WILBERT STUBBLEFIELD, Appellant, v. **REPUBLIC OF LIBERIA,** Appellee.

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

Heard May 30-June 2, 1988. Decided July 29, 1988.

1. A defendant charged with the commission of a criminal offense is presumed innocent until the contrary is proved; and where his pleas on arraignment is 'not guilty', the onus probandi is on the prosecution to establish his guilt devoid of all reasonable doubt.

2. Where reasonable doubt exist as to the guilt of a defendant, he is entitled to an acquittal.

3. Where, upon the trial of an indictment or complaint there appears variance between the allegations therein and the evidence in proof in respect of any fact, name or description not material to the charging of the offense, the court may, if the defendant will not be prejudiced thereby, direct that the indictment or complaint be amended to conform to the proof, on such terms as the court deems fair and reasonable.

4. An indictment or complaint shall not under any circumstance be amended to charge an offense different from or additional to the offense originally charged.

5. In any indictment charging a defendant with theft of property, the value of the property must be stated.

6. It is not mandatory that the value of property stated in an indictment charging a defendant with theft of property be proved, but where any portion thereof is proved during the trial, the defendant will be held for that portion.

7. A reversible variance between the indictment and proof must comprise of substantial departure as to a material fact.

8. In criminal cases, the term 'judges of the fact" means only a determination of whether a crime has been committed or not.

9. Where the prosecution has proved the amount for which an amendment to an indictment is sought and a verdict of guilty has be returned by the jury against the defendant, the court should permit an amendment of the indictment.

10. Where the indictment charges a different amount, the amount proved by the prosecution should be the amo9unt given by the court in its final judgment.

11. In proving embezzlement or theft of property, the establishment of a portion of the amount charged in the indictment constitutes proof of the crime alleged in the indictment.

12. Upon expiration of the session in which the trial of a cause was commenced, the trial shall continue until it is completed.

13. A judgment can only be arrested when the indictment fails to charge an offense or the court lacks jurisdiction of the offense charged.

Appellant appealed to the Supreme court from a conviction of the crime of theft of property by the Circuit Court for the First Judicial Circuit, Montserrado County, Criminal Assizes, Court "A", contending as follows: (a) that the trial judge committed a reversible error in denying his motion to dismiss the indictment since it was the corporations and not the appellant who had the transacted business with the private prosecutor out of which the charges grew; (b) that the trial judge had committed error in denying appellant's motion for arrest ofjudgment as the records clearly showed that there was variance between the indictment and the proof adduced at the trial; (c) that the trial judge had erred in denying appellant's motion for the court to refuse jurisdiction since the court has lost territorial jurisdiction over the case, especially as the term of the court has expired and the trial judge had been given another assignment; (d) that as no specific amount had been proved against the appellant, it was error for the trial judge to name an amount; and (e) that the verdict was against the weight of the evidence. These reasons, the appellant said, warranted a reversal of the judgment and his discharge.

The Supreme Court rejected the appellant's contentions and affirmed the judgment of the trial court. With regard to the appellant's contention that there was variance between the indictment and the proof, especially as to the amount charged, the Court held that in the case of theft of property it is not mandatory that the amount charged in the indictment be proved at the trial in order to find the defendant guilty of the crime. The Court observed that it is sufficient if a portion of the amount charged is

proved and that it is the amount proved for which the defendant is held guilty. The Court noted that the indictment can, following the proof, be amended to reflect the proof and where such amendment is not made or permitted by the court, the trial judge should render judgment on the amount proved. It concluded therefore that the trial judge was in error in denying the prosecutions request for amendment of the indictment, but not in the judgment rendered by him confirming the verdict. Regarding the appellant's contention that the trial judge had erred in denying the appellant's motion in arrest ofjudgment, the Court held that a judgment can only be arrested when the indictment does not charge an offense or when the trial court lacks jurisdiction over the offense charged. The indictment, it said, did charge an offense and the trial court did have jurisdiction over the offense charged. Accordingly, the Court said, the judgment was legal and valid and should therefore be sustained.

