

POPO KOFFA, Appellant, v. **REPUBLIC OF LIBERIA**, Appellee.

APPEAL FROM THE CIRCUIT COURT FOR THE FOURTH JUDICIAL
CIRCUIT, MARYLAND COUNTY.

Heard: November 16, 1987. Decided: February 2, 1988.

1. The prosecuting attorney may, by leave of court, file a dismissal of an indictment or complaint or a count contained therein as to either all or some of the defendants. The prosecution shall thereupon terminate to the extent indicated in the dismissal. Criminal Procedure Law, Rev. Code 2:18.1.
2. The dismissal of an indictment or complaint under Rev. Code 2: 18.1 or 18.2, done at any time before the jury is impaneled or sworn, or if the case is to be tried by the court, before the court has begun to hear evidence, shall not constitute a bar under the provisions of section 3.1 to a subsequent prosecution. Criminal Procedure Law, Rev. Code 2:18.3.
3. The doctrine of double jeopardy is applicable to all criminal prosecutions. Double jeopardy attaches when a person has been placed on trial before a court of competent jurisdiction under a valid indictment or complaint upon which he has been arraigned and to which he has pleaded, and a proper jury has *been* impaneled and sworn to try the issue raised by the plea or, if the case is properly being tried by a court without a jury, after the court has begun to hear evidence thereon. Termination of the case thereafter because of manifest necessity, however, shall not bar another prosecution for the offenses set forth in the indictment or complaint.
4. Where a defendant's evidence as to a mistake in the killing of a decedent is not rebutted by the prosecution, a sufficient doubt is created in the minds of the jury to warrant an acquittal, where the indictment states that the defendant, without legal justification, deliberately, feloniously and with malice aforethought committed the act.
5. A defendant in a criminal action is presumed innocent until the contrary is proved; and in case of a reasonable doubt as to whether his guilt is satisfactorily shown, he is entitled to an acquittal. Criminal Procedure Law, Rev. Code 2:2.1.
6. Malice is the intentional doing of a wrongful act with intent to inflict an injury or under circumstances that the law will imply an evil intent; it is a conscious violation of the law (or prompting of the mind to commit it) which operates to the prejudice

of another person.

7. In murder, malice is deemed to be a condition of the mind which prompts to take a life without justifiable cause or provocation.

8. Where the prosecution fails to present evidence tending to show that the defendant's conduct in shooting and killing the decedent was malicious, intentional, deliberate or willfully done, the proper verdict should be one for manslaughter and not murder.

9. Where a verdict is unsupported by the evidence, a judgment rendered thereon is not founded upon a legal verdict and should not therefore be affirmed.

10. A verdict and judgment for a greater offense than was proved at the trial is illegal; for, it is the offense proved at the trial and not the charged preferred that the court has authority to pass upon.

The defendant/appellant was tried and convicted by the petit jury of the Fourth Judicial Circuit Court, Maryland County, for the crime of murder. The indictment charged that the defendant had deliberately and with premeditation and malice aforethought shot and killed one Peter Davis. Upon a motion for a new trial filed by the defendant, the trial judge reversed the verdict and awarded the defendant a new trial. However, before a new trial could be held, the prosecution moved the trial court to dismiss the indictment upon which the defendant had been originally tried, stating as the ground therefor that there was insufficient evidence to obtain a conviction. The prosecution, however, reserved the right to file a new indictment. The motion was granted and the case was dismissed.

Shortly thereafter, a new indictment was brought against the defendant for the crime of murder in regard to the same incident and he was again accordingly arrested. The defendant thereupon filed a motion requesting the court to discharge him, stating as the basis therefor that the new indictment brought against him was tantamount to subjecting him to double jeopardy. The motion was denied, the defendant arraigned and a trial conducted. Following a trial, the jury returned a unanimous verdict of guilty of murder against the defendant for murder. A motion for a new trial filed by the defendant was denied and judgment rendered sentencing the defendant to life imprisonment. From this judgment, an appeal was taken to the Supreme Court.

On appeal, the defendant argued, that in denying his motion to discharge him

answering to the second indictment, the trial court had subjected him to double jeopardy; and that the jury had violated the law and the charge of the trial judge in finding him guilty of murder instead of manslaughter. He contended that the evidence did not show that he had killed the decedent with malice, and that since in fact he had mistakenly shot the decedent, believing him to be an animal, the verdict should have been guilty of manslaughter.

