

ANDREW DOE WIAH, Appellant, v. **REPUBLIC OF LIBERIA**, Appellee.

APPEAL FROM THE CIRCUIT COURT FOR THE FIRST JUDICIAL CIRCUIT,
CRIMINAL ASSIZES, COURT "B", MONTSERRADO COUNTY.

Heard: May 26, 1997. Decided: July 22, 1997.

1. The object of a bill of exceptions is to put the controverted rulings or decisions upon the record for the information of the appellate court.
2. The Supreme Court cannot sustain a bill of exceptions which fails to state the facts and circumstances in the records upon which it is based.
3. A bill of exceptions is defined as a specification of the exceptions made to the judgment, decision, order, ruling, sentence or other matters of the trial court excepted to and relied upon for the appeal, together with a statement of the basis of the exceptions.
4. A bill of exceptions is substantially a pleading of the exceptant before the appellate court. As such, the exceptant is responsible for all deficiencies therein, and where the bill of exceptions is unintelligible, confusing, or conflicting, it will be interpreted against the appellant and in support of the judgment.
5. Any party may, at the close of the evidence or at such earlier time during the trial and as the court reasonably directs, file written requests that the court shall instruct the jury on the law as set forth in the request and furnish copies of such requests to the adverse parties.
6. The trial court shall instruct the jury on every issue of law arising out of the facts even though no requests to charge thereon have been submitted by counsel for the parties.
7. It is irregular for the trial judge in his charge to the jury to ignore the request of counsel for instructions to the jury on points of law since the jurors, being lay persons, do not understand the legal implications surrounding a given set of facts in a case.
8. The functions of a charge to the jury are (a) to explain the issues, (b) to notice the positions taken by the parties and suggests, as far as the case may require, the rules of evidence and their application, and (c) declare what rule or rules of law are applicable to the facts which may be found.
9. A person is guilty of criminal mischief if he damages tangible property of another purposely or recklessly and absence evidence of such damage, a conviction cannot be upheld.

10. An appellant has no legal standing to include in his bill of exceptions errors committed by the trial judge in his charge to the jury if the appellant did not except to the charge before the retirement of the jury to consider its verdict.

11. Evidence that property was uprooted from the ground without further evidence of damage to said property is insufficient to sustain conviction of malicious mischief.

12. It is a settled principle that a charge must be proven as laid in the indictment.

13. An indictment must allege with precision and certainty every material fact constituting the offence charged, and such material facts must be proved beyond a reasonable doubt, which is the standard for criminal prosecution in this jurisdiction, or the accused will be entitled to a discharge.

Appellant was accused of criminal mischief, charged, indicted, tried, and convicted. The indictment charged that the appellant had unlawfully, wrongfully, illegally, willfully, purposely and recklessly removed, damaged and destroyed four cornerstones of the private prosecutor, which at the time were planted on land owned by the private prosecutor, but which the appellant also claimed ownership to. The value of the cornerstones was placed at L\$350.00 (Liberian dollars). At the trial of the case, the witnesses for the prosecution, including the private prosecutor, testified that the appellant had uprooted the cornerstones planted on the land of the private prosecutor, but no one testified that the cornerstones had been destroyed by the appellant.

The Supreme Court, after reviewing the records, sustained the contentions of the appellant, contained in counts one and two of the bill of exceptions. The Court observed that under the criminal mischief statute, the defendant must have destroyed the property of the private prosecutor, but that this element was absent from the evidence in the case. The Court noted that all the evidence in the case showed that the appellant had uprooted the cornerstones of the private prosecutor but that the records were devoid of any evidence that the cornerstones were damaged and destroyed by the appellant, as alleged in the indictment. In the absence of such evidence, which was not in harmony with the allegations set forth in the indictment, the Court said, there was a failure to prove the guilt of the appellant beyond a reasonable doubt, and therefore the conviction could not be upheld.

The Court also opined that the trial judge committed a prejudicial error when he failed, in his charge to the jury, to instruct the jurors on the points of law requested by the appellant. The court noted that the judge was under an obligation to give such instructions of law even if the parties did not request same. Accordingly, it *reversed* the judgment and ordered the appellant discharged.

Thompson Jagba appeared for appellant. *The Ministry of Justice* appeared for the appellee.

MRS. CHIEF JUSTICE JOHNSON-MORRIS delivered the opinion of the Court.

