ELENDA WEBSTER-ANKRA, Appellant, *V* ***REPUBLIC OF LIBERIA*** , Appellee.

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

Heard: April 25-26, 1979. Decided: June 15, 1979.

1. It is only the absence of jurisdiction or the failure of the indictment to charge the defendant with a crime cognizable under the law that is a ground for the dismissal of the indictment. Therefore, an exception to an indictment for embezzlement on the grounds that the information laid in the said indictment is vague will not be upheld by the Supreme Court where the trial court has jurisdiction over the cause and where the indictment charges the defendant with the commission of an offense.
2. The failure to attach the bill of particulars to the indictment is not ground for the dismissal of the indictment, because the law provides that the defendant may demand the bill of particulars within ten days after arraignment; and, the court itself may ordered the filing of a bill of particulars at any time after arraignment.
3. Generally, a copy of a document may be admitted into evidence only upon proof that the original or first copies are destroyed, lost or in the hands of an adversary. Where the original or first copies are in the hands of a friend of the proponent of the documents, such originals must be produced at the trial.
4. A carbon copy of a document, being a duplicate original, may be admitted into evidence in the absence of the original.
5. It is not a violation of the best evidence rule for a witness who prepared a document to be requested on the stand to identify the document and any signature, including the signature of the accused, which might appear on said document.
6. In all criminal cases, the accused has a constitutional right to be confronted both by his accuser and the evidence against him. Thus, in embezzlement cases where an audit is conducted and such audit is the basis for the charge, the accused should be confronted with the audit report and her approval or denial obtained. The failure to do so is fatal to the prosecution of the case.
7. A material variance between the indictment and the evidence is fatal to a criminal case. So if in a trial for embezzlement the evidence introduced by the prosecution in support of the

amount which the defendant is accused of defrauding his principal is different from the amount stated in the indictment, a conviction on the amount stated in the indictment will be reversed by the Supreme Court on appeal.

Appellant was a cashier in the Motor Vehicle Division of the Bureau of Internal Revenues of the Ministry of Finance; and, in 1968, an audit of her office and functions was conducted. The audit revealed that during the period from January 1, 1967, to February 15, 1968, she had a total cash shortage of $4,824.11. For this unexplained shortage, she was indicted for the crime of embezzlement, tried, convicted and sentenced. She appealed to the Supreme Court for review and reversal of the conviction.

On appeal, the Supreme Court observed that appellant was never confronted with the audit report to either confirm its findings or deny the same. It was also revealed from the records that all the original documents in support of the prosecution's case were not testified to and offered into evidence; instead, only carbon copies were admitted over the objection of appellant's counsel. The evidence further revealed that the original documents were in the possession of the former Under Secretary of the Department of Treasury (now Ministry of Finance), who was at his home in Brewerville but was not subpoenaed to either produce those original documents or to otherwise testify. As for the carbon copies that were admitted into evidence, the circumstances of their production were that the prosecution requested two to three postponements of the trial in order to get officials of the Ministry of Finance to bring the documents and testify to them in court.

The records of the case also reveal that the indictment provided for thirty-nine revenue receipts, which were unaccounted for and their total face value covered in the indictment. However, at the trial, the prosecution produced only twenty-five revenue receipts and did not bother to have the indictment amended to conform with the absence of this material evidence.

The Supreme Court therefore concluded that the weight of the evidence did not support the verdict of guilt for embezzlement for the following reasons: (i) the documentary evidence on which the case was based was not admissible since they were copies and the originals existed; (ii) the appellant was not confronted with the audit report, which formed the basis of the indictment, and as such was not afforded a fundamental constitutional right; (iii) the amount laid in the indictment was at variance with the amount which the prosecution attempted to prove; and (iv) the manner of presentation of the prosecution's

case, especially the several postponements to obtain important and material evidence that should have been easily available, left the Court in doubt about the veracity of such evidence.

The Supreme Court took the position that the prosecution's case had been incompetently presented and that evidence of the appellant's guilt was not conclusively proved. The judgment was therefore *reversed.*

Daniel Draper and *Philip A. Z. Banks, III,* appeared for appellant. *Ephraim W. Smallwood*, Solicitor General of Liberia, and *M. Fulton W. Yancy* appeared for appellee.

MR. JUSTICE TULAY delivered the opinion of the Court.