The Court further held, with regards to the appellant's contention that the verdict was against the weight of the evidence, that the prosecution had proved the case of theft of property against the appellant and that therefore the verdict returned by the jury was not against the weight of the evidence. Hence, the Court affirmed the verdict of the jury and the judgment of the trial court.

Joseph Findley, in association with Philip A. Z Banks, III, appeared for appellant. McDonald J. Krakue, Solicitor General, in association with Marcus Jones, County Attorney for Montserrado County, and D. Caesar Harris of the Ministry of Justice, appeared for appellee.

MR. JUSTICE JUNIUS delivered the opinion of the Court.

The appellant was indicted and subsequently arrested during the May Term of the First Judicial Circuit Court, Criminal Assizes, Montserrado County, A. D. 1987, for the crime of theft of property.

The captioned case was called for trial in the First Judicial Circuit, Criminal Court "C", during its November Term, A. D. 1987, appellant having been arraigned during the August Term of the said Court, A. D. 1987, whereat he pleaded not guilty to the charge. After the selection and empaneling of the trial jury and the production of evidence by the State, appellant elected not to take the stand. In keeping with his legal rights under the law, he waived the production of evidence and submitted the case for argument. Following arguments pro et con and the charging of the jury, the juror went to their room of deliberation and later returned a unanimous verdict of guilty against the appellant. Appellant excepted to the verdict and filed a motion in arrest of

judgment. The motion was heard and denied. Final judgment was thereafter handed down on the 20 th day of January, A. D. 1988, confirming and affirming the verdict of "guilty" brought by the jury. Appellant excepted to the final judgment and announced an appeal to this Honourable Supreme Court of Liberia, sitting in its March Term, A. D. 1988. Hence, this review.

According to the indictment, the appellant was charged as follows:

"INDICTMENT

The grand jurors for the County of Montserrado, Republic of Liberia, upon their oaths do present: That Wilbert D. Stubblefield, defendant, of the City of Monrovia, Republic of Liberia, heretofore, to wit:

That in violation of Chapter 3, Section 3.4 (2), and Chapter 15, Section 15.51 (a) and (b), of the New Penal Code of Liberia, which state: Chapter 3 Section 3.4. Individual criminal liability for conduct on behalf of organization:

(2) Conduct on behalf of organization. 'A person is criminally liable for any conduct he performs or causes to be performed in the name of an organization or in its behalf to the same extent as if the conduct were performed in his own name or benefit.'

Chapter 15 Section 15.51. Theft of Property.

`A person is guilty of theft if he

(a) Knowingly takes, misappropriates, converts, or exercises unauthorized control over, or makes unauthorized transfer of an 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.

That on or about May 12, 1983, up to and including December, A. D. 1984, in the City of Monrovia, County and Republic aforesaid, Wilbert D. Stubblefield, then and there being the president of Dinwill International Exports, Ltd. of Locust Valley, New York, U.S.A., AIMS Enterprises & Export Ltd., also of New York, U.S.A., and Wilder International Import & Export, of 84 Benson Street, Monrovia, Liberia, defendant aforesaid, then and there being with intent to deprive the Liberia Petroleum Refining Company (LPRC), a public corporation of the Republic of Liberia, private prosecutrix of its lawful money to the tune of FOUR MILLION,

FOUR HUNDRED EIGHTY-EIGHT THOUSAND, SEVEN HUNDRED ($4, 488,700.00) DOLLARS) in manner and form as follows to wit:

1. That the defendant aforesaid knowing fully well that he had been fully compensated by the National Bank of Liberia (NBL) for petroleum products delivered by him and received by the private prosecutrix aforesaid did subsequently demand another compensation for the one and same shipment of petroleum products as per Invoice Number DW-013 of Dinwill International Export Ltd., dated May 18, 1983, and others, including a letter dated February 2, 1984, over the signature of the defendant as president of Dinwill International Ltd., indicating the quantity and value of the products delivered by him to the private prosecutrix aforesaid.

