AMOS C. MONGER, Appellant, *v.* REPUBLIC OF LIBERIA, Appellee.

ON APPEAL AFTER CONVICTION (NO SITUS SET FORTH).

Argued April 3, 4, 1967. Decided June 16, 1967.

1. In a criminal case, a motion for a directed verdict may be made at any time during the course of the trial, when the insufficiency of the prosecution's case becomes clearly evident.
2. In a criminal case, where the defendant chooses not to present any evidence in his behalf, he need not move for a directed verdict at the close of prosecution's case in order to lay the basis for a motion for a new trial, subsequent to his conviction.
3. When a defendant in a criminal case makes a motion for a directed verdict, or brings on a motion for a new trial on the ground of insufficiency of the evidence finding him guilty, he must show that there is no substantial evidence from which guilt may legitimately be found of the crime charged or of a lesser crime than the one charged in the indictment.
4. A copy of a document may be offered in evidence, when it is proved that the original has been lost.
5. Conversion to his own use of Government funds, by one serving in an official capacity, constitutes the crime of embezzlement.

The defendant, an official employed by the Government at its Embassy in Lagos, Nigeria, was charged with the crime of embezzlement, involving funds entrusted to him in his official capacity. At his trial he presented no evidence in his defense in the face of extensive evidence presented by the prosecution. The jury found him guilty as charged. An appeal was taken from the judgment entered against him. *Judgment affirmed.*

Dunbar and Tunning for appellant. *Solicitor General Nelson W. Broderick* for appellee.

MR. JUSTICE SIMPSON delivered the opinion of the Court.

On or about September 8, 1962, appellant herein arrived in the City of Lagos, Capital of the Federal Re-

public of Nigeria, and presented to His Excellency, Charles T. O. King, his commission evidencing the fact that he had been accredited to our Lagos Embassy as Second Secretary, Vice-Consul, and Finance Officer. A staff meeting of the Embassy employees was called, at which time appellant was formally introduced to the staff, and thereafter commenced his duty in the several capacities as hereinabove named.

As Second Secretary of the Embassy and apparently, from the records, there being no First Secretary and no higher official of the Foreign Service other than the Ambassador at that Mission, appellant enjoyed the position of being second in command. In this capacity, there devolved upon him the responsibility of being the principal assistant to the Ambassador in diplomatic matters and in charge of commercial matters as Vice-Consul, which included the issuance of visas and validation of commercial documents. As Second Secretary, the appellant automatically became Finance Officer in charge of the finances of the Embassy in accordance with Department Circular No. 5, issued by the Department of State in 1962 and approved by the President of Liberia.

The record shows that shortly after the arrival of appellant at Lagos, he approached and importuned the Chief of Mission to assist him in the procurement of an automobile, since he lived at Apapa which was approximately seven miles away from the Embassy. The testimony of the Ambassador shows that he cabled Monrovia in order to ascertain whether there existed any reluctance in respect to granting the request of appellant. It seems that finally the Ambassador, in his personal capacity, aided Mr. Monger. Having been told by Mr. Monger that the Chase Manhattan Bank at Lagos was willing to accept the personal guarantee of the Ambassador as sufficient to grant a loan to Mr. Monger to purchase his car on a repayment schedule of £60 per month, it was agreed to by the Ambassador and subsequently effected. It is

shown in the record that at the end of September 1962, the appellant was approached by the Embassy's bookkeeper and asked what the amount of his salary was. He thereupon advised the said bookkeeper that his salary was the same as his predecessor and that that amount should be included on the voucher and check. At the end of October of the same year, the appellant was again queried by the same bookkeeper, as the latter had observed that the remittance of salaries from Monrovia for the month did not carry the name of Mr. Amos Monger, Second Secretary. Whereupon Mr. Monger, retorted:

> "I am Second Secretary and Finance Officer. You take instruction from me. Go ahead and make my check."

And in accordance with these instructions, salary checks for Mr. Monger were issued during that month of October and for the following months ending February 28, 1963. These were business checks and even included the True Whig Party deduction during the month of November 1962.

