

JAH MUNNAH and TOGBA SOMMAH, Appellants, v. REPUBLIC OF LIBERIA,
Appellee.

APPEAL FROM THE FIRST JUDICIAL CIRCUIT COURT, CRIMINAL
ASSIZES, COURT '13', MONTSERRADO COUNTY.

Heard: March 23, 1988. Decided: July 29, 1988.

1. It is a legal maxim that what is not denied is deemed admitted.
2. A judge invades the province of the jury where in his charge he confirms the testimony of the private prosecutrix, since under our practice and procedure, the credibility of the evidence lies solely within the province of the trial jury.
3. Where in a criminal case for aggravated assault, the evidence fails to show that the act was committed by the defendants with specific malicious intention, the conviction for the crime must be reversed.
4. Under the Constitution, a defendant cannot be compelled to furnish evidence against himself, and he shall be presumed innocent until the contrary is proved beyond a reasonable doubt; and in case of a reasonable doubt, whether his guilt is satisfactorily shown, he is entitled to an acquittal.
5. Under the Constitution also, a speedy, public and impartial trial by a jury means that the minds of the jury should not be influenced by the court, and that whatever verdict it brings against or in favor of any party should be based upon the evidence adduced at the trial, the jury being the sole judges of the facts in whose province it is to accord whatever credibility it deems fit to the evidence brought before it.
6. Where the trial judge makes a declaration in the hearing of the trial jury, regarding the credibility of the evidence adduced at the trial, the judge thereby usurps illegally the functions of the trial jury and his action constitutes a violation of the due process clause of the Constitution.
7. Where a verdict is brought against a party based upon the judges's influence and statement, be it in or out of court, such verdict must be set aside and declared null and void for want of fairness and impartiality.
8. Under our civil and criminal practice, the burden of proof rests on the party who alleges a fact, except that when the subject of a negative averment lies peculiarly

within the knowledge of the adverse party, the averment is taken as true unless it is proved otherwise by that party.

9. The court will not sustain a conviction for aggravated assault where the evidence shows that the crime of affray was committed by the defendant.

Co-appellant Jah Munnah was charged in the First Judicial Circuit Court, Criminal Assizes, Montserrado County, with aggravated assault and Co-appellant Togba Sommah was charged as an accomplice to the act. The indictment alleged that Co-appellant Jah Munnah was given a razor blade by accomplice Togba Sommah and encouraged to use the said blade to injure the Private Prosecutrix Wleh Wisseh. Co-defendant Sommah denied that he gave a razor blade to Co-appellant Munnah to injure the private prosecutrix while Co-appellant Munnah denied intentionally injuring the private prosecutrix, stating that she did not know the private prosecutrix prior to the incident and that therefore there was no previous ill will; that the incident occurred during an affray or group fight, in the midst of which the private prosecutrix found herself; and that therefore, there was no previous ill will or intent to harm the private prosecutrix.

Following the presentation of the evidence, the jury returned a verdict of guilty against the appellants. A motion for a new trial having been filed and denied, and judgment rendered against them, the appellants noted exceptions and announced an appeal to the Supreme Court.

The Supreme Court reversed the judgment on several grounds. The Court noted that comments made by the trial judge in his charge to the jury tended to influence the minds of the jury and to effectively direct them as to what verdict to bring. The behaviour of the judge, it said, was tantamount to depriving the appellants of the right to due process, since the behavior removed from the province of the jury the right to decide for themselves the credibility of the witnesses and to judge the case for themselves, they being the sole judges of the facts.

Noting that the burden of proof rested with the party alleging a fact, the Court opined that the prosecution had failed to meet that standard, in that (a) it not shown malice aforethought and (b) it had failed to rebut the testimonies of the appellants to the effect that they did not know the private prosecutrix prior to the incident. The Court reasoned that what was not denied was deemed admitted, and it observed that in the absence of the required proof, a conviction could not be sustained or affirmed.