The Supreme Court rejected the defendant/appellant's argument of double jeopardy but sustained the contention that the State had not shown malice, and that therefore the defendant/ appellant should have been convicted of manslaughter rather than murder. The Court opined, regarding the issue of double jeopardy, that the statute granted the prosecution the right, by leave of court, to file a dismissal of its complaint or indictment as to any or all defendants charged with an offense and to thereby terminate the prosecution of the said defendants. The Court observed that the statute also provided that a dismissal by the prosecution of the first complaint or indictment did not however constitute a bar to bringing a new complaint or indictment with regard to any and all of the such defendants for the same offense charged in the original complaint or indictment, if the dismissal of the first complaint or indictment was done before the jury was empanelled (if the case was to be tried by a jury) or before the court had begun to hear evidence (if the case was to be tried by the court without a jury). In such instances, the Court said, double jeopardy would not obtain. The Court noted that in the present case, a jury had not been empanelled when the prosecution filed for a dismissal of the indictment. Hence, it said, the defendant could not contend that he had been subjected to double jeopardy. Therefore, it said, the trial judge had not erred in denying the defendant's motion to be discharged on the plea of double jeopardy.

On the second issue, with regard to the crime being one of manslaughter rather than murder, the Court expressed agreement with the defendant/appellant that the verdict should have been for manslaughter rather than murder. The Court, upon a review of the testimony of the witnesses for the prosecution, noted that none of the witnesses actually witnessed the killing and that none of them established that the defendant had committed the killing with premeditation. The Court noted further that the defendant had testified that he had mistakenly shot the decedent, believing him to be an animal. That testimony, the Court observed, was corroborated by a witness for the defendant and never rebutted by the prosecution. The most the evidence showed, it said, was that there had been a killing; no premeditation was shown. Indeed it said, the defendant's evidence of a mistake in the shooting of the decedent, which was unrebutted by the prosecution, was sufficient to create a doubt in the mind of the

jury as to whether the defendant had willfully, and with premeditation and malice, killed the decedent. It was therefore error, in the face of such doubt, for the empanelled jury to return a verdict of murder rather than manslaughter, the Court concluded. Given that the verdict was unsupported by the evidence, it said, there was no foundation upon which the judgment entered by the trial judge could have rested. The Court opined that as the judgment was not founded on a legal verdict, it could not affirm the same. It accordingly *modified the judgment*, reducing the conviction from murder to manslaughter.

Finally, the Court observed that the defendant/appellant had already been detained for nine years, four years beyond the maximum sentence which could be imposed for manslaughter. In consideration of that prolonged detention of the defendant, the Court held that he had served his sentence for the crime of manslaughter, and accordingly ordered that he be released from further detention.

Stephen B. Dunbar, Sr., appeared for appellant. *McDonald J. Krukue*, Solicitor-General of Liberia, appeared for appellee.

MR. JUSTICE BELLEH delivered the opinion of the Court.

According to the records certified to this Court, the appellant herein, Popo Koffa, was indicted, tried and convicted during the November Term, A. D. 1978 by the Fourth Judicial Circuit Court, Maryland County, for the crime of murder. The defendant, now appellant, excepted to the verdict and filed a motion for a new trial which was heard and granted. During the February, A. D. 1979 Term of the said Court, when the case was again called for trial, the prosecution moved the court to dismiss the indictment upon which the defendant had been tried on the ground that the evidence was insufficient to convict the defendant for the crime of murder. The application was granted by the court and the indictment dismissed.

Shortly thereafter, a new indictment was returned by the grand jury against the defendant, charging him with the same offense. Thereupon the defendant filed a motion, praying that the court discharge him on the plea of double jeopardy. According to the defendant, the former indictment, having been dismissed by the court upon the application of the prosecution, he could not be held answerable for the same offense upon a new indictment. The motion was denied by court; exceptions to the ruling noted by the defendant, and the trial ordered proceeded with.

The defendant was then ordered arraigned, whereupon he entered a plea of not

guilty, thus joining issue with the State. A trial jury was thereupon empanelled to determine the factual issues. The court then entertained the production of evidence by both sides, and upon the resting of said evidence, charged the empanelled jury. The jury, having retired to its room of deliberation, returned a unanimous verdict in open court finding the defendant guilty of the crime of murder. The defendant was thereafter sentenced to life imprisonment by the trial court. Being dissatisfied with the verdict of the jury and the final judgment rendered thereon, the defendant excepted to same and announced an appeal to this Court. The jurisdictional steps necessary for the completion of an appeal having been taken by the defendant, the case is now before us for our consideration on a four-count bill of exceptions.

