**Alex Varney Freeman** of the City of Monrovia, Liberia DEFENDANT /APPELLANT Versus The Republic of Liberia by & thru **Nathaniel Dimerson** of the City of Monrovia, Liberia PLAINTIFF/APPELLEE

APPPEAL

JUDGMENT REVERSED AND REMANDED

HEARD: MARCH 19, 2007 DECIDED: MAY 11, 2007

MR. JUSTICE JA'NEH DELIVERED THE OPINION OF THE COURT

This case is before us on appeal from the First Judicial Circuit, Criminal Assizes "C" for Montserrado County, sitting in its August Term, 2004, where appellant was tried and found guilty for alleged misapplication of entrusted property. The money interest in the case was US$1,705.00 (United States One Thousand Seven hundred Five Dollars) and was said to belong to private prosecutor, Nathaniel Dimerson.

Misapplication of entrusted property is a violation under Chapter 15 Section 15.56 of the *New Penal Law of Liberia (1976)* which states that: "A person is guilty of a misdemeanor of the first degree if he disposes of, uses or transfers any interest in property which has been entrusted to him as a fiduciary, or in his capacity as a public servant or an Officer of a financial institution, in a manner that he knows he is not authorized and that he knows to involve a risk of less or detriment to the owner of the property or to the Government or other person for whose benefit the property was entrusted."

Certified records culled from the court below reveal that on a sworn complaint made by the Republic of Liberia, thru the private prosecutor, Monrovia City Magisterial Court issued a writ of arrest on the 4 th day of December 2004 charging defendant Alex Varney Freeman with the crime of misapplication of entrusted property.

Returns of the Sheriff indicates that said defendant was arrested and brought before the court where he filed a valid criminal appearance bond. Defendant Freeman was subsequently indicted along with co-defendant Florence Sebo and charged with the crime aforementioned.

The indictment states that private prosecutor, Nathaniel Dimerson, desiring to buy and sell bicycles, contacted co-defendant Alex Varney Freeman, to purchase one hundred (100) used bicycles. Co-defendant Freeman had represented himself as a businessman. The indictment alleged that as co-defendant Freeman was on his way to the United States of America, he introduced his fiancée co-defendant Florence Sebo to the private prosecutor and advised that payments for the bicycles be made to her.

The indictment further alleged that based on the said introduction and advice given by defendant Freeman, the private prosecutor, did upon receipt duly issued to him for the said purchase of bicycles, make payments to co-defendant Florence Sebo, in the amount of USD$1,705.00 (One Thousand Seven Hundred Five United States Dollars). On arraignment, co-defendant Alex Varney Freeman pleaded not guilty thus joining issue with the State. The Petty Jury was accordingly empanelled on November 18, 2004, to try the case.

At the call of the case, prosecution requested the court for separate trial of Alex Varney Freeman contending that co-defendant Florence Sebo, up until the commencement of the trial, had not been arrested and brought under the jurisdiction of the court. The court granted said application for severance.

Records further show that on November 19, 2004, Assistant County Attorney of Montserrado County, Atty. Francis W. Sio, wrote a letter to the clerk of Criminal Court Assizes "C", the relevant portion of which reads:

"Prosecution hereby enters NULLE PROSEQUOI in favor of one of the defendants, Codefendant Florence Sebo without reservations thereby dropping the charge of misapplication of entrusted property brought against the said co-defendant by the Republic of Liberia, plaintiff." (Emphasis Ours.)

This Court as a duty says here at least in passing that this letter dated November 19, 2004 from the County Attorney's office, was one of reprehensible conduct of dereliction in prosecution exhibited throughout this case. As can be seen, this request made WITHOUT RESERVATION by prosecution, if granted, would mean that the Republic of Liberia was not only dropping the charge against said co-defendant; by implication, it also means that the State would be legally barred forever from instituting same and identical charge against said co-defendant.

It must also be noted that when prosecution made this application, co-defendant Florence Sebo had not been arrested and brought under the jurisdiction of the Court.

