JAMES G. PASSAWE, Appellant *v.* REPUBLIC OF LIBERIA, Appellant.

APPEAL FROM THE CIRCUIT COURT, FIRST JUDICIAL CIRCUIT, MONTSERRADO COUNTY.

Argued November 3, 4, 5, 1975. Decided January 2, 1976.

1. A subpoena *duces tecum* is required for the production of documentary evidence when such evidence is in the possession of another person.
2. A misstatement of fact by a judge on a purely collateral matter is not ground for reversal.
3. When a defendant in a criminal case elects to testify, he subjects himself to the rules governing witnesses generally.
4. The questioner on cross-examination is given wide latitude.
5. In proving embezzlement, establishment of even a portion of the sum charged constitutes proof of the crime alleged in the indictment.
6. The uncorroborated testimony of a person accused of a crime is insufficient to acquit, especially when the evidence against him is clear and convincing.
7. Any unexplained shortage in an account creates a strong presumption of criminal conversion.

Appellant was a diplomatic employee of the Government and was charged with embezzling funds entrusted to him. He was tried and found guilty. An appeal was taken, contending errors had been made by the trial court in admitting certain evidence. It was also claimed that a motion for a new trial should have been granted.

The Supreme Court found no reversible error. The evidence was scrutinized and the Court found that the verdict was justified. The judgment was *affirmed.*

M. M. Perry for appellant. *Solicitor General Roland Barnes* and *Jesse Banks* for appellee.

MR. JUSTICE AD HOC JOHN A. DENNIS * delivered the opinion of the Court.

* Appointed pursuant to Judiciary Law, Rev. Code 17:2.8.

The record certified to this appellate Court in the above entitled criminal matter discloses the following facts as extracted from the indictment.

That appellant, while in the employ of the Government of Liberia as Charge d'Affaires of the Liberia Embassy in Bamako, Republic of Mali, acquired custody and expended sundry amounts of money of the Government of Liberia, during the period of July, 1963, up to and including December, 1966, aggregating $113,554.55. He misappropriated and embezzled the sum of 32,419.66 therefrom, which was discovered by the audit of Inspector General Christian D. Maxwell, conducted in the Republic of Mali, thereby fraudulently and feloniously converting the same to his own use and benefit.

We have set forth below a resume of the audit, according to the indictment returned against the appellant.

Total Treasury Remittance to Bamako from the third quarter 1963, up to the third quarter 1966. $113,554.55

Add:	Cash in Embassy's dollar account on September 31, 1963, as per bank statement		19,082.94
	Total funds available for disbursement		132,637.49
Deduct:			
	Total disbursements for same period		106,468.10
Difference of remittances over expenditures			26,169.39
Add:	(a) Total excess withdrawals, etc. withdrawals not included above short-recorded	$3,952.00	
	(b) Payment vouchers not included above,		

based on forged invoices and bills	2,661.63	
(c) Shortage in consular fee accounts, etc.	772.58	
		7,386.21
Gross Deficit		33,555.60
Deduct:		
Cash in bank—France account as of October 26, 1966	17.04	
Cash in bank dollar account as of November, 1966	972.90	
Credit for air tickets for auditors Cheedy and Scott, paid from Embassy funds	146.00	
		1,135.94
Net Deficit to Be Accounted for	$32,419.66	

During the November 1968 Term of the First Judicial Circuit Court, Montserrado County, the grand jurors found sufficient evidence to indict the appellant for the crime of embezzlement. Accordingly, when the May Term of said court was convened, the case came on for trial, at which time the appellant was arraigned and entered a plea of not guilty. Thereafter, a jury found him guilty. He has appealed from the judgment.

Counsel for appellant summarized his forty-three count bill of exceptions during argument before us: (a) the absence of evidence of the transfer of funds as claimed by appellee, except mere reference made; (b) that the date September 31, does not exist, a date on which a certain transaction in respect of the charge against the appellant is said to have taken place; (c) The recall of the appellant to testify against himself, which is unconstitutional; he, however, admitted that a witness may be re-

called to testify, but not to state facts that would be used against him as was allegedly done in the instant case in the trial which took place in the lower court.