2.That the defendant aforesaid did represent to the private prosecutrix aforesaid that the amount or value of the products referred to in count 1 above, received by him, would be transferred through financial institutions and banks to the supplier, Philip Brothers International A. G. of New York, U.S.A., on a 9% commission basis, based on the following schedule of payments to the defendant which reflects check numbers, amounts, and transfer commissions, respectively, hereto attached to form a part of this indictment.

3. That further to his fraudulent representations to LPRC, the defendant aforesaid did undertake the responsibility to transfer as president of AIMS Enterprises & Export Ltd. of New York, U.S.A., an amount of $800,000,00. (EIGHT HUNDRED THOUSAND DOLLARS) which he received from LPRC to be transferred on a commission basis of 9% maximum to PETROCI, a supplier of LPRC for petroleum products based in the Republic of the Ivory Coast, West Africa, of which amount, only $250.000.00 (two hundred fifty thousand) dollars was actually transferred to the said PETROCI by the defendant aforesaid and the balance of $550,000.00 (Five hundred fifty thousand) dollars he did unlawfully, wrongfully, fraudulently, feloniously and intentionally convert into his own use and benefit, without and against the knowledge, will and consent of the private prosecutrix aforesaid; that is to say, in checks Nos. 16228 of February 2, 1984, in the amount of $327,000.00 (THREE HUNDRED TWENTY-SEVEN THOUSAND) DOLLARS and 335316, dated August 1, 1984, in the amount of $536,000.00 (FIVE HUNDRED THIRTY-SIX THOUSAND) DOLLARS, both of which amounts include transfer commission payable to the said AIMS Enterprises & Export, Ltd., U. S. A., as reflected in the schedule of payment herein stated in count 2 above, being Nos. 11 and 16 specifically.

4. That up to the finding of this indictment, the defendant aforesaid did unlawfully, fraudulently, purposely, knowingly, feloniously and intentionally convert the aggregate amount of:

Principal $4,195, 600.00
Transfer Commission 293,100.00
$4,488,700.00

Which, said amount or FOUR MILLION, FOUR HUN-DRED EIGHTY-EIGHT THOUSAND, SEVEN HUN-DRED ($4,488, 700.00) DOLLARS, representing principal plus transfer commission, the defendant has not restituted; then and thereby the crime of theft of property the 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

And the grand jurors aforesaid, upon their oaths aforesaid, do present: that Wilbert D. Stubblefield, defendant aforesaid, at the time and place aforesaid, in the manner and form aforesaid, the crime of theft of property he 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 and Thru
Sgd. Marcus R. Jones
(t) Marcus R. Jones
COUNTY ATTORNEY,
MONTSERRADO COUNTY"

Appellant has tendered a six (6) count bill of exceptions approved by the trial judge. The bill of exceptions reads as follow:

"1 Because on the 4th of June, A. D. 1987 defendant filed a motion to dismiss the indictment for want of jurisdiction over his person", in which he contended "that he defendant Wilbert D. Stubblefield, then and there being president "of and having acted on behalf of Dinwill International . . ." It is these corporation..." Your Honour, upon resistance of appellee, denied the motion notwithstanding appellee's admission in count 1 of its resistance in keeping with the letter of the law, Penal Law, Rev. Code 26: 3.42, under criminal liability of corporations, that defendant committed the act complained of in the indictment "in the name of the corporations, as their chief

executive officer." To which ruling of Your Honour appellee duly excepted. See motion and resistance and minutes of court of August 18, 1987, sheets 1-3.

2. And also because Your Honour having charged the jury in keeping with the law controlling, the jury returned a verdict of "guilty" against defendant, contrary to the institution of this Honourable Court and the evidence adduced at the trial; to which verdict defendant duly excepted and gave notice that he would file a motion in arrest of judgment, which motion was duly filed. See minutes of court of January 5, 1988, sheets 1 to 10, especially sheet 10, original minutes of court, which include the court's charge to the jury return and recording of the verdict and defendant/appellant 's exceptions to the verdict. with his notice to file a motion in arrest of judgment. Appellant submits that the evidence submitted by appellee's witnesses, as culled from the court's charge to the jury to wit:

" . . .Variance between the indictment and proof." In this case the defendant is charged with the commission of theft of property in the amount of $4,488,700.00. The law says the indictment must be proved as laid and this must be done by the testimonies of witnesses. Now when we come to variance we will examine the testimonies of the various witnesses who came to prove the indictment. Witness Philip Davies said that the amount allegedly stolen by the defendant was over $4,000,000,00 and that there were 16 cheques in all to cover this amount, even though the cheque in the amount of $7,200.00 had not been found in keeping with the prosecution own admission.