Although to make such a request, we tend to believe that prosecution must have been in touch with co-defendant Florence Sebo.

But the trial court, in denying said application, noted in its ruling as follows:

*"The court observes from the records of this case that since aforesaid defendant, Florence Sebo was ordered arrested on the request of Prosecution counsel and for which a Writ of Arrest was issued from this Court, the court's records show that said defendant Florence Sebo has not yet been arrested Therefore this Court says said defendant Florence Sebo has not been brought within its jurisdiction and therefore this Court will not entertain the aforesaid letter of Aisistant County Attorney, Attorney Francis W. Sio."*

The case file further indicates that on November 22, 2004, that is to say 12 (twelve) days into the trial, the prosecution made yet another application. This time, it requested the court to set aside the Nulle Prose quoi earlier entered in favor of Co-defendant Florence Sebo. The court denied same on ground that said application was intended to baffle and delay the trial of the case in light of the fact that all four of prosecution's witnesses had testified and had been discharged also.

On November 30, 2004, and for the second time, the Assistant County Attorney, Francis W. Sio requested the Court to enter a NULLE PROSEQUOI in favor of co-defendant Florence Sebo without reservation for what he termed "lack of sufficient evidence" to prosecute said Co-Defendant.

The court granted this application and ordered that Defendant Florence Sebo be discharged from further answering to said charge FOREVER. (Our Emphasis).

During conduct of the trial, four witnesses testified in favor of prosecution after which the State rested with production of evidence. Counsel for defendant then moved the court for judgment of acquittal, strongly contending that prosecution did not produce its best evidence to warrant conviction of the defendant.

Counsel argued that prosecution failed to establish a prima facie case against defendant Alex Varney Freeman, because the indictment alleged that US$1,705.00 was given to Florence Sebo on behalf of defendant for the object of buying one hundred bicycles; yet prosecution failed and refused to produce said Florence Sebo to testify before the court and Jury as to whether she ever remitted said money to defendant Freeman. The motion for judgment of acquittal was however resisted by the State, argued, pro and con and denied by the court.

Notwithstanding the denial of the application aforementioned, defendant Freeman declined to testify or have any witness testify in his behalf. Rather, the defendant requested the court to submit the case to final argument. The request was granted followed by charging and retirement of the jury, who deliberated and returned with a unanimous verdict of guilty against defendant Freeman On December 14, 2004, the Court entered its judgment affirming the verdict as stated hereunder, to wit:

*"WHEREFORE, and in view of the foregoing, which also include the verdict of guilt brought by the jury, it is considered and adjudged by this Court that defendant Alex Varney Freeman is guilty of misapplication of entrusted property; and, therefore, he is sentenced to Four (4) calendar months in prison, commencing from the date of this judgment, and he is to pay the amount of US$1, 705.00 (United States One Thousand Seven hundred Five Dollars) or its equivalent in Liberian dollars currency, for which he was indicted. And it is hereby so ordered"*

It is from this final judgment entered by Criminal Court Assizes "C", defendant Alex Varney Freeman perfected an appeal for review of this case by the Honorable Supreme Court.

In doing so, the defendant/appellant has filed a five (5)-count bill of exceptions. The bill exceptions can be summarized into one cogent issue which was eloquently argued by both counsels during oral arguments before this Court. The lone issue determinative of this case at bar is:

ISSUE: Whether in the conduct of the trial, the, State established a prima facie case to sustain defendant's conviction? And if the answer to this question is in the negative then we must ask whether failure to establish a prima facie case due to the exclusion of material evidence, constitutes conclusive legal ground to discharge the accused?

Again we take recourse to the court's records as regard the ultimate recipient of the US$1,705.00 (United States One Thousand Seven hundred Five Dollars) to ascertain whether the evidence produced at trial was sufficient to warrant a guilty verdict.

