YARKPAWOLO ZAYZAY et al., Appellants, v. **REPUBLIC OF LIBERIA**, Appellee.

APPEAL FROM THE CIRCUIT COURT FOR THE TENTH JUDICIAL CIRCUIT, LOFA COUNTY.

Heard: December 22, 1982. Decided: February 4, 1983.

1.The mere overruling or disallowing of irrelevant and immaterial questions of a defendant or sustaining objections interposed by the prosecution, no matter how erroneous the rulings may be, does not by itself render the trial judge guilty of partiality to warrant the reversal of his judgment.

2. The extent to which a witness may be cross examined for the purpose of affecting his credibility rests entirely in the discretion of the trial judge.

3. The Supreme Court will not take cognizance of exceptions not supported by the records.

4. For issues to be reviewed by the Supreme Court, they must have been objected to during the trial, noted on the records, and set forth in the bill of exception.

5. Inclusion of wordings of two separate penal laws in an indictment goes to immaterial defect in the indictment and does not affect the jurisdiction of the court over the subject matter.

6. Failure to raise objections to present defense or raise objection to the indictment before trial constitutes a waiver.

Appellants were convicted of criminal mischief in the Tenth Judicial Circuit, Lofa County, from which they announced an appeal to the Supreme Court. In their bill of exceptions, they contended among other issues that the trial judge did not exercise the spirit of cool neutrality during the trial, in that he overruled questions put to witnesses without objection being interposed by the prosecution, and that in sustaining objections of the prosecution, the trial judge on his own added other grounds to those given by the prosecution; that the trial court was without jurisdiction over the subject matter because the indictment under which the appellants were tried, was drawn up under the 1956 Penal Law which had been repealed and was not operative when the indictment was found; and that the prosecution witnesses were allowed to testify without first been sworn.

The Supreme Court upon review of the records, found that appellants did not aver that the

verdict is contrary to, and manifestly against the weight of the evidence at the trial, and that in the absence of such allegation, the court must assume that the verdict of guilty, as returned against the appellants is supported by the evidence. Noting that evidence of the prosecution was clear and cogent, and that appellants did not deny committing the crime charged, the Supreme Court overruled the contentions of the appellants, and affirmed the judgment.

Robert G. W. Azango appeared for appellants. Richard F. MacFarland, Acting Solicitor General, appeared for appellee.

MR. JUSTICE SMITH delivered the opinion of the Court.

This case originated from the Tenth Judicial Circuit Court, Lofa County, and was subsequently transferred to the First Judicial Circuit Court, Criminal Assizes "A", Montserrado County, based upon an alleged existence of local prejudice. It later came on appeal to this Court on a twelve-page, thirty-nine count bill of exceptions supported by a twenty-three page brief as well as a two-page supplement to the brief, accompanied by a three-page legal citations in addition to the legal citations contained in the brief. During argument before us, the learned counsel for appellants could not support his bill of exceptions and arguments by the trial records; and what was most amazing in the whole exercise is the evasive manner in which the learned counsel answered questions posed to him by the Bench.

However, since the appellants' brief does not sum up the points of contention for the consideration of this Court, the Bench during arguments required counsel for appellants to state the prime issues on which he based his case. And in response, he listed the following as being appellants' main points of contention for their appeal:

1. That the trial court was without jurisdiction over the subject matter because the indictment under which the appellants were tried was drawn up under the 1956 Penal Law which had been repealed and was not operative when the indictment was found.

2. That the prosecution's witnesses were allowed to testify without first being sworn.

3. That the trial judge did not exercise the spirit of cool neutrality during the trial, because, in many instances, he sustained objections interposed by the prosecution and went to the extent of adding other grounds which the State did not anticipate.

Taking recourse to appellants' bill of exceptions, we found no averments therein contesting

the verdict of the jury as being contrary to, and manifestly against the weight of the evidence adduced at the trial. In the absence of such allegation, we must assume that the verdict of guilty as returned against the appellants, is supported by the evidence. We shall therefore proceed in the reverse order to discuss the issues which form the basis of appellants' appeal as presented by their counsel in his argument.

Counsel for appellants argued that the trial judge did not exercise the spirit of cool neutrality during the trial, in that, he overruled questions put to witnesses without any objections being interposed by the prosecution, and further that in sustaining objections of the prosecution, the trial judge on his own, added other grounds to those given by the prosecution. Of the 39 count bill of exceptions, sixteen are specifically complaining about the rulings of the trial judge made on such objections.

In a jury trial, the judge is the referee; he is required to decide all questions of law while the facts are for the jury to decide. The making of rulings on objections interposed, whether they be for or against the objector, is a judicial duty to be performed by the trial judge; and, hence, the question of non-exercise of the spirit of cool neutrality is inapplicable .

