our opinion, should not have remained unchallenged and un-rebutted.

Counsellor Toye C. Bernard, Mr. Bejany's lawyer wrote to co-defendant Ezzat Eid for the return of the cables and other materials that he bought from Mr. Chung. Counsellor Sherman replied that the electric cables were bought by his client, Mr. Eid in good faith thinking that Mr. Chung had the authority to sell items left over at the SKD sports complex, and that those cables were bought by his client directly from State Builders, Inc. and not directly from Mr. Chung. This explana-tion as contained in the letter of Counsellor Sherman, suggests that other items could have been bought from Mr. Chung, whom Mr. Eid thought had authority to sell items left over at the Sports Complex. And because the rolls of cables were bought from State Builders, Inc. and not directly from co-defendant Chung, confirmed the statement of the prosecuting witness that Mr. Eid told him to be patient; that he was going to consult his partners who and him were in the purchase of the cables and that he will keep tho cables in tack until he, Mr. Bejany, returns to the country.

That when he complained to the County Attorney after he had discovered for the second time that some other items including the six (6) big rolls of cables he left at the Complex were missing, the County Attorney informed him, that he received a letter from Counsellor Joseph Findley on behalf of his client, State Builders, Inc. that his said client bought the six (6) rolls of cables from the Capital Electrical Company

of Mr. Ezzat Eid, the co-defendant. The statement seems to point to the fact that although the first ten (10) rolls of cables which were discovered missing sometimes in May or June, which were found with Ezzat Eid and which he promised to return and has not returned, the last six (6) rolls of cables left at the sports complex by the prosecuting witness, were again bought from his Capital Electrical Company by the State Builders, Inc. according to Counsellor Findley's communication. How did the last six (6) big rolls of cables get to the Capital Electrical Company of Mr. Eid? These are incriminating statements, which in our opinion, could have been explained away by the defendants themselves on the witness stand under oath.

As to co-defendant Ghazi Kammand, the evidence in the record reveals that he bought the six (6) rolls of cables from the Capital Electrical Company of Mr. Ezzat Eid. If Mr. Eid bought the rolls of cables in good faith and did not know that Mr. Chung did not had authority to sell them and he promised to return them, how did the last six (6) big rolls of cables come into his Capital Electrical Company to be bought therefrom by co-defendant Kammand? This is a question that only the defendants alone could have answered had they taken the stand. Unless the defendants take the stand to rebut these allegations, they take the chance of any reasonable inference of guilt at their peril.

Summing up the evidence as revealed by the records certified to us, it has been testified to, and a bill of sale was adduced into evidence not disputed, that Mr. George E. Bejany, the private prosecutor in this case, is the owner of the missing items by honorable purchase, stored up in the warehouse of the seller, Mr. Liu Lu Ling for safe keeping under the care of codefendant Chung until the custom duty thereon was assessed and paid and the purchaser, Mr. Bejany, takes delivery of them.

That some of the items purchased, including several rolls of cables, were missing and that co-defendant Chung, (Char Guangin) caretaker at the SKD Sports Complex was identified to be the one who sold these items to co-defendant Ezzat Eid, owner of Aluminum Factory on Gardnersville Highway and the Capital Electrical Company.

That from communication of Counsellor Sherman, codefendant Ezzat Eid purchased the missing rolls of cables. That it was brought out that the said Co-defendant Eid promised to keep the ten (10) rolls of cables in tack to consult with his partners who and him were in the purchase deal and the ten (10) rolls will be returned. That the six (6) big rolls of cables that were left at the sports complex in June, 1993, were in November, 1993 discovered missing again and were bought by co-defendant from the said co-defendant Eid's Capital Electrical Company as shown by Counsellor

Findley's letter. How the six (6) big rolls of cables left the sports complex and got bought from Co-defendant Ezzat Eid's Capital Electrical Company is a mystery that only Mr. Eid alone, as defendant, could have explained.