This Court has steadfastly held that only the exceptions that are taken during the trial below will be considered by this Court on appeal. Examination of the bill of exceptions shows that the exceptions can be divided into two categories: (1) objections to questions proposed to the witnesses, including the appellant, by counsel for both parties, that were overruled by the trial judge, to which exceptions were noted; and (2) count 42 that refers to one of the issues being the recall of the defendant for further cross-examination.

Counts 10 and 29 of the bill of exceptions relate to the admissibility of certain written evidence over the objections interposed by counsel for the appellant; counts 6, 7, 8, 11, 12, 13, 14, 15, 16 through 28, and 30 through 43, are comprised of objections to questions.

As to the issue of the date of September 31, which is not specifically raised by him in his bill of exceptions, nevertheless, in count 20 of his bill of exceptions the question below was propounded to the appellant on cross-examination, to which counsel for appellant objected and was correctly overruled by the trial judge.

> "We hand you a document marked by the court, which is the statement of account of the Bamako Mission, bearing Number 428–37, which shows that the $19,000.00 was in the bank as of September 3, 1963, but because of a typographical error in preparing the account and a one instead of a comma being typed behind the three, making it appear as September 31, 1963; you now try to take advantage of that. Tell the court and jury what you observe from the statement which you now hold with respect to the entry of $19,000.00, and the date thereof?"

Because of the failure to state reasons in count 20 of the bill of exceptions for the objection to the question, we had

to go to the trial record. We found three grounds for the objection: (1) soliciting oral testimony to explain away a written instrument; (2) the document had been admitted into evidence and became the property of the court, therefore, a subpoena *duces tecum* was required; (3) entrapment.

"Notice by writ of subpoena *duces tecum* to produce documentary evidence is only required when such evidence is in the possession of another person." *Thompson* v. *Republic,* 14 LLR 133 (1960). See also Civil Procedure Law, Rev. Code 14.1. This establishes that a subpoena *duces tecum* is only required for the production of documents in another's possession, but not the court's, as in the instant case.

The scope of cross-examination is very wide, as it extends to all matters touching the case or likely to discredit the witness. *Speare-Speare-Hardy* v. *Republic,* 14 LLR 547 (1961); *Yancy* v. *Republic,* 4 LLR 3 (1933). A party, or a witness for that matter, who identifies a document is competent under the law to be questioned as to the contents thereof, especially so as to any question of doubt or ambiguity appearing on the face thereof, referring to the impossible date of September 31.

A cursory glance at the question quoted above shows that the question was put to the person who managed the accounts and could have clarified the issue and is not entrapment. The witness was also afforded an opportunity to help establish his innocence.

What is even more significant, is the answer to this question, after the trial judge had correctly overruled the objections. "I am unable to explain the account."

The nonexistence of September 31, has been emphasized by counsel. It is obvious that no such date exists. We shall examine the consequences of this.

In the statement quoted below, we have set forth the elements needed to be proved to constitute embezzlement.

"In order to establish the crime of embezzlement, it

is usually necessary to show: (1) the trust relation of the person charged and that he falls within that class of persons named by the statute; (2) that the property or thing claimed to have been embezzled or converted is such property as is embraced in the statute; (3) that it is the property of another person; (4) that it came into the possession, or was placed in the care of the accused under and by virtue of his office, place or employment; (5) that his manner of dealing with or disposing of the property constituted a fraudulent conversion and an appropriation of the same to his own use; and (6) that the conversion of the property to his own use was with the intent to deprive the owner thereof." 9 R.C.L., *Embezzlement,* § 42 (1915).

Allegations of physically impossible facts need not be proved in a criminal prosecution, even though set forth in the indictment, especially when lack of proof of such allegations could not effect proof of any essential element of the crime. *Glay* v. *Republic,* 15 LLR 181 (1963).