The appellant, Andrew Doe Wiah, was indicted by the grand jurors for Montserrado County during the May Term, A. D. 1995, of the First Judicial Circuit Court, Criminal Assizes "B", for the crime of criminal mischief. The indictment alleged that in the month of February A. D. 1995, in the vicinity of St. Paul Bridge, Bushrod Island, City of Monrovia, Montserrado County, Republic of Liberia, Appellant Andrew Doe Wiah, then and there claiming ownership of the parcel of land owned by Private Prosecutor Anthony Saah, did unlawfully, wrongfully, illegally, willfully, purposely and recklessly remove, damage and destroy the four cornerstones of the private prosecutor which he (the private prosecutor) had planted at the four corners of his parcel of land. The value of the cornerstones, according to the indictment, was L\$350.00. The indictment further alleged that the appellant failed to replace or retribute the value of the private prosecutor's cornerstones, thereby causing the private prosecutor to suffer financial loss. The indictment alleged that then and thereby the crime of criminal mischief the appellant did do and commit, contrary to the form, force and effect of the statute laws of Liberia, in such cases made and provided, against the peace and dignity of the Republic.

Appellant Andrew Doe Wiah was arraigned on the 22nd day's jury session of the August Term, A. D. 1995 of the First Judicial Circuit, Criminal Assizes "B", presided over by His Honour William B. Metzger, Sr. At the arraignment, he entered a plea of "not guilty".

The appellant having joined issue with the State by pleading "not guilty" to the indictment, the State produced three witnesses, including the private prosecutor, Mr. Anthony Saah, whose testimonies were corroborated on the issue of the appellant uprooting the cornerstones of the private prosecutor. The prosecution witnesses were cross-examined by the defense counsel and thereafter the prosecution, led by Attorney Mardea Chenoweth, rested evidence and presented for admission into evidence instruments bearing court's marks P-1 and P-2, same being private prosecutor's deed and receipt for the four cornerstones, subject of the litigation. Also, at the request of the prosecution, the court admitted the said instruments into evidence to form a part of the prosecution's evidence. After the State had rested evidence *in toto*, the defense counsel, Counsellor Thompson Jagba, announced that his client, the appellant, was waiving the production of evidence, and requested that the case be submitted to the court for arguments, which was done. Following arguments by both parties, the presiding judge instructed the empaneled jury, after which they retired to their room of deliberation and returned with a unanimous verdict of "guilty" against the appellant. Appellant's counsel excepted to the verdict and subsequently filed a motion for new trial in keeping with the Criminal Procedure Law, Rev. Code 2: 22.1. Appellant's motion was resisted and denied, and judgment was entered by the trial judge confirming the verdict of the jury against appellant. From this judgment, appellant announced an appeal to this Court of last resort for review of the trial court's decision on a three-count bill of exceptions.

We shall consider all the counts of the bill of exceptions but in the reverse order. Count three of the bill of exceptions reads thus:

"Because Your Honour committed a reversible error when you failed to acquit the defendant due to the inconsistency and contradictory evidence of the prosecution, as can be clearly seen from the writ of arrest for criminal trespass and criminal mischief which grew out of the same facts".

The exception contained in count three above leaves much to be desired, in that it is so vague that it leaves one with the impression that counsel for the appellant merely filed the bill of exceptions to fulfill the requirements of the appeal process.

There is no showing of the contradictions and inconsistencies in the evidence of the prosecution, referred to by the appellant. Moreover, appellant referred to a writ of arrest for criminal trespass which he claimed is inconsistent with the criminal mischief indictment under which he was tried. However, from an inspection of the records certified to this Court, there is no such writ of arrest for criminal trespass.

The object of a bill of exceptions is to put the controverted rulings or decisions upon the record for the information of the appellate court. On the contrary, count three of appellant's bill of exceptions failed to state with any particularity the contradictions or inconsistencies which he claimed are found in the prosecution's evidence. This Court cannot sustain this count of the bill of exceptions as it failed to state the facts and circumstances in the records upon which it is based. Under the Criminal Procedure Law, Rev. Code 2: 24.9, a bill of exceptions is defined as a specification of the exceptions made to the judgment, decision, order, ruling, sentence or other matter excepted to and relied upon for the appeal, together with a statement of the basis of the exceptions. Finally on this issue of the vagueness of count three of appellant's bill of exceptions, this Court, relying upon the Encyclopedia of Pleading and Practice cited in the case *Johns v. Cess-Pelham and Wither -spoon*, 8 LLR 296 (1944), text at page 302, noted that:

"A bill of exceptions is substantially a pleading of the exceptant before the appellate court. He is therefore responsible for all deficiencies therein, and where the bill of exceptions is unintelligible, confused, or conflicting, it will be interpreted against the appellant and in support of the judgment..."