These are some of the incriminating facts and evidence against the defendants which remain unchallenged, unexplained and un-rebutted to repel the presumption of guilt of the defendants, which in our opinion, and in the interest of transparent justice; and in fairness to the defendants themselves, could have been refuted on the witness stand by the defendants to enable the trier of the fact to weigh and give credibility to all the evidence and say whether in their good judgment, the prosecution's evidence was not sufficient to sustain a conviction. While it is true that an accused, under our statute, is presumed innocent until the contrary is proven, and that he has a privilege not to be called as a witness, and not to testify, and that the enjoyment of such privilege may not draw any adverse inference therefrom, nevertheless, it is to be noted that when the accused in a criminal prosecution fails to explain any incriminating facts and circumstances in evidence on trial that lay peculiarly within his knowledge, he takes the chance of any reasonable inference of guilt at his peril.

Furthermore, although the protection afforded an accused against any unfavourable presumption or inference being drawn because of his failure to testify, remains with him until he takes the stand as a witness, is sworn to tell the truth and thereafter testifies in his own behalf, nevertheless his failure to deny a material fact within his knowledge previously testified to against him, warrants the inference that it was true. 29 AM JUR 2d, *Evidence, § 189, Failure or refusal to testify.*

If there be any contradiction in the testimonies of the prosecution witness, or if the evidence of the prosecuting witness is insufficient to sustain a conviction as argued by counsel for the defendants, legal writers have said:

"That credibility of a witness and the weight and value to be given to his testimony, in a criminal prosecution is a matter to be determined by the jury, or by the court if it sits without a jury. The court or jury, in making such determination, may take into consideration any attendant facts or circumstances which tend to throw light on the accuracy, truthfulness, and sincerity of the witness.

The mere fact that a witness' testimony is selfcontradictory to some extent, or is inconsistent with statements made by him at other times, does not prevent its constituting substantial evidence "on which to base a conviction, especially where there are facts explanatory of the contradiction. The testimony of a prosecuting

witness may be sufficient to justify a conviction, although it is not corroborated, or contradicted by other witnesses. The jury, however, need not accept the prosecuting witness version of the crime but may consider all the surrounding facts and circumstances. Conflicts in the testimony of the prosecuting witness goes to its weight, but not to its sufficiency, to sustain a conviction." 23 C.J.S., *Evidence,* § 905.

The statute as quoted herein above, which requires the entry of judgment of acquittal by the court as a matter of law, if the evidence presented is insufficient to sustain a conviction, also imposes upon the trial judge the responsibility to first of all, determine what constitutes insufficient evidence in criminal prosecution and to revert to the law respecting the functions of the court and the jury as regards to admissibility, weight, and credibility of the evidence adduced at the trial. The granting of a motion for judgment of acquittal in itself will not be justified merely because the statute so provides, when indeed the alleged insufficiency of evidence is to the contrary. And, the fact that a defendant exercises his right not to take the stand, which action may not draw any inference of his guilt, does not render the judgment of acquittal conclusive on the matter.

Insufficiency of evidence to support a verdict, or to sustain a conviction means that there is no evidence which ought reasonably to satisfy the empaneled jury that facts to be proved is established, or there is evidence but not enough in the light of the evidence to the contrary to support a verdict. BLACKS LAW DICTIONARY 942 (4th ed.). However, a sufficient evidence is that which is good and sufficient on its face. Such evidence as, in the judgment of law, is sufficient to establish a given fact or the group of chain of facts constituting the party's claim or defense, and which if not re-butted or contradicted will remain sufficient. *Id.,* pp.1353. Furthermore, a litigating party is said to have a *prima facie* case when the evidence in his favour is sufficiently strong for his opponent to be called on to answer it. A *"prima facie* case" then, is one which is established by sufficient evidence and can be overthrown by rebutting evidence adduced on the other side. *Id., pp.* 1353.