A careful scrutiny of the records reveals that four witnesses, including private prosecutor, Nathaniel Dimerson testified on behalf of the State. Relevant portion of witness Dimerson's testimony in reference to his interactions with the defendant is as follows:

Then I asked and said are you coming and he said yes I will soon be coming and I will be shipping three cars in a container. So I informed him that while coming, he should buy me some mountain bicycles; so he asked me how much I get and I told him the amount, which is $1,700.00 and he agreed to buy me those bicycles and ship them before he comes; but he designated Florence Sebo to receive the amount of money from me and he gave me her number which at that time was 556628."

"The next day Florence came to my shop and she and myself ironed out things and I gave her US$500.00 on January 31, 2003. The second payment was done on the 12th of February 2003 in the amount of US$495.00 and the last payment was done on the 28 of February 2003 in the amount of US$710.00. All that money I sent to him, he agreed that he received from Florence....then he came in the month of October 2003. When he came, I went to him and we sat down and discussed; then he started laying down conditions that I should give him US$1,000.00 [more] before he can ship the bikes. Because I was in desperate need of the bikes and the war had just ended, I told him that I will make available US$485.00 and he said that I should pay the US$485.00 to include US$100.00 to carry to Counsellor T.C. Gould's Office because Cllr. T. C. Gould was his lawyer; so he didn't want when he ship the bikes 1-don't pay his money. I gave him US$100.00 with the land deed and he said that we should take land deed to T. C. Gould office and he will carry the US$100.00 to T. C. Gould. When I got to T. C. Gould's office, and I asked him, the money was not given to

him; I took issue with him [Freeman]. Then I laid his complaint at the Justice Ministry through written document and he was cited at the Justice Ministry, [where] he and myself [appeared] on a Saturday"

"We went through the investigation and they turned us over to the County Attorney, Francis W. Sio's office, who asked me and I explained; Alex Varney Freeman explained also saying ninety percent of all what I explained was true During the time, we were in the County Attorney's office, my brother called me and discussed with the County and Mr. Freeman and my brother agreed for the bikes to be turned over to him in the States and Mr. Freeman, while he was here, designated somebody in the States for the bikes to be turned over to my brother. For two months again the bikes could not be turned over to my brother and the County Attorney called Mr. Freeman and acknowledged him with the situation that the bikes could not be turned over to my brother. Then Mr. Freeman agreed to pay back my money. Two days [to the designated time] to paying my money, Mr. Freeman left the country for America without paying my money. While in the United States, he sent me documents that he bought those bikes and kept them in the storage site. Upon receiving the documents, I found out that it was a fake because the documents he sent say he bought me size 10 and size 12 and there are no size 10 bicycles in the whole World. I told him that there is no size 10 but size 12 which belong to babies and I told the County [Attorney] that this man has used my money and therefore, I want to sue him" The counsel for defendant put the following questions to this witness on the cross:

QUES.: "Mr. Witness, am I correct to conclude and say that Florence Sebo whose signature appears on documents bearing court's mark "RJ1-3" inclusive is the same Florence Sebo who was charged and indicted along with defendant?"

ANS.: Yes.

QUES: "Mr. Witness the Republic of Liberia by and thru you has indicted the defendant for commission of the crime of misapplication of .entrusted property involving one hundred bicycles to the value of US$1,705.00. You have taken the stand in support of the averment in the indictment against the defendant in this case and you have testified to three receipts about the signature of one Florence Sao; according to you. Each of the receipts states that the amount thereon for cost of the goods. My question to you Mr. witness is in two fold; (1) to tell this court and jury if you physically place or pay any amount of money to the defendant?"

"And (2) for you to explain the cost of goods on the receipts you have testified to and the one hundred bicycles for which the defendant is standing trial?"