The second witness, Cletus Wortorson gave the amount of $3,058, 217.00. The third witness, Aletha Johnson said $4,000,000 plus and she further told us that this amount was paid to Dinwill International directly. The fourth witness, Thomas Hanson, gave the figure as $3,410,000.00. The fifth witness, Florence Lynch, gave the amount of $3, 058,217.00. And lastly, the state witness Sam Richards, $3,994.164.00.

Furthermore, plaintiff/appellee itself applied to court for amendment of the indictment to $3,303,000.00 to conform to the evidence. This variance created a doubt which should have entitled appellant to an acquittal. See sheets 7-8, minutes of court, January 5, 1988.

3. And also because defendant/appellant filed a motion for Your Honour to refuse jurisdiction and not proceed further with the hearing of the case because Your Honour had lost jurisdiction over said circuit. This jurisdictional issue over the territory having been resisted by appellee, the motion was denied by Your Honour

and the court proceeded. to hear and determine the motion in arrest of judgment and rendered final judgment. To which ruling appellant duly excepted. See motion to refuse jurisdiction for want of jurisdiction over the territory; the resistance thereto and the minutes of court of January, 20, 1988, sheets 1 and 3.

4. And also because defendant/appellant filed a motion in arrest of judgment which upon resistance by appellee Your Honour overruled, to which ruling defendant excepted because of its illegality and because adjectively Your Honour was out of term... that is, by effluxion of time Your Honour had lost jurisdiction over the court and territory. See motion in arrest of judgment, appellee's resistance thereto . . . and the minutes of court of 20 th January 1988, sheets 3-5.

5. And also because Your Honour, on the 20 th of January, A. D. 1988, rendered. final judgment against defendant and in said judgment also sentenced him by imprisonment for 18 months retroactive from and effective of the date of his imprisonment upon arrest and ordered defendant to make restitution of the $4, 488,700. 00 in the absence of proof, and to which judgment Appellee excepted as a matter of law and. also of fact as the trial records show to wit

(a) on the 21st of December, A. D. 1987, appellee submitted and requested Your Honour to amend the indictment to conform to the evidence which did not establish the amount of $4,488,700.00 as charged, which application was denied.

(b) that under the circumstances the jury should have named an amount in the verdict and since they did not the court, upon request of the appellee, should have had the jury return to their room of deliberation and reconsider their verdict by naming an amount or Your Honour should have sua sponte discharged the jury, and awarded new trial.

(c) Further, that Your Honour's naming of an amount in your judgment was equivalent to amending the verdict given the circumstances or subject hereof, which act of amendment is illegal and unauthorized under the law.

(d) That the act of Your Honour's naming in amount and sentencing the defendant/appellant to imprisonment and make restitution in your judgment is illegal and contrary to law for the court shall enter judgment of "guilty or not guilty" only.

(e) that at the time Your Honour tendered final judgment you had lost jurisdiction over the circuit and had already received another assignment from His Honour the

Chief Justice to preside over the November, A. D. Term 1987, of the Circuit Court for the Second Judicial Circuit, Grand Bassa County and appellant did not fail to bring this to Your Honour's attention and notice on sheet 1 of the minutes of court of January 20, 1988 - A fact and circumstance the court admitted. Your Honour should have sought further assignment from the Chief Justice before proceeding further.

(f) That Your Honour should not have included in the final judgment, which is a "separate and distinct finding, a sentence which is different in scope and effect and "means the adjudication by the court of the method of treatment of a defendant found to be guilty" whereas a judgment "means adjudication by the court that the defendant is, "guilty or not guilty" only.