The Court therefore *reversed, the* conviction and ordered the defendants discharged.

Henrietta M Koenig and *Ceapar Mabande* of the Koenig, Cassell, and Garlawolo Law Office appeared for appellants. The Solicitor General, *MacDonald J. Krakue*, appeared for appellee.

MR. JUSTICE BELLEH delivered the opinion of the Court.

This matter is on appeal from the Criminal Assizes of the First Judicial Circuit, Criminal Court "B", Montserrado County.

In the May Term, A. D. 1986, of said court, an indictment was brought against the appellants on a charge of aggravated assault, wherein, it was alleged as follows: "Jah Munnah, principal, and Togba Sommah, accomplice, defendants, of the Borough of New Kru Town, City of Monrovia, County and Republic aforesaid, heretofore, to wit:

"That in violation of chapter 3, section 3.1 (a) and (b) and chapter 14, section 14.20 (a) and (b) of the New Penal Code of Liberia which state:

‘ACCOMPLICE: A person is guilty of an offense by the conduct of another person when:

(a) Acting with the kind of culpability required for the offense he causes or aids an innocent or irresponsible person to engage in such conduct; or

(b) With the purpose that an offense be committed, he commands, induces, procures, or having a legal duty to prevent its commission, he fails to make proper effort to do so...!

“AGGRAVATED ASSAULT: A person is guilty of aggravated assault if he:

(a) Causes serious bodily injury to another, purposely, knowingly or recklessly; or

(b) Purposely or knowingly causes bodily injury to another with a deadly weapon..."

The gist of the complaint is that Co-appellant Togba Sommah, accomplice on March 7, 1986, in the Borough of New Kru Town, took a razor blade and gave it to Co-appellant Jah Munnah, principal, whom he encouraged until the latter took said razor

blade and wounded Private Prosecutrix Wleh Wisseh about 1 1/2 centimeter deep below the right lower eye lid; and that as the result of said wound, Wleh Wisseh, private prosecutrix, was rushed to the Island Clinic on Bushrod Island, where she was treated and later discharge. The alleged acts of the two appellants were said to be contrary to the laws of the Republic.

Appellants were arrested and detained, but were later released after they obtained an appearance bond.

The case was called for trial on August 21, 1986, during the August A. D. 1986 Term of the First Judicial Circuit Court, Criminal Assizes, Court "B". Defendants were arraigned and they pleaded "NOT GUILTY" to the charge of aggravated assault, thus joining issue with the State. Thereafter, a jury was selected, sworn and empanelled.

In an effort to prove the charge of aggravated assault, the prosecution produced six witnesses, including the private prosecutrix and Dr. Augustine Amechi of the Island Clinic, who testified that the private prosecutrix was treated at the Island Clinic. Dr. Amechi also identified the medical certificate the Island Clinic had issued in favour of the private prosecutrix.

The records reveal that on March 7, 1986, there was an affray or a group fight amongst various groups of the Kru Tribe in the Borough of New Kru Town, and that in the course of the said fight, Jah Munnah was said to have wounded private prosecutrix Wleh Wisseh with a razor blade which was allegedly furnished her by Co-appellant Togba Sommah.

The appellants testified separately that Jah Munnah was in fact a stranger to the neighborhood, that she had just delivered a child about a day or two before the fight, that she had swollen legs, and that therefore she could not have taken part in the affray, especially so when she was still bleeding from the child's delivery. Co-appellant Togba Sommah, however, denied ever aiding Co-appellant Jah Munnah in injure the private prosecutrix.

The various witnesses for the prosecution, including the arresting officer, also testified that there was a group fight in which the private prosecutrix was injured. However, none of them personally witnessed Jah Munnah wounding the private prosecutrix, even though some of them testified to having seen Co-appellant Togba Sommah with a razor blade.