Appellant herein, Elenda Webster-Ankra, was employed as a cashier in the Division of Motor Vehicle, Bureau of Internal Revenues, Department of Treasury (now Ministry of Finance), Republic of Liberia. Her employment covered the period of January 1, 1967, up to and including February 15, 1968. During this time, she is alleged to have misappropriated the sum of $4,824.11, for which she was indicted before the First Judicial Circuit Court for Montserrado County. Trial was held, and the trial jury found appellant guilty of embezzlement. From the judgment entered on that verdict, appellant appealed to this Court on a seven-count bill of exceptions.

The indictment, which brought appellant under the jurisdiction of the trial court, is as follows:

THE INDICTMENT

> "That on the 1st day of January, A. D. 1967, that is to say, from the said 1st day of January, A. D. 1967, up to and including the 15th day of February, A.D. 1968, in the Commonwealth District of Monrovia, Montserrado County, Republic of Liberia, Elenda Webster-Ankra, defendant aforesaid, then and there being employed by the Govern-ment of Liberia as cashier, Treasury Department, Bureau of Internal Revenues, Motor Vehicle Division, Republic of Liberia; and by virtue of said employment and during the course of said bailment, the defendant aforesaid received into her possession and control sundry amounts, but that she becoming unmindful of the trust and confidence reposed in her by the Government of Liberia, her principal, unlawfully, wilfully, deliberately, intentionally, feloniously and fraudulently embezzled, appropriated and converted to her own use and benefit the sum of Four Thousand Eight Hundred Twenty-Four Dollars and Eleven Cents ($4,824.11), property of the Liberian

Government; then and thereby the crime of embezzlement, the defendant did do and commit contrary to the form, force and effect of the statue laws of Liberia in such cases made and provided, and against the peace and dignity of this Republic."

The first error complained of in the bill of exceptions is the trial judge's refusal to grant appellant's motion to quash the indictment for two reasons, the first being that the information laid in count one of the indictment was too vague and did not give appellant any notice of any specific acts of which she was accused. Under our current law only the absence of the juris-diction of the trial court over the crime stated in the indictment and/or the failure of the indictment to specifically charge the defendant with the commission of the crime is ground for the dismissal of the indictment. *Yancy v. Republic*, 5 LLR 216 (1936). A perusal of the indictment reveals that it shows jurisdiction of the trial court over the cause and it also charges the defendant with an offense, embezzlement. Therefore, appel-lant's contention on the sufficiency of the indictment in this regard is not well founded.

The second reason advance by the appellant for dismissal of the indictment and which formed a part of the first count of the bill of exceptions is that the indictment is not supported by a bill of particulars attached to it. This second contention of the appellant on the sufficiency of the indictment is also unfounded because the law provides that a bill of particulars may and can be demanded by motion of the defendant within ten days after arraignment or at such other time after arraignment as may be ordered by the court. Criminal Procedure Law, Rev. Code 2:14.5. Therefore, the failure or neglect of the prosecution to attach the bill of particulars to the indictment is no ground for the dismissal of the indictment. In fact, appellant could have moved the court to obtain a copy of the bill of particulars and her failure to exercise this right cannot be the basis for dismissal of the indictment.

In count two of the bill of exceptions defendant considered it an error of the court to have sustained the prosecution's objection to a question from the defense, which demanded that Gustavus Lardner, the witness for the prosecution, who audited appellant, identify the auditor's report bearing appellant's signature. The objection was sustained under the best evidence law.

The evidence shows that witness Lardner audited appellant, prepared the audit report which was lodged with Under Secretary Greaves of the Treasury Department. To require him to identify his own writing allegedly carrying the signature of appellant is not a violation of the best evidence rule. In fact, the evidence also shows that appellant was never given the account statements and auditor's report. She never read nor signed them. The trial court

therefore committed an error when it sustained the objection of the prosecution.

Count three of the bill of exceptions assigns as error the trial court's ruling sustaining an objection to a question put to witness Lardner, the auditor, in an attempt to show that there was no auditor's report among the documents marked "P" by the court. Here again the trial court erred in sustaining that objection because the evidence shows that Under Secretary Greaves had the original auditor's report at his home in Brewerville and so said auditor's report could not be a part of the documents marked "P" by the court.

Count four of the bill of exceptions assigns an error as to the identity of appellant; that is, that the indictment does not refer to appellant. This exception is not sustained because the names, Elenda Webster and Elenda Webster-Ankra are one and the same person. Appellant was employed in January 1967 under the name of Elenda Webster; before she was audited, she became Elenda Webster-Ankra because of her marriage to Mr. Ankra. No inference can be made here that the names apply to two different persons, as count four of the bill of exceptions seems to imply.