Counts one to three relate to exceptions taken to the ruling of the trial judge which, in our opinion, are not worthy of our consideration in the determination of this case. We shall therefore concentrate on count four thereof.

Count four of the bill of exceptions substantially reads as follows:

"...The jury violated a fundamental principle of law and instruction when Your Honour in your charge to them made a complete review of the facts and the law controlling and instructed them regarding 'malice' in the conviction of murder as requested by defendant's counsel. And quoting the record, that part of Your Honour's charge: 'No one can be convicted of murder unless there is positive or circumstantial proof.' "We will comment on this count later in this opinion. For now, we take recourse to an examination of the charge against the defendant.

The defendant was charged with the violation of section 14.1 of the New Penal Law of Liberia, approved July 19, 1976, the relevant portion of which reads:

"A person is guilty of murder if he:

- (a) Purposely or knowingly causes the death of another;
- (b) causes the death of another human being under circumstances manifesting extreme indifference to the value of human being."

The issues presented for our consideration are as follows:

1. Whether or not the trial judge committed a reversible error when he denied the appellant's motion for acquittal, predicated upon a plea of double jeopardy;

2. Whether or not the killing of the decedent constituted murder; and

3. Whether or not malice was established.

The relevant portion of the indictment reads:

"That during the month of July, in the Town of Gbake, Bamake, Monulue, Karluway Chiefdom, Pleebo Soloke District, Maryland County, Republic of Liberia, at the rubber farm of one Abraham Davis, in this area and place aforesaid, Popo Koffa, defendant aforesaid, one of the tappers of the rubber farm of Philip Nimpson in that settlement, then and there being not having the fear of God before his eyes but moved and seduced by the instigation of Satan, the devil, without any legal justification or excuse, did unlawfully, willfully, wrongfully, intentionally, deliberately, purposely, feloniously with premeditation and deliberation, and with malice aforethought, to kill and murder Peter Davis of Gbake, Bamake, Monulue, Karluway Chiefdom, Pleebo Salome District, Maryland County, Republic of Liberia, thereby the crime of murder the defendant did do and commit, contrary to the statute laws of the Republic of Liberia in such cases made and provided and against the peace and dignity of the State."

During the trial in the court below, the prosecution produced four witnesses. The prosecution's first witness, Isaac Davis, testified as follows:

"On July 26 in the morning, 1978, my brother Peter Davis and I went on the farm to tap rubber; while tapping, I heard a sound of a gun and I inquired twice who shot the gun? But there was no answer. So I ran on the scene. Reaching on the scene, I saw Popo Koffa and asked him what has happened. He answered me that he shot Peter Davis. I left him and returned to the village to call my father, Mr. Abraham Davis. When we got on the scene, we did not meet the defendant on the spot; but after a few while, he came from behind us and at that time he had already removed the body of Peter Davis from where he was shot. We left the defendant with the body and went to town. This is what I know."

The testimony of the prosecutions second witness, Abraham Davis, reads as follows:

"On July 26, 1978, while resting at my village with my wife and two of my children, Peter Davis, the decedent, and Isaac Davis, went to my rubber farm to tap the rubber. My wife called my attention to the sound of cries coming from the rubber

farm. At this time, I was trying to sharpen my cutlass to go in the bush myself. I left toward the farm and quite a few yards from the village, I met on with Isaac Davis, who informed me that Popo Koffa had shot my son Peter Davis. The both of us rushed on the scene; but upon arrival, we only saw blood smear of Peter Davis under one of the rubber trees. We started wondering and searching for Peter Davis and during this search, the defendant came out of the bush behind us and offered to carry me to the place where he had removed and carried my son. I followed him in tears and we walked quite a distance from the original spot to where the body was removed. After seeing the body, Isaac and myself left the body with the defendant and returned to the village. That is what I know."