As already observed, an objection to a question during trial, as a matter of law, is for the decision of the judge, while the facts are left to the jury to decide; and not only is the trial judge authorized to either sustain or overrule an objection, but he is also required to state his legal reason for so ruling. He may overrule inapplicable grounds of objection and at the same time disallow questions on proper legal ground, because it is his sole duty to control the trial and the records in order to avoid the burdening of the record and ensure proper maintenance of the accepted practice and procedure. As referee, it is the duty of the trial judge to sum up the evidence adduced at the trial to the jury and also identify the applicable law to the points in issue; and, therefore, he may ask questions aimed at a complete revelation of the truth since the purpose of a trial is to find out the truth. This, however, should be done without bias towards the accused; and no matter how erroneous his rulings may be, he cannot be assumed guilty of partiality and failure to exercise a spirit of cool neutrality in the performance of his judicial duty. The extent to which a witness may be cross-examined for the purpose of affecting his credibility rests almost entirely in the discretion of the trial judge. Peehn et al. v. Republic, 5 LLR 192 (1936).

A neutral and impartial judge, as frequently used, means a judge who does not favor one party against the other, un-prejudicial and disinterested in matters before him or her. He or she is also one who should have an impartial frame of mind from the beginning to the end of the trial, influenced only by legal and competent evidence produced during trial. He or she is considered neutral when not engaged on one side, and impartial when not taking

active part with either of the contending parties.

A judge is said to be partial and not exercising the spirit of cool neutrality in a trial where he or she is disqualified and yet elects to preside over the trial of a case because of his/her relationship with either of the parties; where he or she had once acted as counsel for either of the parties and expressed his or her opinion in the case before trial. Hence, it is generally assumed that he or she may be bias and prejudicial, and, therefore, the trial cannot be said to be fair and impartial. But the mere overruling or disallowing of irrelevant and immaterial questions of a defendant or sustaining objections interposed by the prosecution, no matter how erroneous the rulings may be, will not in itself render the judge guilty of partiality to warrant the reversal of his/her judgment.

No one can reasonably conclude that Judge Obey, resident in Montserrado County, who tried this case when it was transferred to Montserrado County from Lofa County, would be biased and prejudicial to the interest of the appellants, all citizens and residents of Lofa County, who have charged that they could not have had a fair and impartial trial in their own county by the peers of their own vicinity because of alleged local prejudice. Not having found any partiality in the trial on part of the trial judge, we cannot sustain the contention of appellants that the trial judge did not exercise the spirit of cool neutrality during the trial. This issue and along with it the counts of the bill of exceptions in connection therewith are, therefore, overruled.

The next issue as stated hereinabove is the contention of the appellants that witnesses for the prosecution testified without being placed under oath. This allegation is contained in counts 4, 14, 19 and 22 of appellants' bill of exceptions. In these counts, appellants alleged that the prosecution's witnesses, namely: Flomo, Bardura, Sekou, Zoe Flomo, Mulbah Sumo Gliwu and Edwin Zakarma took the witness stand and testified for the prosecution without being placed under oath. This contention is not supported by the records, which indicate at sheets 2 and 6 of the 7th day's session of the court, May 19, 1981, that when the case was called for trial and the trial jury was selected, sworn and empaneled, the prosecution requested the court for the qualification of five witnesses, namely: Sekou Kamara, Garfour Kongbowale, Zoe Flomo, Flomo Mulbah Sumo and Flomo Bahula, which application was granted and the witnesses were ordered qualified and seque-strated. The trial records also show that only these five witnesses testified for the State, and that on the 28th day of May, 1981, being the 14th day's session of court, the prosecution rested evidence. There is no where shown in the records that the appellants noted objection to any of the witnesses testifying for not being sworn. These counts of the bill of exceptions, that is to say, counts 4, 14,19 and 22 are not supported by the records and, therefore, cannot be considered by this Court. There are a long line of opinions of this Court that this Court will not take

cognizance of exceptions not supported by the record. Johnson v. Powell, 4 LLR 221 (1934) and Elliott v. Dent, 3 LLR 111 (1929). For issues to be reviewed by the Supreme Court, they must be set forth in a bill of exceptions which shall contain the objections made at the time of the trial, raising such issues for the court's consideration. Wilson v. Dennis et al., 23 LLR 263 (1974). The contention that witnesses for the prosecution testified without being qualified, as contained in counts 4, 14,19 and 22 of the bill of exceptions, is therefore not sustained.