ANS.: "Physically I did not give Mr. Freeman the money but he instructed his fiancée at that time to receive said amount upon that she issue me receipts; US$1,705.00 was given to Mr. Freeman through Florence Sebo to buy one hundred bikes. Upon receiving the money he promised to ship the bikes and up9his arrival later, I will pay his difference which is his shipment cost"

Prosecution second witness in person of Henry Dimerson testified and we quote relevant portion of his testimony as follows:

"Yes, I can remember, it was on Sunday when Nathaniel, Joe Roberts, Musu and myself went to Varney's (defendant) house. When we got there, I asked Nathaniel what was the cause of *us* coming here, and Nathaniel said that he gave Varney some money to buy bicycles, and so I reached it to 'Varney and said this is what Nathaniel say, and Varney said, Nathaniel gave the money for bicycles but I already bought the bicycles and they are in storage. But the only thing we can do is that we join fifty-fifty to pay for the trip. So we stopped there and we went home. I say for two or three weeks, we were brought before the County Attorney where Nathaniel presented all his receipts to the County Attorney and the County Attorney asked Varney what you

say about the receipts. Varney admitted that all the receipts were correct; he received the money and the County Attorney asked can the man get his money; and in that time, Varney called someone over his phone; and they stood a temporary bond for him and we went home. Thereafter, while Nathaniel, George Scott and myself were in our little shop, Varney came and said Nathaniel, look I do not think we should fight over this money because we are all friends. I will be paying the money small, small to the old man and I said okay, Varney, if you will do that, it will be better than for you to be hurling and pulling. And since Varney left, I never saw him again until we came in this Court. That is all I know about it."

Prosecution's third witness who took the stand and testified before the court and the trial jury was Joe Roberts. We quote relevant portion of his testimony as follows:

"On Sunday, Nathaniel, Henry Dimerson, Nathaniel's fiancée Musu and myself went Sunday morning to Vamey's house. When we got there we met him. Nathaniel asked him about his bicycles and he told us that he had already bought them and Nathaniel must try to call his brother who lives in the same America, named George Dimerson to come to Varney to pick these bicycles up. That's all I know about the case."

The fourth and last prosecution's witness was George K. Scott who testified to the effect that defendant admitted receiving money from Private Prosecutor in his presence as stated by other witnesses. The State then rested with production of evidence.

It was at the conclusion of these testimonies that defendant/appellant moved for judgment of acquittal contending that prosecution failed to produce the best evidence that would warrant the conviction of the defendant. Counsel for defendant vehemently argued that prosecution failed to establish a prima facie case against the defendant because it is alleged in the indictment that the money or property of US$1,705.00 was given to Florence Sebo to be sent to defendant for the bicycles; but prosecution failed and refused to produce said Florence Sebo to testify before the court and Jury as to whether she sent or gave any money to the defendant.

During argument before us, appellant's counsel strongly maintained the position that in the face of the prosecution's failure to place Sebo on the stand, even if the whole population of the Republic had testified, the sum total of such testimony would simply amount to the existence of better evidence. The counsel further argued that the best testimony would have been that of defendant Florence Sebo's, who is said to have actually received the money and issued receipt therefore. The Counsel also contended that the failure by prosecution to produce the best evidence in this case entitles defendant Freeman to acquittal and discharge from any further answering to the charge of misapplication of entrusted property.

This Court accepts the forceful argument advanced by counsel for defendant that the evidence produced by prosecution in these proceedings tdmits the existence of better evidence. In our opinion, defendant Florence Sebo's testimony would have probably shed light on that critical missing link between defendant Freeman and the money or between Sebo and the entrusted amount. For it was defendant Florence Sebo who actually received and duly issued receipt for the US$1,705.00 from the private prosecutor reportedly at the instance of defendant Freeman. What transpired thereafter, this Court believes, defendant Florence Sebo is best situated to know, or must have reasons to know than the rest of the other State witnesses combined.

Under the best evidence rule, it is generally held that:

"THE BEST EVIDENCE WHICH THE CASE ADMITS OF MUST ALWAYS BE PRODUCED; THAT IS, NO EVIDENCE IS SUFFICIENT WHICH SUPPOSSES THE EXISTENCE OF BETTER EVIDENCE" *1LCLR. TITLE 1, SECTION 25.6 page 198*.