What is most amazing about the case is that despite the above statements made by the witnesses for the defense, to the effect that no previous existed between the private prosecutrix and the principal appellant, Jah Munnah, and that Wleh Wisseh had just delivered a child and was suffering from swollen feet, that she was not familiar with the area in which the incident occurred since she had just recently taken residence thereat, and that Wleh Wisseh and Co-appellant Togba Sommah were not acquainted with each other prior to their arrest the prosecution failed to rebut these statements.

It is a legal maxim that "what is not denied is deemed admitted." There is also a legal maxim that he who keeps silent when he should speak, assents."

On September 3, 1986, counsel for both sides rested evidence and argued their respective sides of the case. Thereafter, the jury was charged and instructed to retire to their room of deliberation, from whence they returned a unanimous verdict of GUILTY against appellants.

The appellants excepted to the verdict, and on September 5, 1986, filed a motion for new trial. The motion was resisted and denied. The court then entered final judgment confirming and affirming the verdict of the empanelled jury, and sentenced the appellants to one (1) year imprisonment at the common jail in Montserrado County. The appellants excepted to this final judgment and announced an appeal, which was granted.

Appellants filed a six-count bill of exceptions alleging, among other things, that the trial judge had invaded the province of the jury when, in his charge to the jury, he had made the following remarks:

"Private prosecutrix, in her testimony, substantially proved the charge laid in the indictment and that the second witness for the prosecution strongly corroborated the testimony of the private prosecutrix...."

Further in his charge to the jury, the trial judge had said:

"We have been asked to charge you on the following points of law: 1. REASONABLE DOUBT: A defendant charged with the crime must be proven beyond a reasonable doubt and where there is any doubt in your mind concerning the accused, that doubt must operate in favour of the accused. 2. FAILURE TO REBUT: A party who announces that he will produce a rebuttal evidence but fails to

do so, leaves a question for his failure. This does not necessarily mean that what he had failed to rebut is true. 3. BURDEN OF PROOF. One who alleges the affirmative of a matter has the burden to prove the allegation. 4. MENS REA OR GUILTY MIND, CONSCIOUS INTENTION TO COMMIT A CRIME OF AGGRAVATED ASSAULT: Is essential as an ingredient. 5. VARIANCE: It is where the evidence conflicts with the charge. 6. PRINCIPAL AND ACCOMPLICE. A principal in criminal law is a person who commits a crime and an ACCOMPLICE acts under his advice. 7. FLIGHT OR ESCAPE from the scene of the crime raises strong presumption of guilt. 8. RELEVANCY OF EVIDENCE: That evidence which links the party in some way to the facts or the allegations. 9. MALICE OF EVIL INTENT: Is presumed where during the course of an unlawful act, someone is deliberately injured; and 10. PRIMA FACIE EVIDENCE: Is sufficient to sustain a verdict of conviction.

The foregoing is a portion of the charge of the trial judge to the jury. We note that throughout the charge, the judge had avoided charging the jury on the essential elements of aggravated assault which the prosecution had a duty to prove against the appellants before a conviction could be obtained.

The appellants contended that the statement invaded the province of the jury, which had no alternative but to bring a verdict of "GUILTY" against them, arguing that while they could have been charged with an affray, it was improper to charged them with aggravated assault. They argued also that the prosecution had failed to prove aggravated assault against them and that therefore the verdict was contrary to the evidence adduced at the trial.

This Court agrees with the appellants that the trial judge had in fact invaded the province of the trial jury when, in his charge, he confirmed the testimony of the private prosecutrix, since under our practice and procedure, the credibility of the evidence lies solely within the province of the trial jury.

Where the evidence fails to show that the act was committed by the defendants with specific malicious intention, which gives character to the act of aggravated assault, the conviction for the crime of aggravated assault must be reversed. The Penal Law, Rev. Code 26: 14.20, aggravated assault is defined as follows:

"A person is guilty of aggravated assault if he:

(a) Causes serious bodily injury to another purposely, knowingly or recklessly; or

(b) Purposely or knowingly causes bodily injury to another with a deadly weapon."