(g) No specific amount was proven, not to mention $4,488,700.00 which Your Honour included in the illegal sentence, that defendant/appellant should make restitution of.

6. And also because defendant says that he filed a motion to vacate the illegal sentence complained of herein but Your Honour denied said motion to which defendant excepted.
See minutes of court of January 26, 1 988."

During the argument before this Court, counsel for appellant vehemently argued the six counts of appellant's bill of exceptions and requested this Honourable Court in closing to reverse the final judgment of the trial court and discharge the appellant without delay.

Counsel for the State, for their part, argued that the final judgment of the trial court should be sustained and affirmed, the trial being regular, fair arid convincing.

Let us now analyze appellant's brief filed in support of his six (6) count bill of exceptions and the records to see if the final judgment of the trial court should be reversed as requested by appellant, or be sustained and affirmed as per appellee's request.

The indictment under which the appellant was tried and convicted charged him with deception and misrepresentation which caused LPRC to part with its lawful money.

Under our Criminal Procedure Law, a defendant who is charged with the commission of a criminal offense is presumed innocent until the contrary is proven; and where his plea on arraignment is "not guilty", the onus probandi is on the prosecution to establish his guilt devoid of all reasonable doubt which, if it exist, must result in his acquittal. Criminal Procedure Law, Rev. Code 2: 2.1.

In the instant case, the appellant having pleaded not guilty. It was therefore encumbent upon the prosecution, under the law, to establish beyond all reasonable doubt every element of the crime of theft of property as laid in the indictment brought against the appellant. Appellee, in proving its case, produced several witnesses who testified that certain of the amount for which appellant was charged with the crime theft of property was proven at the close of prosecution's production of evidence. Thereafter, the prosecution moved the trial court, upon application to amend the indictment, since indeed the total amount for which appellant was charged had not been proven but rather that only a portion thereof, being $3,303,025.08, had been proven. The trial judge denied the application of prosecution to amend but said that where there exist "formal defects, the court shall permit an indictment or complaint to be amended at any stage of the proceedings to correct the formal defect."

With regards to the amendment of the indictment to conform to evidence, the law states that "when upon the trial of an indictment or complaint there appears a variance between the allegation therein and the evidence offered in proof in respect to any fact, name or description not material to the charging of the offense, the court may, if the defendant will not be prejudiced thereby, direct that the indictment or complaint be amended to conform to the proof on such terms as the court deems fair and reasonable, but an indictment or complaint shall not under any circumstance be amended under this paragraph to charge an offense, different from or additional to the offense originally charged." In the face of this law, the trial judge concluded that "the amendment fought is genuine and material to the charging of the offense, in that the value or amount charged in the indictment is important and material to the charging of the offense (theft of property)." The trial judge having said this, further stated that "the reason being, without value the guilt of the defendant cannot be founded and restitution which is part of the punishment for this crime cannot be made." This Court holds that in any indictment charging the defendant with theft of property, the value is bound to be stated. However, it is not mandatory that the value stated in the indictment be proved, but where any portion thereof is proved during trial the defendant will be held for that portion. Passawe v. Republic, 24 LLR 516 (1976). Also, this Court holds that the appellant was being charged with the crime