From the testimonies of the witnesses for the prosecution, quoted above, it is clear that neither of the witnesses was an eye witness to the shooting which resulted in the death of the decedent. Also, there was no indication that the defendant purposely and intentionally killed the decedent. However, the prosecution having rested evidence, defendant Popo Koffa took the witness stand and testified as follows:

"On July 26, 1978, while hunting I came across an object on the farm of Mr. Abraham Davis. I saw the object shaking the bush and it stopped. Thinking that it was a bush goat, I aimed and shot at it from a distance. When I rushed on the scene, I discovered that I had shot Peter Davis instead of an animal. His brother, Isaac Davis inquired twice asking who did the shooting; I answered him that I was the one who had mistakenly shot Peter Davis. Isaac did not reach to me as he took off to the village to call his people. At this time, Peter Davis was still scrambling for life and in an attempt to save him, I took him bodily towards the main road where I could get help; but I did not reach the main road when Peter Davis gave up the ghost I became weak heavily and began to cry. Isaac and his father Abraham Davis came and met me and I showed him the body of his son. They left and returned to town and I went and made the report to my employer, Mr. Phillip Nimpson and told him that I have accidentally shot and killed Mr. Peter Davis. He then gave me a red T-shirt to wear and then took me to the Police Headquarters in Pleebo City and turned me over to the custody of the Police. The police took me back on the scene in company with Mr. Nimpson himself. Arriving on the scene, I showed them where I stood and shot the gun itself because right after the shooting, I dropped it on the same spot and there we met the gun. The police conducted their investigation and afterward brought me here to Harper City and I am now in custody. That is all I know.

The above testimony of the defendant was corroborated by his witness, Phillip Nimpson, to the effect hat defendant mistakenly shot aid killed the decedent.

Regarding the first issue, with respect to the plea of double jeopardy, the Court would like to mention here in passing that according to the records, the appellant was tried and convicted during the November Term, A. D. 1978 of the Fourth Judicial Circuit Court, Maryland County.

The defendant excepted to the verdict and filed a motion for a new trial which was granted by the court. At the call of the case for the new trial, the prosecution moved the court to dismiss the indictment on the ground that the evidence was insufficient to convict the defendant for the crime of murder. The application was granted by court. Thereafter, however, a new indictment was returned by the grand jury against the defendant, charging him with the same offense; whereupon the defendant filed a motion praying that he be discharged by the court on the plea of double jeopardy. According to the defendant, the former indictment against him having been dismissed, he could not be answerable upon a new indictment for the same offense. The motion was denied by the court and the trial was ordered proceeded with.

Our statute provides that the "prosecuting attorney may by leave of court file a dismissal of an indictment or complaint or a count contained therein as to either all or some of the defendants. A prosecution shall thereupon terminate to the extent indicated in the dismissal." Criminal Procedure Law, Rev. Code 2: 18.1, under *Dismissal by Prosecuting Attorney*.

The same statute provides further that the "dismissal of an indictment or complaint under section 18.1 or 18.2 at any time before the jury is impaneled and sworn, or if the case is to be tried by the court, before the court has begun to hear evidence, shall not constitute a bar under the provisions of section 3.1 to a subsequent prosecution." Criminal Procedure Law, Rev. Code 2: 18.3, under *Effect of Dismissal*.

Section 3.1 of the Criminal Procedure Law, Rev. Code 2, under the caption Cases in Which and Time When Jeopardy Attaches, states:

"The doctrine of double jeopardy shall be applicable to all criminal prosecutions. Jeopardy attaches when a person has been placed on trial before a court of competent jurisdiction under a valid indictment or complaint upon which he has been arraigned and to which he has pleaded, and a proper jury has been impaneled and sworn to try the issue raised by the plea or, if the case is properly being tried by a court without a jury, after the court has begun to hear evidence thereon. Termination of the trial thereafter by the court because of manifest necessity, however, shall not

bar another prosecution for the offenses set forth in the indictment or complaint." *See* 140 U.S. 118, 35 L.Ed. 377).

In light of the statutory provisions quoted above, we are of the opinion that the trial judge did not err when he denied the appellant's motion for acquittal based upon the plea of double jeopardy.