The Supreme Court, in a line of decisions, has held that in all trials upon indictments, to convict, the State is under a duty to prove the guilt of the accused with such legal certainty as will exclude every reasonable hypothesis of his innocence. *Republic of Liberia Versus Smith 224 (1976); Thompson Versus Republic 14 LLR 133 (1960). Abraham Sealon Flomo Versus Republic of Liberia 26LLR 51 (1977).*

In light of the circumstances, a conclusion could be drawn that the evidence produced by the prosecution in the conduct of this trial was insufficient, thereby creating room for a reasonable doubt, which, under normal circumstances, operate in favor of the defendant. We shall elaborate on this point later in this opinion.

Reverting to the case file once again is important to the determination of: whether failure to establish a prima facie case due to the unfettered exclusion of material evidence, constitutes conclusive legal ground to discharge the accused?

This Court notes that aside from the private prosecutor, three other witnesses, under oath, also testified on behalf of the State. These four witnesses testified to the effect that defendant Freeman in their presence and at different times, made promises to ship the bicycles or refund Private Prosecutor's money:

Further, this Court has also taken keen note of the testimony made by Private Prosecutor on cross-examination as enumerated hereunder to wit:

QUES. "Mr. Witness did I understand you to say that while you and the defendant were being investigated by the County Attorney's office, the defendant agreed and promised to pay back the money to you?"

ANS. "Yes, he agreed".

QUES. "Did you agree with the promise to receive the money from the defendant in the office the County Attorney?"

ANS. "Yes, I agreed."

QUES. "Was that promise made by the defendant to pay back the money to you reduced into writing, signed by the defendant and witnessed by more than one person?"

ANS. "Yes, it was reduced into writing and witnessed by more than one person and I can produce it."

QUES. "Thank you Mr. Witness, since you went on your own volition and told this Court, the jury and the defendant that you can produce the promissory note that was prepared by the defendant in the office of the County Attorney for Montserrado County for the payment of the US$1,705.00 which you agreed to, please produce said document?"

ANS. "Yes, Your Honour, this is the promissory note."

Following this answer, the defense Counsel made the following submission:

"At this stage, counsel for the defendant gives notice that at the appropriate time the witness now on the stand will be subpoenaed or a writ of Subpoena Duces Tecem will be prayed for to be issued and served on the witness, the Private Prosecutor in this case, the promissory note, stipulation allegedly executed by the defendant on March 22, 2004, witnessed by A. Blamo Dixon and James Sumo and attested to by Atty. Francis W. Sio, Assistant County Attorney for Montserrado County to be used by the defendant."

On redirect, the witness was asked by prosecution:

QUES. "Mr. Witness, a question was posed to you on the cross as to whether defendant Alex Varney Freeman executed a promissory note to you for payment of the US$1,705.00 and you answered yes. Please refresh your memory Mr. Witness, were you to see said promissory note, would you recognize same?"

To this question, defense counsel objected and said objection was sustained on ground that it was out of pale of redirect.

Sustaining this objection appears strange in light of the materiality of the subject promissory note invariably brought to the attention of the court at the instance of counsel for defendant. We note that the court had allowed the state witness to be cross-examined on the subject promissory note, during which time, it is important to observe, the said instrument (promissory note) was presented to the trial judge who apparently inspected same. Importantly, this material instrument tending to directly link defendant Alex Varney Freeman to the crime as charged, was excluded by the court on ground that it was outside the latitude of redirect. The exclusion by the court of this important instrument reportedly executed by defendant Alex Varney Freeman, an allegation un-rebutted, therein promising to refund the Private Prosecutor's money, is neither an exercise in sound discretion by the trial court nor was it in harmony with the holding of this Court in the case: Lamco J.V. Operating Company versus Gbezon, 29 LLR, 225, 231S(1981). In the cited case, the Supreme Court held that "Determination of the materiality of a document when offered by a party lies within the sound discretion of the trial judge." The Court's holding in the referenced case is also supported by Chapter 25.4 on "relevance" which provides: "All evidence must be relevant to the issue; that is, it must have a tendency to establish the truth or falsehood on the allegations or denials of the parties..”