But before we further examine the evidence adduced at the trial by the State to see whether or not it is sufficient or insufficient to sustain a conviction, let us revert to the law in respect of the functions of the court and that of the jury empaneled to try the issue joined between the State and the defendant in a criminal prosecution as regards the admissibility of evidence and the weight and credibility to be given to it.

In a long line of opinions of this court and that which was delivered 49 years ago by Mr. Justice Russell speaking for the court in the case *Beysolow v. Coleman,* 9 LLR 156

(1946), this court held that it is the right of the court to decide on the admissibility of evidence; but when it is admitted, it is the right of the jury to decide upon its weight, credibility, and effect.

Perusal of the trial records certified to us show that the following documents were testified to, marked and confirmed by court without objection to their admissibility. The documents are: Court's marks P/1 thru P/8 which are apparently the bill of sale said to have been prepared by Counsellor Bernard's Law Office and signed by Lieu Lu Ling and the prosecuting witness George Bejany; the letter from Counsellor Toye C. Bernard to co-defendant Ezzat Eid requesting him to return the cables and materials allegedly bought by him from the sport complex; a letter from Counsellor Sherman, Counsel for codefendant Ezzat Eid to Counsellor Bernard stating that his client, Ezzat Eid, did purchase the cables in good faith directly from the State Builders, Inc. and not from co-defendant Chung.

Another letter from Counsellor Findley, counsel for State Builders, Inc., addressed to the County Attorney that the six (6) rolls of cables were bought by his client from the Capital Electrical Company of co-defendant Eid. Still, another letter from Counsellor Sherman, counsel for Co-defendant Ezzat Eid, stating that the ten (10) rolls of cables were in the possession of his client Ezzat Eid awaiting evidence from Counsellor Bernard that the prosecuting witness George E. Bejany was in fact the owner of the materials left over at the SKD Complex. All of these documents which are material and relevant to the subject of the action were identified by witnesses, marked by court and confirmed and admitted to form part of prosecution's evidence without any objection from the defense.

The practice and procedure hoary with age in our jurisdiction is that all documentary evidence which are material to the issue of fact raised and which are received and marked by court should be presented to the jury which has exclusive authority to decide on their weight and credibility but not the court. *Walker v. Morris,* 15 LLR 424 (1963).

In the exercise of the exclusive function of the court with respect to the admissibility of documentary or any other evidence for that matter, the court has the right, upon objection, or on its own objection, to deny the admissibility of an instrument into evidence which is not sufficiently identified, or which is irrelevant and immaterial to the case at bar. But where the instrument or documentary evidence is sufficiently identified, marked by court and confirmed, and the same is relevant and material to the case in point and it is so admitted by the court to form part of the evidence of the

party offering it, just as in the instant case of court's marks P/1 through P/8, it becomes the exclusive function of the jury to determine their weight, credibility, and effect to be given to them; but for the court to determine their weight and credibility after they had been admitted into evidence, was an invasion of the province of the jury and prejudicial to the State, hence a reversible error. In *Simpson v. Republic,* 3 LLR 300, 313 (1932), this Court held that: "it is the right of the court to decide on the admissibility of evidence; but when it is admitted, it is the right of the jury to decide upon its credibility and effect". In the instant case, the court and jury were sitting and incriminating documentary evidence relevant and material to the facts of the case and connecting the defendants, had been admitted for the consideration of the jury without objection. It was therefore a reversible error on the part of the court to have invaded the province of the Jury when it granted the motion of acquittal without allowing the jury to determine the weight and credibility of the evidence which had been admitted for their consideration.

In view of all that we have narrated herein above, and the legal citations in support of our position, it is our holding that the ruling on the motion for judgment of acquittal be, and the same is reversed; the case remanded for a retrial to take precedence over all other criminal matters pending before the court. And it is hereby so ordered. Case remanded.

Judgment reversed; case remanded for new trial.