The Liberian Constitution, at Article 20(h), provides:

"No person shall be held to answer for a capital or infamous crime except in cases of impeachment, case arising in the Armed Forces and petty offenses, unless upon indictment by a grand jury; and in such cases, the accused shall have the right to a speedy, public and impartial trial by a jury of the vicinity, unless such person shall, with appropriate understanding, expressly waive the right to a jury trial. In all criminal cases, the accused shall have the right to be represented by counsel of his choice, to confront witnesses against him and to have compulsory process for obtaining witnesses in his favour. He shall not be compelled to furnish evidence against himself and he shall be presumed innocent until the contrary is proved beyond a reasonable doubt. No person shall be subject to double jeopardy."

Under the foregoing provision of our Constitution, a speedy, public and impartial trial by a jury means that the minds of the jury should not be influenced by the court and that whatever verdict it brings against or in favour of any party should be based upon the evidence adduced at the trial, the jury being the sole judges of facts in whose province it is to accord whatever credibility it deems fit to the evidence brought before it in any given case. Where the trial judge makes a declaration in the hearing of the trial jury, as in the instant case, regarding the credibility of the evidence adduced at the trial, the judge thereby usurps illegally the functions of the trial jury. In the event a verdict of guilt is brought against the party based upon the judge's influence and statement, be in or out of court, such verdict must be set aside and declared null and void for want of fairness and impartiality.

In the opinion of this Court, the above quoted portion of the judge's charge to the trial jury constitutes a gross violation of the due process clause of our Constitution. Hence, we are of the opinion that the appellants did not have a fair trial.

In a criminal trial, "a defendant is presume 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.

Also, under section 25.5 of the Civil Procedure Law, at subparagraph 1, it is provided that "the burden of proof rests on the party who alleges a fact except that when the subject of a negative averment lies peculiarly within the knowledge of the

adverse party, the averment is taken as true unless it is proved by that party." Civil Procedure Law, Rev. Code 1: 25.5(1).

The prosecution having charged the appellants with the commission of the crime of aggravated assault, the burden of proving that charge, as levied in the indictment, rested wholly and solely upon the shoulders of the State.

The appellants having taken the stand in their own defense, told the court that on the 7th day of March, 1986, there was an affray within the Borough of New Kru Town, that the private prosecutrix was among the fighters, and that she had at the time sustained the injury, the subject of the trial. This statement, in our opinion, was subject to rebuttal by the State, but it failed to present such rebuttal.

An affray is defined as "the fighting of two or more persons in some public place to the disturbance of the public, e.g. where two or more persons voluntarily or by agreement engage in any fight, or use any blows or violence towards each other in an angry or quarrelsome manner, in any public place to the disturbance of other." BLACK'S LAW DICTIONARY 56.

The statements made by the appellants and confirmed by their witnesses to the effect that there was a "group fight" on March 7, 1986, was never rebutted by the prosecution. Instead, some of the witnesses for the prosecution confirmed that in fact there was a group fight in the Borough of New Kru Town in which the private prosecutrix was present, and that those involved in the fight were arrested, taken to the police station at New Kru Town and subsequently released on bail.

The records also show that a few days prior to the incident, Co-appellant Jah Munnah had just delivered a baby and that her feet were swollen, rendering her unable to move around and increasing the prospect of her being involved in the fight. The prosecution also failed to rebut this statement. It is a legal maxim that what is not denied is deemed admitted. Thus, from the evidence adduced at the trial by both the prosecution and the defense, the court is not convinced that the appellants committed the crime of aggravated assault as alleged in the indictment.

This Court will not sustain a conviction for aggravated assault where the evidence shows that the crime of affray was committed by the defendant.

WHEREFORE, and in view of the foregoing, the judgment appealed from is hereby reversed. The Clerk of this Court is hereby ordered to send a mandate to the trial

court to resume jurisdiction over the case and discharge the appellants from the charge against them without day. And it is hereby so ordered.

Judgment reversed.