theft of property. The amendment sought by the prosecution was neither to charge a different offense nor to add an additional offense to that originally charged, but rather to correct an error within the indictment which was not material to the charging of the offense. As such, the trial judge should have granted the prosecution's application. A reversible variance between the indictment and proof which our law speaks of must comprise of substantial departure as to a .material fact. Swaray v. Republic, 15 LLR 149 (1963). The value or figure for which appellee requested the amendment did not in any way affect or depart from the offense charged. We therefore disagree with the contention of the trial judge, especially as the appellant had entered a plea of "not guilty" when he was arraigned. The appellant, although charged with theft of property, yet, deception and misrepresentationwere the key words. Furthermore, appellee, at the close of its evidence, did establish that appellant illegally received and caused private prosecutrix LPRC to illegally part with its lawful money (property). Appellant did not put forward any other plea, but said straight forward that he was not guilty; that is, that he had on no occasion caused Private Prosecutrix LPRC to part with any amount, be it the amount charged in the indictment or the amount proved by the prosecution for which it sought to amend the indictment. Law writers have held that where a portion of the amount charged is proven, the defendant must be held for that which has been proven. Passawe v. Republic, 24 LLR 516 (1976). Under this principle we find ourselves unable to accept what the trial judge had said that "for this court to amend the indictment will be prejudicial to the defendant for by so doing the court will be giving credence to the evidence adduced thus far, this being the function of the empanelled jury, they being judges of the fact." The interpretation given by the trial judge to the jurors who are judges of the fact was erroneously given. In criminal cases, judges of the fact mean only whether a crime has been committed or not. If his interpretation is correct, why then does the empanelled jury at times reduce the crime charged, e.g., from murder to manslaughter.

We strongly hold that in view of the foregoing since the prosecution did prove the amount for which an amendment of the indictment was sought and the empanelled jury returned a verdict of guilty against the appellant, the trial judge should have permitted the indictment to be amended. His failure to do so was erroneous. Furthermore, having failed to permit the amendment, the amount proven by the prosecution should have been the amount given in his final judgment based upon the jury's verdict.

Count two (2) of appellant's bill of exceptions concerns itself with the allegation that the verdict was against the weight of the evidence adduced at the trial. We fail to see

that the evidence given by prosecution did not prove the crime charged. The prosecution did prove beyond all reasonable doubt that appellant did commit the crime of theft of property. The jury was given complete picture of the surrounding circumstances and they determined on the basis thereof the guilt of the appellant with regard to the crime charged. The evidence was neither conflicting nor was there any material variance. Legal authorities have held, as quoted supra, that "in proving embezzlement (theft of property), establishment of a portion of the same charge constitutes proof of the crime alleged in the indictment." Ibid.

Count three (3) of appellant's bill of exceptions is unmeritorious since the law specifically provides that upon the expiration. of the session at which time the trial was commenced, the trial shall continue until it is completed.

Also, the Judiciary Law, Rev. Code 17: 3.10, supports the Civil Procedure Law, Rev. Code 1: 26 and 1.7 (5) . As such, the court had jurisdiction over the subject matter and over the person of the appellant. Appellant's further contention that this was a jurisdictional issue over the territory is farfetched and a misapplication of the concept of the law on territorial jurisdiction. See Hill v. Republic, 2 LLR 517 (1924), wherein it is stated that. "territorial jurisdiction is given by law and cannot be conferred by consent of the parties."

Counts four (4), five (5) and six (6) of appellant's bill of exceptions refer to the following: Count four refers to the sustaining of appellee's resistance to appellant's motion in arrest of judgment. With regard to this point, the trial court was properly correct in sustaining appellee's resistance. A judgment can only be arrested when the indictment does not charge an offense or if the court was without jurisdiction of the offense charged. Criminal Procedure Law, Rev. Code 2: 2.2. The section reads:

"Motion in arrest of judgment.

The court on motion of a defendant shall arrest judgment if the indictment does not charge an offense or if the court was without jurisdiction of the offense charged. The motion in arrest of judgment shall be made within five days after the verdict or finding of guilty, or after plea of not guilty. The motion shall be heard before Judgment is rendered. If judgment is arrested, the court shall discharge the defendant from custody, and if he has been released on bail, he and his sureties are exonerated and if money has been deposited as bail, it shall be refunded."

In the instant case, an offense was charged and the court had jurisdiction.

Turning to count five, A through F, and count six (6), the said counts refer to exceptions taken by appellant to interlocutory rulings, same being loosely and vaguely stated by appellant. They failed to indicate what relief is being sought by appellant and therefore cannot be considered.

In view of the foregoing, the trial court's final judgment is hereby modified to reflect the amount of $303,025.08 proven by the prosecution and the sentence imposed is hereby confirmed and affirmed. And it is hereby so ordered.

Judgment affirmed with modification.