The next issue to be considered is whether or not the killing of the decedent constitutes a crime of murder under our Penal Law. According to the testimony of the appellant, while hunting on July 26, 1978, he came across an object on the farm of Mr. Abraham Davis. He saw the object shaking the bush and then it stopped. Thinking that it was a bush goat, he aimed and shot at it from a distance. When he rushed to the scene, he discovered that he had shot and killed Peter Davis instead of an animal. Peter Davis' brother, Isaac Davis, thereupon inquired twice, asking who had done the shooting, and to which he, the appellant, had answered that he was the one who had mistakenly shot and killed Peter Davis. The above testimony of the appellant was corroborated by witness Phillip Nimpson, to the effect that the appellant mistakenly shot and killed the decedent. With these statements recorded on the minutes of court, the defense rested evidence. The State did not rebut this evidence with respect to appellant's mistakenly shooting and killing the decedent. The evidence of mistake not having been rebutted by the prosecution, was sufficient to create a doubt on the minds of the jury since according to the indictment, the defendant "without any legal justification or excuse did unlawfully, willfully, wrongfully, intentionally, deliberately, purposely, feloniously with premeditation and deliberation, with malice aforethought, killed and murdered Peter Davis, did do and commit the crime of murder, contrary to the statute law of the Republic of Liberia in such cases made and provided against the peace and dignity of the State. "Yet, the empanelled jury returned a unanimous verdict of guilty against the appellant for the crime of murder and the trial judge thereupon proceeded to sentence him to life imprisonment. Under our law, a "defendant in a criminal action is presumed to be innocent until the contrary is proved; and in case of a reasonable doubt whether his guilt, is satisfactorily shown, he is entitled to an acquittal." Criminal Procedure Law, Rev. Code 2: 2.1.

His Honour Judge Alfred B. Flomo, who presided over the case during the February Term of the Fourth Judicial Circuit Court, Maryland County, A. D. 1979, in his final judgment, found on sheet 5 of the 42nd Day's Session, April 4, 1979, declared:

"The verdict, as returned by the jury, is even contrary to the instruction of the court

and would only indicate a high degree of prejudice of this state or share ignorance on the part of the grand jury."

The judge, while charging the jury, had stated in simple and unequivocal language that "no one can be convicted of murder unless there is a positive or circumstantial proof of malice. Malice is not always expressed. It may be implied under circumstances surrounding the commission of the offense charged. Where one engaged in a lawful pursuit without any intent to hurt or to kill, negligently caused the death of another, this is manslaughter." (*See* sheet 6. 32nd Day's Session, March 22. 1979).

"Malice is the intentional doing of a wrongful act with an intent to inflict an injury or under circumstances that the law will imply an evil intent."

A conscious violation of the law (or prompting of the mind to commit it) which operates to the prejudice of another person,"

In murder, the condition of mind which prompts to take the life of another without justifiable cause or provocation."

Malice in its acceptance means towards some person. In its legal sense, it applies to a wrongful act done intentionally without legal justification or excuse." BLACK'S LAW DICTIONARY 1109.

The basis for the defendant's indictment is that with malice aforethought, he intentionally and deliberately shot and killed the decedent. While it is true that the witnesses for the prosecution did establish at the trial that the decedent died and that his death was caused by the wrongful conduct of the defendant, there was however no evidence to show that the shooting and killing of the decedent was malicious, intentional, deliberate or willfully done. Under these circumstances, the Court is of the opinion that a verdict for manslaughter should have been brought against the defendant.

According to law writers, "a jury is a body of men who are sworn to declare the facts of a case as they are proven by the evidence placed before them by witnesses under oath or affirmation. When they become unanimous and decide on much facts and the law, they report such findings to the court which is called their verdict."

Considering the facts in this case as given by the witnesses in their testimonies, it can

be clearly seen that the verdict in this case is not justified by the oath which the jury took "to well and truly try the issues joined between the Republic of Liberia and the defendant. . ."

In our opinion, if the verdict is unsupported by the evidence, there is no foundation upon which the judgment could rest, and if the judgment of the court below is not founded upon a legal verdict, said judgment should not be affirmed which says that the defendant is guilty of willful murder rather than manslaughter.

"A verdict and judgment for a greater offense than was proved at the trial is illegal; it is the offense proved at the trial and not the charge preferred that the court has authority to pass upon." *Brooks v. Republic*, 1 LLR 284(1896).

Wherefore, and in view of the facts and circumstances in this case outlined herein, coupled with the legal citations we have quoted above, it is our considered opinion that the judgment of conviction for murder, with the sentence of life imprisonment should be, and the same is hereby modified and the defendant/ appellant herein, Popo Koffa, is adjudged guilty of manslaughter. Since the maximum sentence for manslaughter is five (5) years and the appellant has spent nine (9) years in detention, he is deemed to have already served his sentence. He is therefore ordered released from further detention. And it is hereby so ordered.

Judgment affirmed with modification.