In passing upon count three of the bill of exceptions, which relates to the court's denial of a motion in arrest of judgment on the ground that the allegations of the indictment charge both embezzlement and forgery, it is necessary that we refer to sections (a) and (b) of the indictment: "(a) Withdrawals not included above short-recorded. . . ; (b) Payment vouchers not included above, based on forged invoices and bill . . . $2,661.63."

A motion in arrest of judgment is a purely legal issue and not factual in nature and character, and has to be decided on such a legal basis; otherwise, the testimony of witness George Harris would have been detailed here, but instead will be done in disposing of count two of the motion for a new trial.

The inclusion of the words "forged invoices" in the indictment do not negate the crime of embezzlement fully described in the indictment against the appellant. Count three is, therefore, not sustained.

We shall now deal with counts four and five which we have set forth, both being related to the judge's charge to the jury.

> "Count four. And also because defendant says that Your Honor refused to charge and instruct the jury on the several salient points of law laid in defendant's written request for instructions to the jury; to which defendant then and there excepted.
>
> "Count five. And also because defendant says that Your Honor erred when you stated in your charge that the witness for the defendant was his (defendant's) relative and which according to the records, is to the contrary; and to which defendant then and there excepted."

We have delved into both the judge's charge and the written requests therefor, to arrive at the conclusion that the judge's charge was correct.

An incorrect statement was made by the judge in his charge that witness Momo Passawe was a relative of the accused. A recital of an opinion by a judge on a purely collateral issue, such as this one of alleged relationship, furnishes no ground for reversal, so long as the whole case is submitted to the jury upon a charge which is proper.

We are of the viewpoint that the trial judge's reference to one of the witnesses, as such, did not in itself constitute sufficient irregularity to adversely affect the ends of justice and the trial held in the court below; we so declare in disposing of count five of the bill of exceptions.

We come next to consider another of the numerous issues in this case, raised in counts ten and twenty-nine of the bill of exceptions, regarding the admissibility of certain documents.

The appellant's objections at the trial contested the admissibility of the documents because the written instruments were not annexed to the indictment. Counsel fur-

ther objected because some were photostatic copies and the documents were not identified by more than one witness, so that they were not sufficiently identified.

Indisputably, it is a fundamental principle of all pleadings and practice in this jurisdiction, of affording notice to the opposite party of all matters of fact intended to be made use of at the trial of all causes.

The practice in criminal matters is to present written evidence to the witnesses for identification. After which such written instruments are turned over to the adverse party, after having been marked by the court, to be used by the said party in cross-examination.

On the point of not more than one witness having identified the documents now under consideration, this contention is not borne out by the testimony of the witnesses for the State.

As to the objection that some documents were only photostatic copies, this Court held in *Thomas* v. *Republic,* 2 LLR 562 (1926), that the contents of books or other documents which have been deposited in a public office may be proved by the production either of the originals or by certified copies thereof.

We come now to consider counts 6, 7, 8, 11, 12, 13, 14, 15, 16 through 28, and 30 through 41, relating to objections on the grounds of entrapment, not the best evidence, and the like, most of which we have already decided. The scope of a party who produces a witness is to elicit by question such facts as the witness omitted to testify to in his general statement, prior to the commencement of cross-examination. As to cross-examination, we have said great latitude is allowed the examiner.

One of the principal contentions in the bill of exceptions is that the defendant was used as a witness by the prosecution, that he was only subjected to cross-examination and only recalled after some court business.

Some of the written evidence, very relevant to the case,

was not written in the speaking language of the court, which is English. In consequence of which they were translated from French into English, after the defendant, who was on the stand as a witness, had left. This circumstance created the necessity of having the defendant recalled to the stand for further cross-examination, and the application was made by the prosecution and granted.

It is also our holding that an accused waives his privilege when he takes the stand as a witness, except to not being asked self-incriminating questions.