Coming now to the second count of the bill of exceptions, appellant contended that the trial judge erred when he failed to instruct the jury as per the prayer of appellant's counsel on the issues of law relating to the rights of the defendant, burden of proof, and the obligation of the prosecution to produce corroborating evidence.

Under the Criminal Procedure Law, Rev. Code 2: 20.8, *instructions to the jury*, under paragraph one, captioned *Prior to retirement of the jury*, it is stated that at the close of the evidence or at

such earlier time during the trial as the court reasonably directs, any party may file written requests that the court shall instruct the jury on the law as set forth in the requests. At the same time, copies of such requests shall be furnished to the adverse parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. *The court shall instruct the jury on every issue of law arising out of the facts even though no requests to charge thereon have been submitted by counsel.* (Emphasis ours).

Notwithstanding this statutory obligation, the trial judge woefully failed to instruct the jury on the statutory definition of the crime with which the appellant was charged. We quote the trial judge's charge verbatim below, as found on sheet two of the 28th day's jury session of the August Term, A. D. 1995, dated September 26, A. D. 1995.

"A CHARGE TO THE JURY

The Court: Let us first of all recognize you all and evaluate you as respected good men and women selected on the basis of trust that you will faithfully and impartially discharge these sacred duties without fear or favor and/or for reward.

You have sat with us and heard this case from its inception to now. You have actively participated in the day to day deliberations by even posing intelligent questions to the witnesses.

You have also heard the arguments in which the prosecution pointed out legal and factual reasons why you should convict and bring the defendant down guilty. You have also heard on what legal principles and facts the counsel for the defendant expounded and requested you to set the defendant free.

Now, therefore, we charge you to go in your deliberations room and conscientiously debate the pros and cons in this matter and submit a verdict of guilty to us if in your unanimous opinion he is guilty, or a unanimous verdict of not guilty if in your candid opinion he is not guilty. Let us remind ourselves of the biblical commandment 'Do unto others as you would have them do unto you'. This is our charge and we hand you the records and all submissions in this case."

This charge of the trial judge completely ignored not only the request of the appellant's counsel for instructions to the jury on points of law as found on sheet (1) of the 28th day's jury session, dated September 26, 1995, but also that of the prosecution. This is very irregular and unfortunate because the object of the charge to the jury is to enlighten them on the issues involved in the controversy since jurors are lay persons who do not understand the legal implications surrounding a given set of facts involved in a case. In 1975, this Court opined in the case *Nyumo v. Republic*, 24 LLR 154 (1975), that the functions of a charge to a jury are, as follows:

1. To explain the issues;
2. To note the positions taken by the parties and suggest, as far as the case may require, the rules of evidence and their application therein.
3. To declare what rule or rules of law are applicable to any state of facts which may be found.

Having thus stated the functions of a charge to the jury, it is obvious to us that the trial judge's charge to the jury in the instant case did not achieve the object of a charge to the jury; otherwise, we believe that the verdict would have been different. Let us for instance take recourse to the statutory definition of criminal mischief, which is also recited in the indictment, as follows:

"Chapter 15 section 15.6(a) of the Penal Law, Rev. Code 26, states thus: "*Criminal Mischief*: A person is guilty of criminal mischief if he: (a) "damages tangible property of another purposely or recklessly".

Regrettably, however, appellant's counsel failed to except to the judge's charge before the retirement of the jury to consider its verdict, as required by the statute. Criminal Procedure Law, Rev. Code 2: 20.8. Therefore, as prejudicial and inadequate as the charge may have been, appellant had no legal standing to have included it in his bill of exceptions as an error committed by the judge. Therefore, count two of appellant's bill of exceptions, as it relates to such omission by the trial judge, is not sustained.

Let us now consider the evidence adduced by the prosecution in support of the allegations of the indictment which have already referred to in this opinion.

The first witness for the prosecution, who was also the private prosecutor, Mr. Anthony Saah, stated the following in his testimony in chief:

"In the month of February 1995, I met Mr. Doe Wiah taking up my cornerstones. So I asked him to place them back and he refused. So I took the complaint to the Grebo Chief. The chief called him, asked him whether he took my cornerstones up, and he said yes. The chief asked him, why you took the cornerstones up for? and he said that the place was for him and I told the chief that the place was for me. Then I took out my deed and showed it to the chief. The chief asked him to present his own document. He failed to present his document to show that the land was for him, so he was told to put my cornerstones back, but he refused. So I took him to the magisterial court in New Kru Town. While we were on the case, his counsellor, Thompson Jargba, brought Judge Zogan's complaint to Criminal Court "B". So when we got here, we went into the case. While going into the case, I met Mr. Doe Wiah constructing on the land. I told him to stop and he refused and I brought him before this judge to show that the land is mine. I have my original deed here with me". (See Sheet 2

of the 24th day's jury session and Sheet 2 of the 25th day's jury session for this testimony of the witness Anthony Saah).