In March of 1963, the Ambassador had occasion to dispatch Mr. Monger to Monrovia in respect to certain governmental matters. It was at this time of appellant's sojourn from Lagos that the manager of Barclay's Bank, Lagos, the Government's bank, called the Ambassador and apprised him of the fact that the Embassy's account was overdrawn and lacked sufficient funds to permit the bank to honor the monthly salary checks of employees. Being completely astounded, the Ambassador immediately sent a cable to the President informing him of the Embassy's financial situation and simultaneously forwarded a cable to Mr. Monger informing him of the action that he, the Ambassador, had taken.

The matter was thereupon referred to the Department of State by the President, and the Inspector General of the Foreign Service was required to institute immediately an investigation into this alarming situation. Since ap-

pellant was at that time in Monrovia, he was asked to give his observation in respect to the Ambassador's cable. At this time he held that certain financial commitments, incurred prior to his departure from Liberia in September 1962, had necessitated his issuing to the Chase Manhattan Bank, Monrovia, a limited power of attorney authorizing that institution to receive and retain his salary checks for his account, from the Department of State.

Additionally, appellant contended that the Ambassador was privy to this illicit undertaking of his, because of the Ambassador's personal guarantee issued to Chase Bank at Lagos. He further contended that the Ambassador had assumed this position predicated upon the latter's desire to have a speedy conclusion of the financial transaction with the bank involving appellant's car. According to the testimony of witness Stewart, when he arrived in Lagos in company with Mr. Monger and confronted the Ambassador with this allegation, the latter was astounded. However, at a subsequent time, appellant approached the Ambassador and informed him that he had had a change of heart and was completely sorry for what he had said, and in pursuance thereof he directed a letter to the Ambassador in which he stated his sincere apology for his actions and said in the third and fourth paragraphs of that letter, dated March 26, 1963, and marked P-3b:

> "I want to declare here that you knew nothing about what was being done. What was done was done voluntarily on my part.
>
> "I am awfully sorry for any embarrassment my observations might have caused you. I apologize for the unfounded statements which I made against you and humbly pray for your forgiveness."

In any event, the audit was concluded, and it was determined that there had been these salary duplications. For some unknown reasons, it was decided that appellant would remain on his job. However, as fate would have

it, on June 18, 1963, another cable was sent to the Secretary of State apprising him of additional mishandling of funds by Mr. Monger. This cablegram was followed by a letter, dated June 20, 1963, to the Secretary of State from the Ambassador, embodying the full text of the radiogram of June 18. This letter said that the appellant had withdrawn funds from both the operational fund of the Embassy and the Consular fees' fund. Mr. Monger was also given a copy of this letter through a letter of transmittal, dated June 20, 1963, and marked P-4. It should be mentioned here that according to the testimony of witness King, the letter of June 20 was never sent to Monrovia because appellant had promised the Ambassador on June 27, after receiving a copy of it, that he would refund the outstanding amounts.

Things appeared to resume a semblance of normalcy until October 25 of the same year, when the bookkeeper approached the Ambassador, and gave information to the effect that the appellant had continued making withdrawals from both the Consular fee fund and the operational fund. In addition to this, the manager of Barclay's Bank called the Ambassador's attention to an existing overdraft in the Embassy's account, in the amount of one thousand odd pounds.

At this juncture, the Ambassador, in his capacity as head of Mission, decided that he would withdraw from the Financial Officer the right to handle the account of the Embassy, at which time a letter was written by appellant, calling the Ambassador's attention to Departmental Circular No. 5, dated April 10, 1962, making specific reference to section 2 thereof, which states, and we quote:

> "The Financial Attache or the First or Second Secretary in whose favor funds are remitted shall have control over the disbursement of funds for which he shall be responsible *to no one* (emphasis ours) at the Mission. He shall have total responsibility to the

Department of all expenditures and amounts remitted to the Agency through him."

Predicated upon this letter of Mr. Monger to the Ambassador that included the above recited quotation, the Ambassador did not, at that time, desire to take further action against his Second Secretary, pending action by the Department of State.

