CHARLES D. B. NURSE, Appellant *v.* REPUBLIC OF LIBERIA, Appellee.

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

Argued March 23, 1971. Decided May 28, 1971.

1. Changing voluntarily a plea of not guilty to one of guilty, precludes the right of appeal in a criminal case.
2. Withdrawing voluntarily a motion for a new trial precludes consideration of a bill of exceptions which only raises factual issues, since a motion for a new trial is a prerequisite in such a case.
3. A party may waive his right to move for a new trial without losing his right to move in arrest of judgment.
4. A person possessed of a right who, with full knowledge of the material facts, intentionally does or does not do something, thereby evincing intent to pursue a course contrary to his right, has waived such right and is thereafter precluded from asserting it.

After trial and conviction of embezzlement, the defendant changed his plea to guilty and immediately thereafter withdrew the motion he had made for a new trial. After sentencing, the defendant filed his bill of exceptions which was directed only at issues of fact, and perfected an appeal from the judgment to the Supreme Court, which held that no justiciable issue presented itself, the plea having been changed to guilty and the motion for a new trial having been withdrawn. *Judgment affirmed.*

Joseph Williamson for appellant. The *Solicitor General* for appellee.

MR. JUSTICE MITCHELL delivered the opinion of the Court.

According to our Penal Law, embezzlement is a felony and is thus defined:

"Any person who:

"(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 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 imprisonment for not more than six months where the amount embezzled is one hundred dollars or less. Restitution shall be required." 1956 Code, 6:299.

Under this statute, Charles D. B. Nurse, former stipendiary magistrate at Bondiway, Firestone Plantations, Montserrado County, was indicted by the grand jury at the November Term, 1964, of the First Judicial Circuit Court, charging him with having converted to his own use almost all of the bags of rice for the sustenance of prisoners and sundry fines rightfully owed to the Government, between 1961 and 1964, in all amounting to $9,145.50.

The record of this case shows that it was tried in the February Term, 1966, of the First Judicial Circuit, Criminal Assizes. The defendant when arraigned, pleaded not guilty. At the trial, the prosecution introduced ten witnesses who were examined and cross-examined. They all testified to the fact that the defendant did receive rice from the Firestone store in the amount of twenty bags each month, consigned to the Government of Liberia as prisoners' subsistence, but he provided only two bags monthly for the prisoners sustenance, converting the remainder of the rice to his own use. That he imposed fines on parties before his court and collected the fines and appropriated the proceeds to his own use. Some of the

witnesses, of course, were the identical persons who paid to him some of the fines imposed.

At this point the prosecution rested and the defendant took the stand. In testifying, among other things, he said that the private prosecutor Kandakai had designed and contrived this charge against him merely because he desired to take reprisal for the fact that the defendant had urged the complainant to return money taken by him from a man named Moneysweet, without authority and without justification.

He denied having misappropriated fines collected after they were imposed by him in matters brought before him as stipendiary magistrate, nor had he converted to his own use any rice received from the Firestone store as prisoners' subsistence.

He summoned James Mooney as a witness on a subpoena *duces tecum,* requiring him to appear with certain documents, and also Benjamin G. Nebleh, assistant clerk of court to the stipendiary magistrate. They testified, Mooney verifying, as statistician of the Supreme Court, copies of the weekly report rendered by defendant over the signature of Benjamin Nebleh, and Nebleh testifying to the fact that he prepared the daily minutes of the court during the incumbency of Magistrate Nurse and in the absence of the Chief Clerk, Mr. Kandakai. Concerning other facts in connection with the case, they testified that they had no certain knowledge. At this point the written documents, identified and confirmed, were admitted into evidence over objections from the prosecution.

The jury, after being charged, retired for deliberation and returned a verdict of guilty against the defendant.