In count five of the bill of exceptions, appellant assigned as an error the admission into evidence of copies of statements and copy of the auditor's report over the objection of her counsel. Appellant contended that copies of these documents should not have been admitted into evidence over her objections, without the prosecution proving that the originals were destroyed or in the possession of an adverse party. On this issue, the prosecution argued that carbon copies are as good as original or first copies and that the law contemplates certified copies as inadmissable, and not carbon copies.

This Court has held that carbon copies may be admitted only upon proof that the original or first copies are destroyed, lost or in the hands of an adversary. The records show that the first copies of the documents were reportedly with Under Secretary Greaves at his Brewerville home and the prosecution never sought to have them brought to court through a writ of *subpoena duces tecum*. It was therefore an error for the court to have admitted carbon copies into evidence.

Failure to profert the original or first copies of the statements and report of the auditor was sheer carelessness on the part of the prosecution. The records show that on three different occasions the prosecution requested time, additional time, and more time to get the relevant documents from the Treasury Department. On sheet three (3) of June 10, 1969, and upon the defendant's arraignment and plea, the prosecution made the following record:

> "Prosecution would like to bring to the attention of Your Honour some information which he received from witness Michael J. Doe to the effect that he, the said witness,

received a writ of subpoena to appear this morning to testify in the case now on trial. But that the said case which from his knowledge was instituted against the defendant in the year 1969, and because of the long period of time he has not been able, up to this point, to get all his records to come to court in keeping with the time stipulated on the subpoena. To avoid being held in contempt of court he came to put in his appearance and has asked us to grant him time to return to the Ministry of Finance (Department of Treasury) to collect all documentary evidence in his case so as to commence with the trial. This information is not made for the purpose of delaying the trial of this case."

The court granted the request. At two o'clock in the afternoon of the same day and at the call of the case, the prosecution once more made the following record:

"When the case was called this morning for hearing, the prosecution requested for time to commence the production of evidence. Because witness for the prosecution, Mr. Doe, did not at the time have in his possession the documentary evidence in this case, which is essential to the prosecution of the case in point, the court postponed the hearing for 2:00 p.m. today. The witness, Mr. Doe, is now on the stand and before resuming he handed me a copy of a letter which he addressed to the Deputy Minister of Finance for Revenue, Honourable Moses W. Harris, indicating therein that they have received a subpoena to testify in this case but because the report of the audit was lodged with the Honourable William Greaves, who was the Under Secretary of the Treasury for Revenue at the time and he is now being retired, the witness requested Honourable Harris to make available the audit report and other relevant documents so that they can be brought for the trial of this case. The witness requested that said Honourable Harris makes the documents available to him by 2:00 today; but up to the time he left the office to come to court, because the court has ordered him to be here at 2:00 p.m., he has not received the documents. Prosecution therefore respectfully prays Your Honour to grant additional time to enable the officials of the Ministry of Finance to make available to us all relevant documents that are connected with this case. This prosecution respectfully prays. And submit."

The court granted the request. Again, on Friday, June 11, 1976, when the case was called, the prosecution said:

"The prosecution at this stage respectfully requests this court for additional indulgence to have the officers of the Ministry of Finance, who have been subpoenaed as witness in this case to produce relevant documents that the prosecution has asked them to bring. Prosecution sincerely assures this court that this act on our part to

request for additional time for the production of these documents is not made to baffle or delay the trial of this case.

We are therefore respectfully asking Your Honour to have Mr. J. B. Doe, the Chief Inspector of the Bureau of Revenues, Ministry of Finance, who is now presently at the Ministry getting his files together to come and testify in this case. We respectfully submit."

The Court granted the request and postponed the hearing of the case to Monday, the 14th of June, 1976.

We agree that carbon copies are duplicates of the original. But are we certain that carbon copies brought in by the officials of Ministry of Finance were really genuine since it took them twelve days (June 3 - June 14) to have them brought to court, and considering that both witnesses, Lardner and Doe, testified that at the close of the audits they turned all the documents over to Under Secretary Greaves, who was never served a *subpoena duces tecum*? We are not.

Counts six and seven of the bill of exceptions submit that the trial court should not have affirmed the verdict of the trial jury for it was manifestly against the weight of the evidence adduced at the trial, and should not have entered judgment on said verdict. But before addressing this assignment of error, we shall delve more into the evidence adduced at the trial.

