AUGUSTUS SNEH, Appellant, v. **REPUBLIC OF LIBERIA**, Appellee.

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

Heard April 25, 1988. Decided July 29, 1988.

1. The gravamen of the crime of embezzlement is that it must involve a sum certain of money or value of an article alleged to have been converted or misappropriated, and fraud must be established beyond a reasonable doubt.

2. A criminal charge levied against a defendant must be proved as laid in the indictment, and embezzlement is no exception.

3. An agent may not use the position entrusted to him during the course of his agency to acquire for himself, without his principal's knowledge and consent, any adverse right or interest in the subject matter of the agency; nor should he acquire for himself, during the course of his agency any adverse right or title to the principal's property. Any such act by the agent will lead to the conclusion that fraud was committed.

4. When the statute speaks of variance, it means material variance and not immaterial variance.

5. A trial judge does not err in overruling objections to questions or allowing questions which go to the interest, motive and prejudice of a witness when those vices are being tested.

6. A trial judge is not considered to have abused his discretionary power in denying a defendant's motion for a new trial or motion in arrest of judgment where they are not based on grounds upon which such motions can be granted, such as defects appearing on the face of the indictment, in the case of a motion for new trial, or evidence already adduced at the trial, in the case of a motion in arrest of judgment.

Appellant, who was employed as a storeboy and later a store keeper in the appellant facility, and vested with authority to manage a section of the store and control the sale of the goods therein, was found by audit reports to have incurred a shortage in the amounts reported for the goods sold. The appellant was therefore charged with

the crime of embezzlement, indicted, tried and convicted of the said crime. Judgment having been rendered confirming the verdict of guilty, the appellant excepted thereto and announced an appeal to the Supreme Court.

In his appeal, the appellant argued that he had protested the correctness of the audit report and that an agreement had been reached with the appellee for a re-audit to be conducted; that the re-audit was never conducted; and that therefore it was improper for him to be charged with embezzlement. The appellant also argued that the testimonies of the State witnesses were at variance and therefore warranted his acquittal. In addition, appellant asserted that the mere shortage in an account does not constitute embezzlement; instead, he said, the State must prove with certainty that he had feloniously, intentionally and fraudulently converted into his own use and for his own benefit the amount stated in the indictment. He argued that the State had failed to meet this burden of proof and that this failure should have operated in his favour.

The Supreme Court rejected the appellant's contentions, holding that the verdict and judgment of guilty was proper and legal. The Court noted that the gravamen of embezzlement was that a sum certain of money or thing of value had been converted and that fraud was established beyond a reasonable doubt. The Court observed that the records showed that the total amount with which the appellant was charged comprised shortages on three occasions, the first two of which the appellant had not protested against and had in fact agreed to make restitution of. Contrary to the appellant's contention, the Court said, the records failed to show that appellant ever protested against the first and second audit reports. It was only in respect of the last audit that the appellant had protested. But the Court pointed out that with regards to the third shortage, the appellant's counsel had admitted that there was a shortage to the value of the amount stated in the indictment.

The Court advanced the theory that when a person into whose care goods are entrusted, fails to account for the said goods, or that when there is a shortage of said goods for which there is no account, there should exist no doubt that the goods, if sold (as was in the instant case), or the value thereof, was converted to the person's own use. The Court opined that the consistent shortages by the appellant could not be considered as mere shortages, but that they evidenced the lack of good faith and loyalty. The Court said that it was of the opinion that the appellant, as the agent of the private prosecutor, had used his position to acquire for himself, without the consent of his principal, adverse right and interest in the subject matter of the agency,

and that it was therefore logical to conclude that fraud was the principle motive behind the shortages.

On the question of the variance of the testimonies of the State witnesses, the Court noted that when the statute speaks of variance, it has reference to material variance and not immaterial variance, as was in the instant case. The Court found that the State had proved its case, that the judge had not abused his authority and discretion in allowing certain questions to be answered and in denying the motion for new trial and the motion in arrest of judgment, and that the evidence warranted the verdict returned by the jury. It therefore affirmed the judgment of the trial court.

M Kron Yangbe appeared for appellant. MacDonald Krakue, Solicitor General, R. L., appeared for appellee.

MR. JUSTICE JUNIUS delivered the opinion of the Court.

Appellant was employed by Liberia Trading Corporation (LTC) as a storeboy and was later promoted to storekeeper. By virtue of said employment, appellant was given the authority to manage a section of the store, with sundry items stored therein, and to control the sale of said goods. During the 1965 November Term of the Circuit Court for the First Judicial Circuit, Montserrado County, appellant was charged with and indicted for the crime of embezzlement. The indictment charged that the appellant had misappropriated the sum of $7,464.22, property of Liberia Trading Corporation (LTC). Appellant was tried during the May Term, 1966, of the said Court, and convicted of the crime with which he was charged. He excepted to the verdict and filed a motion for new trial. The motion was resisted and denied. Appellant also filed a motion in arrest of judgment, which was also resisted and denied. Whereupon final judgment was rendered. Appellant excepted to the judgment of the trial court and prayed for an appeal to this Honourable Court.