As far back as 1907–08 our Legislature passed into law "An Act to render competent the evidence of parties to suits." We quote hereunder section 3:

> "That in criminal cases the defendant cannot be compelled to testify as in civil cases, but having elected to take the stand said defendant testifies under the rules which govern witnesses except that the said defendant can not be compelled to answer questions which may tend to incriminate himself.
>
> "If the defendant in a criminal prosecution voluntarily offers himself as a witness in his own behalf and testifies in chief, he thereby subjects himself to a legitimate and pertinent cross-examination. He may not prevent or defeat cross-examination by claiming the protection of the constitutional provision against compulsory self-incrimination." 58 AM. JUR., *Witnesses,* § 616 (1948).

Another question in the case is the recall of a witness. This Court held in *Scott* v. *Republic,* 1 LLR 430 (1904) that it is within the discretion of the trial court to allow the recall of a witness for further examination before the case is submitted to the jury.

The recall of the defendant in this case was for the primary aim of confronting him with the evidence developed against him since he last left the witness stand, so as to afford him an opportunity to clarify the issue. We, therefore, do not adjudge the ruling of the trial

judge to be incorrect, and count forty-two of the bill of exceptions is not sustained.

We revert to count two of the bill of exceptions, the last count to be considered, regarding the judge's denial of the motion for a new trial. A review of the evidence becomes necessary, which we shall now proceed to do. Prior to doing so, we would like to call attention to the third proposition of the defense with reference to the absence of evidence of the transferral of funds to the appellant, which the prosecution objected to on the ground of the same not being included in the bill of exceptions. We have to sustain this objection, for inspection of the bill of exceptions shows the absence of an exception. Nevertheless, we shall consider the point. The record shows proof of the existence of the account of the funds of the Government of Liberia which were controlled and disbursed by the appellant, and of his inability to explain discrepancies in the account.

Because of the similarity in the contents of the documents "A" through "M," and those documents inclusive through number 14, dissimilar only in dates and amounts transferred to the personal account of the appellant, we deem it necessary to quote only one of such documents and refer merely to the remaining ones.

"Department of State, Monrovia, Liberia
Document 5/09
Embassy of the Republic of Liberia,
Bamako, Republic of Mali, Bamako
January 6, 1965.
"Gentlemen:

"We would be grateful were you to kindly transfer from the account of the Embassy, Account No. 423–37, to account No. 423–36 the amount of $1,000 (One thousand dollars). With our thanks, kindly accept, Gentlemen, our distinguished salutations.

"[Sgd.] JAMES G. PASSAWE,
Charge D'Affaires, a.i.

"Bank of the Republic of Mali,
Foreign Department,
Bamako."

On April 15, 1964, request to transfer to account No. 423–36 the amount of $3,000.00.

June 21, 1965, another such request for the transfer of $6,000.00 to account No. 423–37.

Another document undated, being document 6/9, request for the transfer of $1,341.29 to account No. 423–36.

May 28, 1964, transfer of $1,500 to account No. 423–36.

April 27, 1964, transfer of $1,000 to account No. 423–36.

September 28, 1964, transfer of $4,000 to account No. 423–37.

June 29, 1965, transfer of $800.00 to account No. 423–37.

March 23, 1966, transfer of $2,666.00 to account No. 423–37.

Countering this oral testimony of the witnesses, it is recorded that after an inspection of the account of the Embassy at Bamako, and after having discovered such an enormous shortage of $32,000 odd, an inquiry was had, as to how this amount had been fraudulently converted.

After the shortage was uncovered, the technique employed by the appellant became clear; he had transferred Government funds to his personal account as indicated by the original copies of the transfer orders which were lodged in the Bank of Mali. There were other amounts deposited in another bank, a witness stated in his testimony.

The appellant was given an opportunity to explain the apparent shortage. A witness, Christian D. Maxwell, was among one of several witnesses who testified on behalf of the prosecution, substantiating its case.

Witness Albert Juste testified that he translated a group of documents from the French to the English language. They were identified by him and admitted into evidence.

The evidence of the witnesses of the State bore out his culpability.