The foregoing chief testimony of the private prosecutor lacks an iota of evidence of destruction of any tangible property of the private prosecutor as alleged in the indictment. The prosecution's witness, Anthony Saah, talked about the taking up or removal of his cornerstones by the appellant which is not the same as damaging the cornerstones as contemplated by the statute. The cornerstones could be planted if they were only removed, taken up or uprooted, as the evidence revealed. Again, while on the direct examination, witness Saah did not identify a piece of the broken cornerstones, but rather a deed and a receipt for the cornerstones which were marked by the court as "P-1 and P-2" respectively, and subsequently admitted into evidence.

Mr. Fayiah Carpenter was the prosecution's second witness. He testified briefly as follows:

"The thing where I know, it was one day, I sat down right in front of my house, the place where the tailor boy was sewing, I see this man Andrew Doe Wiah. He came out of the house. After he came out of the house, I saw him take up the cornerstones. He then dropped it down. That is all I see". (See sheet 7 of the 5th day's jury session).

While under cross-examination, witness Carpenter was asked by the defense counsel whether appellant destroyed the cornerstones. His answer was: "I don't know whether he destroyed it or not because the time he was carrying it, I leave them there."

The testimony of the third and final witness of the prosecution, Solomon Saah, was no better in establishing the essential element of the crime charged. The scanty testimony was that "one time private prosecutor, Anthony Saah, lodged a complaint to their Community Chairman, said that Andrew Doe Wiah took up his cornerstones, so he should go and find out from Andrew Doe Wiah. So that evening we went to Mr. Andrew Wiah. The Chairman asked Mr. Andrew Wiah whether he was the one that took up the cornerstones. So Andrew Wiah said yes, I took it up. So from there they came to call me and I left them there. So that all I know".

The foregoing evidence of the prosecution simply cannot constitute the crime of criminal mischief as defined under the statute quoted supra because no evidence of the destruction of the cornerstones was established. Therefore, we concur with count two of the bill of exceptions that the trial judge committed a fatal error by failing to instruct the jury on the issue of law relating to the rights of the defendant and the burden of proof which rests on the prosecution to prove the defendant's guilt beyond all reasonable doubt.

Finally, count one of the bill of exceptions averred essentially that the evidence of the prosecution failed to establish a prima facie case and created a material variance, thereby

creating doubt in the mind of every reasonable being which should have operated in favour of the appellant, in that the prosecution tried to prove title rather than the crime charged.

The Court concurs with the contention of this count of the bill of exceptions because the evidence of the prosecution is wholly at variance with the allegations of the indictment, especially as regards the gravamen of the crime of criminal mischief, which is the destruction of tangible property. In the instant case, the cornerstones. 29 C.J.S., § 47, states thus:

"It is a settled principle of law that a charge must be proven as laid in the indictment."

Also in the case *Appleton v. Republic*, 23 LLR 109 (1974), text at page 116, this Court, relying upon its previous opinions in the cases *Sampson v. Republic*, 11LLR 135 (1952), and *Attob v. Republic*, 9 LLR 3 (1945), said that an indictment must allege with precision and certainty every material fact constituting the offense charged. And such material facts must be proved beyond a rational doubt or the accused will be entitled to a discharge. We are of the opinion that the prosecution in the instant case failed to substantiate a very essential allegation of the indictment that appellant damaged the cornerstones of the private prosecutor. Even the testimony of the private prosecutor himself is devoid of any mention of the destruction of his cornerstones. His testimony stated only that the cornerstones were uprooted. Consequently, we sustain the contention of count one of the bill of exceptions.

Finally, because the prosecution failed to prove the appellant's guilt in keeping with the standard set for criminal prosecution in our jurisdiction, that is, proof beyond a reasonable doubt, the judgment of the trial court must be reversed. This conclusion is based upon a previous holding of this Court in which it opined that a judgment founded upon a verdict contrary to the evidence cannot be upheld. See the case *Appleton v. Republic*, 23 LLR 109 (1974).

Wherefore, and in view of the foregoing, it is our opinion that the judgment of the trial court should be and the same is hereby reversed and the appellant ordered discharged. And it is hereby so ordered.

Judgment reversed.