In pursuing his appeal, appellant has filed before this Honourable Court for review a bill of exceptions containing twenty-eight counts. However, in accordance with the brief filed before this Honourable Court and argued by counsel for appellant, only the following issues are presented for our consideration:

(a) Where a defendant protests the correctness of an account and as a result an agreement is reached to re-audit the account, but the rechecking is not done, can the defendant be fairly and legally charged with the crime of embezzlement?

(b) Where an indictment for embezzlement charges the accused with a sum certain and at the trial the proof of the amount varies, is this variance material and sufficient to warrant acquittal?

(c) Does mere shortage in an account constitute embezzlement? Additionally, in a case of embezzlement where the State fails to prove with certainty that the defendant has feloniously, intentionally and fraudulently converted into his own use and benefit the amount specifically stated in the indictment, does it constitute a doubt which ought to operate in favour of the defendant

Appellee filed a brief before this Honourable Court resisting each count of appellant's bill of exceptions and vehemently argued same.

Because appellant has presented the above quoted issues in his brief for our consideration, we will traverse all of them, as duty demands. In so doing, we shall endeavour to cover the twenty-eight counts raised in the bill of exceptions.

The gravamen of the crime of Embezzlement is that (a) there is a sum certain of money or value of the article alleged to have been converted or misappropriated, and (b) fraud is established beyond all reasonable doubt. Sancea v. Republic, 3 LLR 347 (1932). It is a settled principle of law that a charge must be proven as laid in the indictment, and that embezzlement is no exception. 29 C.J.S., Embezzlement, § 47.

The indictment upon which the appellant was tried and convicted reads as follows:

" INDICTMENT
The Grand Jurors for the County of Montserrado, Republic of Liberia, upon their oaths do present: That Augustus Sneh, defendant, of the City of Monrovia, Montserrado County, Republic of Liberia, heretofore to wit:

That between the first day of November, A. D. 1964 and the 12' day of November. A. D. 1965, in the City of Monrovia, Montserrado County and Republic of Liberia, Augustus Sneh, defendant aforesaid, then and there, being employed by the Liberian Trading Corporation, a Swiss business establishment doing mercantile business in the City of Monrovia, as a storekeeper, and by virtue of said employment and during the course of said bailment, the defendant aforesaid did receive into his custody, charge, possession and control, stocks of sundry goods, property of the said Liberian Trading Corporation, private prosecutor, amounting to Seven Thousand Four Hundred Sixty-Four Dollars and Twenty Two Cents ($7, 464.22), as per statement of account

hereto annexed and marked exhibit "A", to form a cogent part of this indictment; but that defendant aforesaid, becoming unmindful of the trust and confidence thus reposed in him by the Liberian Trading Corporation, private prosecutor aforesaid, wrongfully, unlawfully, wilfully, intentionally, fraudulently and feloniously, did embezzle, appropriate and convert to his, defendant aforesaid, own use and benefit the sum of Seven Thousand Four Hundred and Sixty-Four Dollars and Twenty-Two Cents ($7,464,22), being cash received from the sale of goods and merchandise received by defendant aforesaid during his bailment from stocks of goods entrusted into his care, custody and control, which defendant aforesaid did appropriate and convert to his own use and for his own benefit, property of the Liberian Trading Corporation; defendant/principal, without the knowledge, will and consent of his said principal, thereby wrongfully, unlawfully, wilfully, intentionally, fraudulently and feloniously committing the crime of embezzlement, contrary to the form, force and effect of the statute laws of Liberia, in such cases made and provided and against the peace and dignity of this Republic.

And so the grand jurors aforesaid, upon their oath aforesaid, do say that Augustus Sneh, defendant aforesaid, at the time and place aforesaid, in manner and form aforesaid, the crime of embezzlement the said defendant did do and commit, contrary to the form, force and effect of the statute laws of Liberia, in such cases made and provided and against the peace and dignity of this Republic.

REPUBLIC OF LIBERIA....PLAINTIFF, BY
Sgd. Alfred Raynes
Alfred Raynes
COUNTY ATTORNEY"

Let us now turn to the issues which appellant has asked us to consider, and which we have quoted supra. The first issue centers around the following question: "Where a defendant protests the correctness of an account, but as a result, an agreement is reached to re-audit the account and the rechecking is not done, can the defendant be fairly and legally charged with the crime of embezzlement?