A statement of account showing these transfers to the personal account of the appellant was upon request submitted to the Government of Liberia by the Bank of Mali. At the time of the audit the accused was present, said the auditor on the witness stand. An opportunity was given the appellant to repay the deficit, but he did not do so. This is in essence the evidence of the prosecution connecting the appellant with the commission of the crime of embezzlement.

The defendant took the witness stand in his own behalf and denied the testimony, in particular that of Inspector General Maxwell and Auditor Cheedy. He denied that in his capacity as First Secretary of the Embassy, he was the official of the Mission responsible for finances, but admitted that it is the duty of the First Secretary to handle the funds and conduct the accounts of the Embassy.

He admitted that an audit was made by Messrs. Maxwell and Cheedy, of the accounts of the Mission, but said that there was no shortage, but a surplus. He further stated that upon a second audit it was discovered that some checks had been illegally raised in amount by George Harris, described by a witness as a thief.

The appellant referred to a loan, which he had obtained from the bank to account for increases in his account and declared ignorance of the transfer of money to his personal account, except for $6,000.00, which he admitted as being the Government's funds. He explained it was to be transferred to someone named Virnnered in Paris. Apparently he alleged the same purpose for other amounts also transferred to his personal account, aggregating $21,000.00. He admitted also receiving sundry amounts from the Government of Liberia, which denied his counsel's contention of no evidence of transfer of amounts.

He produced Momo Passawe, who disclaimed any

knowledge of the auditing of accounts, but who said that on one occasion the appellant called George Harris in his presence, as well as the wife of Mr. Harris, who was the bookkeeper. The appellant charged Mr. Harris with increasing checks after having been issued, as said before, amounting to $6,000.00, leaving still unaccounted about $26,000.00.

Witness Okai took the stand and denied the testimony of the accused that in 1963, the Republic of Mali informed the Liberian Government that because of financial conditions the Mission was to be closed, when in June, 1963, he was on vacation in Liberia. He denied also the testimony of appellant as to instructions for the transfer of money to Paris. Witness Dinadian Cheedy also took the stand and denied the statement of the appellant that the audit showed a surplus.

Finally, the evidence of the prosecution as to how the deficit amount of $32,419.66 was arrived at showed that it was derived from "Bank balance, together with transferred Counsellor's fees, spurious bills account."

The issue raised in the motion for a new trial, which were passed upon, consisted of the impossible date of the 31st of September, the nonproduction of original documents, failure to advance proof beyond a reasonable doubt, and that every shortage is not tantamount to embezzlement. The ruling of the trial judge denying the motion for a new trial was justified by the evidence produced.

We are bound by law defining the crime of embezzlement, specifically the essentials following: (a) a sum certain of money or the value of the articles alleged to have been converted by the defendant, and (b) fraud established beyond all reasonable doubt. *Sancea* v. *Republic,* 3 LLR 347 (1932).

Our Penal Law spells embezzlement out, as indicated by our summary below: (1) that while employed by another, one receives money or any other thing of value and

converts the same fraudulently and feloniously to his use; (2) whether for reward or otherwise, during the period of the bailment, a person fraudulently and feloniously converts the same to his use. 1956 Code 27:299.

We have analyzed the entire evidence in this case, as well as the law applicable thereto and find them compelling. Moreover any unexplained shortage in an account creates a strong presumption of criminal conversion. *Appleton* v. *Republic,* 11 LLR 284 (1952).

In proving the crime of embezzlement, establishment of even a portion of the amount charged constitutes the offense, although it is our conclusion, from the evidence, that the entire amount charged has been satisfactorily proven. *Hill* v. *Republic,* 2 LLR 517 (1925).

We have not been able to glean any corroboration of defendant's testimony; consequently we must base our decision on another settled principle of law: the uncorroborated testimony of a person accused of crime is insufficient to acquit, especially when the evidence against him is clear and cogent.

In view of the foregoing, we hereby affirm the final judgment of the court below. And it is so ordered.

Affirmed.