For the second time in the same year, the Inspector General was again dispatched to the Embassy at Lagos to effect an accounting of the Embassy's funds. This he did, and to his utter amazement found the following discrepancies in the accounts of Mr. Monger:

"(b) That defendant duplicated his salary for the months of September 1962 through February 1963, inclusive, and converted the proceeds thereof to his own use and benefit, amounting to the sum of $2,749.60.

"(c) That defendant embezzled a sum of money contributed by the staff of the Embassy for the celebration of the National Independence Day (July 26), amounting to the sum of $169.53.

"(d) That defendant collected and received in the name of the Embassy a sum of money to purchase drinks for the staff of the Embassy, duty-free, and misappropriated the same to his own use and benefit, amounting to the sum of $135.63.

"(e) That the proceeds realized from the sale of various commodities sold at the Liberian Pavilion at the Agricultural Trade Fair held in Lagos, Nigeria, amounting to the sum of $252.00 which the defendant did misappropriate and embezzle.

"(f) That Mr. M. Simplinsic Jubwe, Assistant Public Relations Press Attache of the Liberian Embassy, Lagos, Nigeria, paid to defendant the amount of $36.75, in favor of the True Whig Party, to be transmitted to the Secretary of State, but that said defendant embezzled the said sum of money.

"(g) That the defendant withdrew and misappropriated to his own use and benefit the sum of $1,924.15, from the operational funds of the Embassy.

"(h) That the defendant withdrew and misappropriated to his own use and benefit the sum of $322.00, from the scholarship funds of the Embassy.

"(i) That the defendant withdrew and misappropriated to his own use and benefit the sum of $627.03, from Consular fees.

"(j) That defendant further withdrew and misappropriated to his own use and benefit a further amount of $225.26, from Consular fees."

The total amount of funds not accounted for was $6,441.16.

After these facts were discovered, Mr. Monger, on December 30, 1963, wrote a letter to the Secretary of State, stating that he had noted the Secretary's directives predicated upon the allegations of the Ambassador. At this stage, appellant made no mention of the November 5 report of the Inspector General. However, continuing his letter to the Secretary, he stated, and we quote:

"I wish through this medium to advise that I am preparing my observation in respect to the report of the Inspector General and *will intimate to your Excellency the means by which I would be able to refund the amount in question.*" (Emphasis ours.)

This constitutes a summary of the evidence amassed at the trial against the appellant. However, quite surprisingly, he agreed to have the case submitted without having put on record any evidence in his defense. In other words, he stated that the facts adduced were in his view insufficient to convict and, therefore, since a *prima facie* case had not been established against him, there was no necessity to testify in his own behalf.

Predicated upon the above, the case went to the jury, and after their deliberation they returned a verdict against appellant. Thereupon, a motion for a new trial

was filed, and this motion stated in its one count, and we quote:

> "Because defendant says that the verdict of the jury is palpably and manifestly against the law and evidence adduced at the trial."

At the time of the argument of the motion, the prosecution endeavored to attack the motion for want of notice, in that it had failed to state what particular law the verdict contravened, to which the defendant did not make the requisite answer in the lower court. Instead, after the final judgment on December 23, 1965, an eighteen-count bill of exceptions was submitted by appellant and approved by the trial judge, insofar as the bill was supported by the record. The first glance at such a voluminous bill of exceptions makes one believe that there were several grave issues of law which the trial judge had erroneously ruled on, and in consequence thereof would require a meticulous review by this tribunal. However, to our amazement, perusal of the bill of exceptions showed that each and every count therein dealt with matters of evidence and, in particular, with objections taken to the several rulings of the trial judge in respect to the admissibility of both oral and documentary evidence.

Before dealing at length with the bill of exceptions, for the benefit of future guidance to the bar, we would like to touch upon that portion of the prosecution's brief which relates to a directed verdict. It is being contended that where a defendant maintains that a *prima facie* case has not been proved, and, therefore, determines it is in his best interest to refrain from testifying in his own behalf, a request, by way of motion, should be addressed to the court for a directed verdict. Our Criminal Procedure Law, 1956 Code, tit. 8, § 266, states:

> "Directed Verdict.—When the facts adduced in evidence justify such a course, the judge may direct the jury to bring in a verdict for the defendant."