The records reveal that appellant was entrusted with sundry goods for sale and that after the stock had been taken, appellant was found to be short in the sum of $7,464.22. This amount represented an aggregate of three shortages: November 30, 1964, $796.67; March 30, 1965, $271.00 and November 12, 1965, $6,396.55. It is worthy to note that after the first and second audits, appellant was sent back to work and he continued as a storekeeper. It was the last audit that resulted in his removal

from being a storekeeper. His counsel argued that he protested against the last audit, but the records fail to show that he actually protested and that he requested a re-audit. Appellant's counsel also argued that mere shortage did not constitute embezzlement. As to that contention, the records reveal that when the appellant was found to have shortages for the first and second times, management (LTC) asked him to pay back the amounts through salary deductions. It was only when he was found to be short for the third time the management took the action which resulted into his prosecution and this appeal. We do not believe that three shortages can be considered as mere shortages. They go beyond such claim. There should exist between a principal and agent a duty of good faith and loyalty. In the case Cess Pelham v. Witherspoon and Greene, 9 LLR 59 (1945), this Court said: "An agent may not use the position obtained by him during the course of his agency to acquire for himself, without his principal's knowledge and consent, any adverse right or interest in the subject matter of the agency, nor shall he acquire for himself during the course of his agency any adverse right or title to the principal's property." It is therefore logical to conclude that fraud was the principal motive behind the various shortages. Accordingly, we hold that appellant's primary aim was to deprive LTC of its just property. While it is true, as argued by appellant, that the keys to the store were in the possession of the management, yet the store in which the goods entrusted to appellants care were stored for sale was a department store with different sections, and it was one of those sections that appellant was controlling. It would be absurd under the circumstances, for anyone to conclude that the management took away its own goods for the purpose of creating a shortage against appellant. We therefore do not subscribe to such argument.

We now proceed to issue no. 2, which reads as follows: "Where an indictment for embezzlement charged the accused with a sum certain and at the trial the proof of the amount varied, is this variance material and sufficient to warrant an acquittal?" When the statute speaks of variance, it means material. variance and not immaterial variance. In Johnson v. Republic, 13 LLR 435 (1960), we held that "[a] witness may be cross-examined as to all facts relevant to the issues of the case or to the impeach-ment of the witness himself." In this process of cross-examination, variance may be shown. However, in the instant case, the circumstances show that the variance was immaterial. Indeed, the appellant admitted, as per the answer of his counsel, placed on record during the argument before this Court, that there was a shortage. Here is the question propounded to appellant's counsel and the response given thereto:

"Q. Are you saying that when your client was charged for embezzling the sum of $7,464.22, he admitted to $6,396.55 ?

A. This is the charge the defendant himself agreed to..."

We conclude therefore that it was proven that appellant did embezzle valuable goods and other property belonging to LTC. Indeed, when you add the first two shortages of $1,067.67 to the third shortage, you get the total shortage of $7,464.22, the amount with which the appellant was charged.

In answering the first of the issues presented by appellant during his argument, we believe that we have answered the third issue. We therefore turn to the various counts of appellant's bill of exceptions.

Appellant has brought before this Honourable Court a bill of exceptions containing twenty-eight counts for our review. We note, in addressing and answering the first issue raised by appellant in his arguments, that counts twenty-five and twenty-six of the bill of exceptions were answered. Counts 2, 3, 4, 5, 6, 7 and 8 deal with the question of doubt relative to the innocence of the accused. In those counts, the appellant attribute error to the trial judge for allowing questions to be asked which raised doubts as to the appellant's innocence. As to those counts, we opine that when goods are entrusted into one's care and he fails to account therefor, or where there is a shortage of said goods and same cannot be accounted for, there exists no doubt that the goods, if sold, as in this case, or value thereof, was converted to one's own use. Hence, that trial judge did not err when he overruled and allowed those questions, especially because the interest, motive and prejudice of the witness were being tested.

As to the other counts of appellant's bill of exceptions, we believe that they have already been addressed supra. Additionally, we opine that the trial judge did not abuse his discretionary power when be denied the motion for new trial as well as the motion in arrest of judgment. Appellant’s motion for new trial lacked the grounds upon which a motion for new trial can be granted since defects appearing on the face of the indictment is not one of such grounds. With regards to appellant's motion in arrest of judgment, the same only revealed the evidence that had already been adduced at the trial. That evidence, we hold, was sufficient to warrant the appellant's conviction.

Accordingly, this Court therefore adjudges that the crime of embezzlement was committed by appellant and that the charge levied against the appellant was proven. The judgment is therefore affirmed. And it is hereby so ordered.

Judgment affirmed.