The issue which counsel for appellants argued very strongly and for which he prayed the discharge of the appellants is that, the trial court lacked jurisdiction over the subject matter of the case because the indictment under which the appellants were tried was drawn up under the 1956 Penal Law which had been repealed and not operative when the indictment was found. Counsel for appellants contended that he moved the trial court to refuse jurisdiction but the trial judge denied the motion.

The trial records show that during the November 1980 Term of the First Judicial Circuit Court, Criminal Assizes "A", Montserrado County, presided over by His Honour Jessie Banks, a motion was made for the court to refuse jurisdiction; the said motion was resisted, heard and denied by the court. During the February, A. D. 1981 Term of the said court, presided over by His Honour Eugene L. Hilton, a similar motion was also made, resisted, heard and denied by the court. However, the case was not heard until the May 1981 Term of the court, presided over by His Honour A. Wallace Octavius Obey. After the prosecution presented and rested evidence, counsel for appellants moved for judgment of acquittal, which motion was heard and correctly denied by the court, judging from the evidence presented by the prosecution. Following the trial judge's ruling denying the motion for judgment of acquittal, counsel for appellants made another motion for the court to refuse jurisdiction over the subject matter on the ground that the statute under which appellants were held to answer had been repealed. This motion was also resisted by the prosecution and denied by the court. Because we are in full agreement with the conclusion of the trial judge, we deem it necessary to quote his ruling on the motion to refuse jurisdiction for the benefit of this opinion, as follows:

"An application or motion to court to refuse jurisdiction over the subject matter is not one of those defenses or objections which may be raised before trial, as the same may be raised at any stage of the trial. The court, however, finds it necessary to have a look at the indictment itself which was founded for the first time during the February 1978 Term of Court. The Court says that this first indictment which was dismissed upon application of the prosecution was founded under the old statutes.

A look at the indictment subsequently drawn up during the August 1979 Term of the Court, shows evidence on its face that the defendants were indicted for commission of the crime of criminal mischief. Although the indictment reads, inter alia: "That the defendants in violation of Title 27, Section 194, Chapter 11, Sub-section (d), pages 976 and 977, Volume 3 of the Liberian Code of Law which pro-vides that: "... Nevertheless, immediately after this quotation and in the indictment, the prosecution quoted as follows:

'CRIMINAL. MISCHIEF: A person is guilty of criminal mischief if he: (a) damages tangible property of another purposely or recklessly; or (b) damages tangible property of another negligently in the employment of fire explosives or dangerous means listed in section 15.4(1).'

Looking at the New Penal Law, at page 87, the court finds that criminal mischief as quoted hereinabove falls under the statute of 1976 which was approved April 18, 1978, by its amendment on September 2, 1978. Criminal mischief, as quoted hereinabove, may never be found on pages 976 and 977 of Title 27 of the Liberian Code of Law of 1956. It would seem that the preparation of the second indictment by the clerk, or whoever did it, did not quote the page and section of the New Penal Law, but carried the same description of the old title; nevertheless, what is more important is the quotation laid down in the indictment relates to the definition of criminal mischief under the New Penal Law. Had the indictment relied upon the definition of malicious mischief, as found in the statute of 1956, the contention of the defense would have been taken into consideration, but the court is of the opinion that the application of the defense as made hereinabove is based merely on a microscopic technicality which the modern practice of law does not entertain. This is the old legal practice. Under the circumstance, the application or motion, or whatever it is, is denied. And it is so ordered."

The subject matter, criminal mischief, charged against the appellants was a result of their destruction of 1,118 live trees "purposely, or recklessly, or negligently". These terms, in our opinion, are synonymous with: "unlawfully, wrongfully, illegally, maliciously, intentionally, and deliberately cutting, damaging and destroying tangible property of another without legal justification". The inclusion of the wordings of the two separate Penal Laws in the indictment charging "Criminal Mischief" does not in any way affect the jurisdiction of the trial court over the subject matter; it only goes to an immaterial defect of the indictment which does not in itself oust the trial court of its jurisdiction or deprive the appellants of that notice needed for them to ably prepare their defense; in fact, the so-called defect was cured by the failure of the appellants to raise objection to the indictment before trial. "Any defense or objection which is capable of determination without trial of general issue may be raised before trial by motion to dismiss the indictment. Defenses and objections based on defects

in the institution of the prosecution or in the indictment other than that it fails to show jurisdiction in the court over the subject matter or to charge an offense, may be raised only by motion before trial to dismiss. The motion shall include all such defenses and objections then available to the defendant. Failure to present any such defense or objection as herein provided constitutes a waiver . . . " Criminal Procedure Law, Rev. Code 1: 16.7(1) and (2). It is, therefore, our holding that the trial judge correctly denied the motion to refuse jurisdiction over the subject matter, the main issue and/or basis of the appellants' appeal as contained in count one of the bill of exceptions. Count one of the bill of exceptions is, therefore, overruled.