This provision is not possessed of the clarity that one finds in our Civil Procedure Law regarding the time for requesting a directed verdict. In that body of law it is said that the proper time would be after the plaintiff has rested. At that time the defendant may interpose his motion and, if denied by the Court, may continue presenting his evidence as if the motion had not been made. 1956 Code 6:623. Since our Criminal Procedure Law is silent as to the time when the motion should be made, we have resorted to the common law for its pronouncement on this score.

At common law, a motion for a directed verdict may be made by the defendant at any time during the trial when the insufficiency of the prosecution's case is clearly evident, or may be made initially for the same reason, as was here done, by a motion for a new trial. 53 AM. JUR., *Trial,* § 425.

And, generally, on the question of directed verdicts, the following is the common law:

> "There is no duty on the part of the court to direct an acquittal where there is sufficient evidence to warrant the jury in believing beyond a reasonable doubt that the defendant is guilty, or where there is substantial evidence from which guilt may legitimately be found. It is proper to refuse to direct a verdict of acquittal, and to submit the case to the jury, where the evidence is conflicting, or is sufficient to overcome, *prima facie,* the presumption of innocence, or to convict the defendant of a lesser offense than that charged in the indictment, or tends directly to show the defendant's guilt." 53 AM. JUR., *Trial,* § 421.

Therefore, although a motion for a new trial may be made initially, without a prior motion for a directed verdict, under the foregoing, and under the evidence, the motion for a new trial is denied.

Turning now to the question of the bill of exceptions, we would first of all like to state that we are displeased

by the cavalier manner in which this important document was drawn by counsel for defense in the court below. As heretofore mentioned, not one of the eighteen counts relates to an issue of law. They constitute solely a recital of objections to matters of evidence and the court's several rulings thereon. We feel it an imposition upon this Court to require us to singly treat these several items, especially since the defendant chose to present no evidence after the prosecution had made out a *prima facie* case. We are not being unmindful of the provision of Section 7th of Article I of the Constitution, which says that no man should be compelled to give evidence against himself. However, others may have been put on the stand to testify for defendant if he felt it wise not to testify himself.

The one point in evidence, which in our view requires specific mention, has to do with admissibility of the Inspector General's report to the Secretary of State, dated November 5, 1963. It is contended that this report was inadmissible in evidence since it was a copy and not the original. Although this point was raised at a premature stage of the proceedings, it was subsequently determined that the copy would be admitted in evidence since the original could not be found, having been lost in the office of the President and, therefore, not available for presentation to the court. This fulfills the requirements of the Civil Procedure Law as it relates to the admissibility of copies. 1956 Code 6:722, 724, 736.

The appellant was employed by the Government of Liberia in the capacities mentioned in the first paragraph of this opinion, and pursuant thereto was entrusted with the management and operation of the funds of the Government at its Embassy in Lagos, Nigeria. He received in his official capacity funds that were the property of the Government, and being unmindful of his oath of office and the relationship of trust existing between himself and the Government of Liberia, proceeded to convert to his

own use and benefit funds belonging to the Government in the amount of $6,441.15. These acts were intentionally committed by the appellant, and his letter written to the Secretary of State on December 30, 1963, constitutes grave suspicion of guilt. Our Penal Law, in defining embezzlement, says:

> "'Embezzlement.—Any person who:
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> "(a) While employed by another and by virtue of such employment, receives and takes into his custody money or other articles of value, and intentionally, fraudulently and feloniously converts them to his own use; or
>
> "(b) Whether for reward or not, receives money or other articles of value to deliver to another, and during the continuance of the bailment intentionally, fraudulently and feloniously converts the whole or any part thereof, to his own use
>
> "is guilty of embezzlement and punishable by a fine of not more than five hundred dollars and by imprisonment for not less than three months nor more than two years where the amount embezzled is more than one hundred dollars, or by a fine of not more than one hundred dollars or imprisonment for not more than six months where the amount embezzled is one hundred dollars or less. Restitution shall be required." 1956 Code 27:299.

In view of the above statute and the facts as adduced at the trial, we have no alternative other than to affirm the judgment of the court below and the same is hereby affirmed. And it is hereby so ordered.

Affirmed.