At the trial, the prosecution introduced four witnesses to prove the crime of embezzlement against the appellant. Witness Lardner testified that he was ordered by Under Secretary Greaves to audit the appellant's office; that during the period January to December 1967, appellant collected $271,047.53 and between January to February 15, 1968, she collected $33,767.70, making a total of $304,834.86. Witness Lardner also testified that of this amount of $304,834.86, appellant deposited only $303,480.95 into the Government's account, thus making a shortage of $1,353.91. Witness Lardner further testified that it was discovered that of the receipt books received and signed for by appellant, she was unable to account for 264 receipt books. Under Secretary Greaves therefore invited taxpayers through radio announcements to bring in their revenue receipts and thirty-nine (39) persons responded. The face value of the 39 receipts retrieved from the taxpayers was $3,470.20. The 39 receipts testified to came from some of the 264 lost receipt books. Witness Lardner testified that the two amounts put together gave the sum of $4,824.11, which was the amount for which appellant was indicted for commission of the crime of embezzlement.

Also according to witness Lardner, all these reports from his audit investigation were

submitted to the Under Secretary of the Treasury for further action and based upon that the matter was referred to the Justice Department, and eventually taken to court.

The next witness was one Michael Doe, who testified that in June 1968 he was instructed by the then Under Secretary of Treasury, Honourable Greaves, to associate with Mr. Gustavus Lardner, traveling auditor for the Department of the Treasury, to inspect and audit the accounts of appellant; that appellant made available to the auditors all the receipts covering the deposits she had made between January 1967 to February 15, 1968; that it was discovered that she had a short deposit of $1,353.91 and that the face value of the 39 retrieved receipts from lost receipt books was $3,470.20. Witness Doe also testified that they, the auditors, added the short deposit of $1,353.91 to the $3,470.20 face value of the 39 retrieved receipts to get $4,824.11. He testified that when the audit was concluded they summarized and coordinated their report and forwarded same to the Under Secretary of the Treasury, Honourable Greaves. This witness said that he was later instructed to prepare a list of the 39 retrieved receipts from the missing receipt books to be sent to the National Bureau of Investigation (NBI) for comparison of the signatures and he believed that Hon. Greaves sent the receipts to the NBI. He testified that his belief was based on the fact that after he delivered the receipts to Hon. Greaves, one Michael Sartieh from the NBI told him (the witness) that Hon. Greaves had sent him (Michael Sartieh) some original flag receipts with the list prepared by him (the witness).

Witness Michael Sartieh testified that on December 9, 1968, he received and examined 25 government revenue receipts which were allegedly forged and which contained the signature of Mrs. E. Webster-Ankra; that appellant gave him specimen of her handwriting, which he compared with the signature on the revenue receipts and found all to be appellant's handwriting.

The last witness for the prosecution was Samuel Berry, also of the NBI, who testified that he received a letter from the county attorney for Montserrado County, together with 25 disputed government receipts for the NBI to determine whether or not the receipts carried appellant's genuine signature, but because he had to take up another assignment out of town he turned over the receipts to his immediate assistant, Michael Sartieh, who did the work. The witness testified that when he returned to the city he examined and approved Sartieh's work, which he turned over to NBI Director Minikon. The witness identified the 25 receipts.

We will now see whether appellant's contention that the weight of the evidence is against the verdict of guilty has foundation.

Under cross examination, this question was put to witness Gustavus Lardner:

"Q. Mr. witness, do you make this court and jury to under-stand that in your audits, you did not confront the defendant with the facts found by you and you did not gave her the audit report and statement of account for her signature?

"A.In the first place it was not within my province to do that. We were to audit the account and send out our findings to the higher authority, Mr. Greaves. Subsequently Mr. Greaves held an investigation at which Mrs. Ankra was present. I and Secretary of the Treasury, Mr. Weeks, were also present. The report was read to her on the salient points raised by me. We brought the shortage to her attention and, instead of defending herself or challenging the report, she resorted to extraneous matter, not at all connected with the subject matter, and the conference ended in disarray."

This answer shows that (a) appellant was audited in her absence; (b) appellant did not read the auditor's report and account statements, but instead the report was read to her on the salient points; (c) appellant did not sign the statements and report made of her accounts; and (d)the two top most officials of the Treasury Department were unable to conduct an orderly conference in their own Department. What a disgraceful situation.

Two questions that were not permitted by the court to be answered beg our attention, and these are:

I pass you instrument marked 'P,' look through it and identify that particular statement, which was signed by the defendant?

Tell us if we must presume that such a statement is absent from these documents marked 'P,' could you tell us the whereabout of same, if you can?"