There is no doubt that the promissory note was truly essential both in materiality and relevance which could lead to a conclusive finding either in favor or against the accused.

Additionally, the damning testimonies of three corroborating state witnesses who said that defendant Freeman promised at different times to ship the bicycles or to return Private Prosecutor's money, were never refuted by the Defendant.

In the case *Paye Versus Republic of Liberia 1OLLR 55 (1948),* the Supreme Court adopted the definition that "Prima Facie evidence of fact is in law sufficient to establish the fact, UNLESS REBUTED" (Emphasis Supplied)

The aforementioned case, Paye versus Republic of Liberia, involved a more serious crime, a murder case. During the trial of this murder case, the State produced four (4) witnesses whose testimonies showed that Appellant Paye shot and killed two persons in the settlement of White Plains. One of the witnesses testified that he saw the defendant with the gun running away and later had conversation with the defendant in the presence of more than one person when he (defendant) admitted to killing the two persons. When prosecution rested with production of evidence, as in the instant case, defense counsel notified the court that in view of Prosecution's failure to establish a Prima facie case of murder as charged, defense would waive production of evidence. The jury found the defendant guilty, as the jury also found in the case before us.

The Supreme Court affirmed the final ruling. In affirming said ruling, the Supreme Court held that in the face of the damning testimony of admission allegedly made by defendant, the defendant neither brought witnesses to testify in his behalf nor testified to refute what had been placed on the record by the prosecution against him.

From the records before us, we find clear and undisputed evidence that the Private Prosecutor paid US$1,705.00 to defendant Florence Sebo. It is equally undisputed also that said amount was received and receipt duly issued by co-defendant Sebo for purposes of remittance to co-defendant Freeman. What was not clearly established was the transaction between the two co-defendants, Sebo and Freeman. Had defendant Florence Sebo testified as to circumstances attending this entire transaction, a conclusive case would have probably been made for conviction or acquittal.

This Court is of the view that the exclusion of both co-defendant Sebo as well as the promissory note, said to have been executed by principal defendant Alex Freeman, an allegation never denied, deprived this case of material and prima facie evidence.

All these circumstances, when combined, tend to sway to a conclusion that neither the State prosecuted with utmost sagacity, nor did the court exercise sound discretion by its exclusion of a material and relevant instrument, which it had received and inspected during cross examination.

The Supreme Court has passed on similarly situated circumstances. In the case *Gauhoe and Gavzoe Versus Republic of Liberia 1OLLR, 204 (1949);* Mr. Justice Reeves speaking for the Court held that "when neither the defense nor the prosecution in a murder trial exercised due care, diligence, and legal astuteness in protecting its client's or the State's interest, the Court will reverse the conviction and remand the case for new trial."

As regard the exclusion of the promissory note by the court, it has been generally held" when that error is found as to proceedings anterior to and inhering in the verdict, *the proper practice is to direct new trial, and not merely to render a judgment of reversal. This is true where there has been error in the admission or exclusion of evidence, or in the rejection of proper instruction..... "* [Emphasis supplied]...." Errors and defects in trial *3 AM JUR., APPEALS & ERROR, SEC. 1220.*

So where a case has been tried with irregularities and lack of diligence, the rule is to remand such case for trial de novo. *Gauhoe and Gavzoe Versus Republic of Liberia 1OLLR, 204 (1949* The general exception to the rule "to order a new trial" was also stated clearly when Mr. Justice Tulay speaking for this Court observed: "It is apparent from the evidence that the State could not make out any better case if a new trial should be awarded; on this basis the appellant must be acquitted." [emphasis supplied]. *Smith Versus Republic of Liberia 28LLR 226 227(1979).*

In the case at bar, a situation appears to exist, in harmony with a line of decisions of this Court, to remand this case for new trial.

WHEREFORE, and in view of the irregularities and exclusion of material evidence, the judgment of conviction is hereby reversed and the case remanded with instruction that the court below resume jurisdiction and hear same *de novo.* IT IS HEREBY SO ORDERED.
*Reversed and Remanded.*