There are sixteen counts of the thirty-nine count bill of exceptions which counsel for appellants did not bother to argue, because he could not find records to support his contentions therein, and therefore limited his argument to the three main issues which we have just discussed. It is our opinion that the trial judge's ruling on questions and objections referred to by the appellants' counsel, have no defeating effect on the evidence adduced at the trial that would suggest a reversal of the judgment, and, therefore, we do not consider any further discussion on the point. We also consider the discussion of the other counts of the bill of exceptions as fruitless exercise if we must compare the evidence with the ruling complained of.

It should be remembered that the appellants were charged with the crime of criminal mischief, for purposely and recklessly destroying the live trees of the private prosecutor without any legal justification. For the benefit of this opinion, we quote hereunder the relevant testimony of each of the appellants herein, in support of their plea of not guilty. The first appellant to take the witness stand was Walubah Tarnu. Here is what he said at sheet 11 of the minutes of court, June 1, 1981:

"When Town Chief Mulbah Wezeh presented the 50 cents that Mr. Sekou gave as an apology, Mr. Lavala Yaryay told Sekou that I have many boy children, so in order for me to allow you to stay here we have to make paper to the effect that you will not have to plant any cocoa, orange, plum, etc. again on this land. Sekou agreed to this and the paper was made. One of the writing was given to Zoe Flomo and the other to Lavala Yaryay. From that day if Mr. Sekou planted live tree, I do not know anything about it. When Mr. Sekou planted the first cocoa, the old man told us, the five boys that went to find out, to uproot all the cocoa and bring them to town. And this we did . . ."

The second defendant, Wolubah Sumo, while testifying as witness in his own behalf, on sheet 5 of the minutes of court, June 2, 1981, said:

"What I have to say is just what Mr. Wolubah Tarnu explained here is what happened. The only thing I have to add is concerning the character of the Private Prosecutor. Mr. Sekou Kamara went to Mr. Flomo Badubu and brushed his farm. The people stopped him from doing so and moved him from there. He left and went to Town Chief Kogbogolor who told him since we allowed you to make this farm, do not even build a kitchen. When you cut the sticks, do not even put it on top of some sticks. When Mr. Tarnu talked about Sekou moving from place to place, this is what I have to add and which Mr. Tarnu did not mention of; this is all I know" (sic).

The third defendant, Yarkpawolo Zayzay, also testified on sheet 6 of the minutes of court, June 2, 1981, as follows:

"We the family advised him enough not to plant live trees, they would all be uprooted. Sekou Kamara agreed to it that he would never plant any live tree on the land. When he agreed with the agreement they made together with Mr. Zavala Yaryay, after two years time, Sekou Kamara started planting live trees on the land. When Mr. Zavala heard the news, he sent for him on the farm. When Sekou came they asked him since you are here, you do not want to obey any rule. The result to that is that all of your trees will be uprooted"(sic).

The records do not show that the other two defendants, Zubah and Kpageh Balla Mongla, took the stand to testify; however, three other witnesses in persons of Kulubah Sumo, Wolobah, and Wolobah Wezzeh testified in substantiation of the testimonies of the appellants. We deem it necessary to only quote a relevant portion of the testimony of one of these witnesses, in the person of Kulubah Sumo. Here is what he said on sheet 4 of the minutes of court, June 3 , 1981:

"Before the Quarter Chief Sekou admitted planting cocoa on the land in the sugar farm, Sekou begged my father admitting that he was wrong with a token of 50 cents; when the 50 cents was presented to the quarter chief, he reached the palaver to my father. My father told him to keep the 50 cents and said that his foremost concern or desire was for the cocoa trees to be uprooted that very day from the land. After my father said this, the quarter chief gave somebody to go and have the cocoa trees uprooted. I was one of the persons who went to uproot the cocoa trees. A man named Wolobah was one; the third person was Yarkpawolo Zay-zay, and the fourth, who is now dead, was Flomo Marrow. When we returned from uprooting the cocoa, the private prosecutor himself went and uprooted the balance trees that we forgot to uproot and which were planted in the young bush."

From the testimonies of the appellants and their witnesses, we do not hesitate to conclude that in contrast to appellants' plea of not guilty, they did not deny committing the crime

charged as per the records; and where the evidence of the prosecution is clear and cogent, a judgment of conviction will be confirmed.

In view of the foregoing, the judgment of the trial court is hereby confirmed and affirmed. And it is hereby so ordered.

Judgment affirmed.