We hold that the trial court should have allowed these questions to be answered under cross examination, for they were intended to confirm that appellant never signed the statement and report made by the auditors and that the first copy of those documents were not admitted into evidence for they were up to the close of the trial still in the possession or custody of Under Secretary Greaves. The law on the scope of cross examination is that any matter that touches the cause or is likely to discredit the witness is permitted to be inquired into on the cross examination. Civil Procedure Law, Rev. Code 1:25.23.

The defense objected to the admission of the copies into evidence, but the trial court overruled the objection. On this issue, the prosecution ably argued, giving some common law citations to support the argument, that carbon copies are just as good as original or first copies; hence, he said, the court below properly admitted them into evidence.

This Court says that the very laws relied upon by the prosecution are explicit that carbon copies may be used only when the original or first copies are not available. Were the original

copies not available in this case when they were not in the hands of prosecution's adversary but in the possession of a friend, the man who ordered the inspection and audit of appel-lant? The argument that Hon. Greaves who had the document was no longer in office when the trial commenced does not convince us, for he lived at Brewerville and a *subpoena duces tecum* would have had him produce them. We therefore hold that the failure of the prosecution to retrieve the original or first copies of the statements and the audit report for the trial and to have Hon. Greaves take the stand to testify for the prosecution was fatal to this case. The law is clear and certain that the best evidence of which the case admits must always be produced; and that no evidence is sufficient which supposes the existence of a better evidence. *Ibid*, 1:25.6(1).

We consider it as gross negligence on the part of the auditors when they failed to furnish appellant copies of the statement of her accounts and of their report, and when they failed to have her sign or endorse those documents as to their correctness or incorrectness. We also consider it gross negligence on the part of the prosecution of its failure to retrieve the original documents from Hon. Greaves for the trial. Additionally, the prosecution woefully failed to exercise vigilance in the drawing of the indictment and in introducing into evidence the retrieved revenue receipts reportedly taken from some of the 264 lost receipt books. This series of gross negligence on the part of both the auditors and the prosecution fatally affected the trial of this case.

The two auditors testified that there were thirty-nine (39) such receipts and their total face value was $3,470.20, which amount they added to appellant's short deposit of $1,353.91 to make $4,824.11, the amount for which defendant was indicted. The two handwriting experts from the NBI testified that they received only twenty-five retrieved revenue receipts from the prosecution, which they examined and compared with appel-lant's specimen signature and found all to be appellant's writing. Yet the thirty-nine (39) receipts remained on the indictment. Why did the prosecution fail to reduce the amount of $3,470.20 by the total face value of the fourteen (14) receipts unaccounted for, as this part of the evidence proved an amount less than the amount carried in the indictment? Hence, a material variance, which operates in favor of the appellant, existed.

The fact that appellant never read the statements and report of the auditors who inspected and audited her accounts, and the fact that none of the thirty-nine (39) or twenty-five (25) tax-payers, whose receipts were retrieved ever testified at the trial, shows that appellant was not afforded the opportunity for confrontation as is required by the constitution. LIB. CONST. Art. I, Sec. 7.

Misappropriation of funds, both in private and public sectors in this country by persons under whose care and trust huge sums of money are placed, is becoming rampant and the reason for this is the gross negligence on the part of many of our auditors and prosecuting attorneys who perfunctorily execute their duties. This Court has had several embezzlement cases during this term and many more in the past in which we discovered that the audits were incompetently performed and the indictments were loosely drawn up. It cannot be said that many of the defendants acquitted in embezzlement cases are innocent; for many of them actually misappropriated their principal's or the taxpayers' money or property. But because the collection of the evidence against them and the prosecution of the cases against them were so incom-petently done, they were set free.

Some of our auditors irresponsibly include no clues in their reports and statements, without which the prosecution would woefully fail. Auditors hold a position of important responsibili-ty and therefore they must be mindful that whenever they inspect and audit any accounts and discover some misappropriations, the matter will eventually end in criminal prosecution.

To our prosecuting attorneys all over the country, we repeat that the fate of a cause under trial depends not on eloquence or oration but purely on the facts and laws controlling; and these facts and laws are not discovered before the bar and Bench but in the lawyer's office where the pleadings are prepared.

Having thus discovered that the verdict in this case was manifestly against the weight of the evidence, the judgment entered upon it must be reversed, and we so hold.

The Clerk of this Court will immediately send a mandate to the trial court ordering it to resume jurisdiction over the cause and enforce this judgment. And it is so ordered.

Judgment reversed.