After the verdict had been received by the court the defendant availed himself of his right under the law by filing a motion for a new trial alleging failure of proof of various elements and a verdict contrary to the evidence and the law, and various irregularities occurring during trial, concerning jury tampering. This motion necessi-

tated an investigation, particularly that portion of it which refers to the foreman's conversation with the private presecutor. During the investigation, the foreman of the jury testified and said that he did not converse with W. C. Kandakai, the complainant, but he raised some other issues. Based thereon, and for other causes, much procedural skirmishing followed, with mutual recriminations, as well, among the bench, the prosecution, the defense, the foreman of the jury and the private prosecutor. In fact, the court was authorized to reconvene the February Term in order to complete this case.

The record seems to resolve itself when on May 11, 1966, the court entertained argument on the motion for a new trial, in which appellant did not participate, after which the defendant changed his plea of not guilty to guilty, and sought to withdraw his motion for a new trial. The court denied the application and proceeded to deny the motion on the ground of waiver and withdrawal, the defendant was sentenced to 12 calendar months, fined $100.00 and ordered to make restitution, and the same day defendant excepted to the final judgment of sentence and the denial of the motion for a new trial.

His appeal was taken and he filed his bill of exceptions, consisting of nine counts. In view of the defendant having withdrawn his plea of not guilty and entering the plea of guilty, and having also withdrawn his motion for a new trial, we are puzzled upon what principle of law he relied when he subsequently filed a bill of exceptions. This act on the part of defendant in our opinion, barred him from appeal, since he had waived all rights thereto and made himself subject to the judgment of the court. This act of the defendant the law considers to be voluntary and intentional and thereby he relinquished any and all rights guaranteed to him under the Constitution.

> "Waiver is the intentional relinquishment of a known right or the voluntary relinquishment of a known right. . . ." 92 C.J.S., *Waiver,* p. 1041.

> "It is the fundamental principle of law that one in possession of a right conferred by law, and who has full knowledge of material facts and does or fails to do, something which is consistent with the existence of his right, or of his intention to rely upon the same, waives such right and is precluded from thereafter asserting same." *Eveloff* v. *Cram,* 161 SW. *2nd,* 36, 39.

It is commonly accepted that the essential elements of a waiver are knowledge and intent and both are involved in the one act because they presuppose that the person acting or to be affected by the act has knowledge of his rights and does not wish to assert them.

It was surprising that the defendant charged with the crime of embezzlement would at such a stage of his trial waive his rights for a review of his case by changing his plea to guilty. This has happened and no one of us can determine the motive which moved him to so act.

There was no legal basis for the defendant to file the bill of exceptions when he had withdrawn voluntarily his plea of not guilty and substituted the plea of guilty.

Moreover, appellant's bill of exceptions is exclusively directed to questions of fact. Having withdrawn his motion for a new trial he could no longer seek such relief. In *Brown* v. *Republic of Liberia,* 14 LLR 437 (1961), it was the holding of this court that where a bill of exceptions in a criminal appeal is exclusively directed to questions of fact, and expressly disclaims the raising of any issues of law, the filing of a motion for a new trial is an indispensable prerequisite to perfection of the appeal.

Although the defendant could have made a motion in arrest of judgment after withdrawing his motion for a new trial he did not. This Court has held on this point that a party may waive his right to move for a new trial without losing his right to move in arrest of judgment. *Berry* v. *Republic of Liberia,* 3 LLR 24 (1928).

The Constitution guarantees to every person criminally charged the right of an impartial trial and this right can-

not be denied anyone, but where and when a defendant charged for a criminal offense intentionally deprives himself of the enjoyment of such rights then the Courts are rendered helpless to safeguard those rights in his behalf.

The motion for a new trial would be a proper subject for a review by this Court if the defendant of his own accord had not withdrawn it. Moreover, defendant having voluntarily withdrawn the plea of not guilty and substituted the plea of guilty, there is nothing that this Court can do but to affirm the judgment of the lower court. Therefore, the said judgment is hereby affirmed, and the Clerk of this Court is hereby ordered to send a mandate to the lower court informing it of this judgment.

Affirmed.