NATHANIEL FORD BRUCE, Appellant, v. **REPUBLIC OF LIBERIA**, Appellee.

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

Argued April 1, 1954. Decided May 28, 1954.

The constitutional rights of defendants in criminal proceedings require that, on appeal to the Supreme Court, legal counsel be assigned to represent an indigent appellant who was represented by statutory Defense Counsel in the court below.

Appellant, who had been convicted of forgery in the court below, did not appear upon call of the case for hearing in this Court. The Solicitor General moved to dismiss the appeal, which motion was granted. *Bruce v. Republic, 11* L.L.R. 441 (1954). Three days later, defendant submitted a motion for rehearing to Mr. Justice Davis who recorded his desire for a rehearing and submitted the case to this Court *en banc*. On petition for rehearing of the appeal, *petition granted.*

Nathaniel Ford Bruce, appellant, *pro se. The Solicitor General* for respondent.

MR. JUSTICE DAVIS delivered the opinion of the Court.

This is one of those cases which, if viewed superficially, is likely to be considered a novelty in this Court; but if we make careful and judicial study of all the surrounding facts and circumstances and the applicable law, and if we realize that law is a progressive and expansive science, and that it adapts itself to the new relations and interests which constantly spring up in the progress of society, we soon discover that the real issue is the constitutional right of every person charged with a crime to be heard.

Nathaniel Ford Bruce was indicted by a grand jury of Maryland County during the November, 1949 term, of the Circuit Court of the Fourth Judicial Circuit. We deem it necessary to quote from the indictment:

"The Grand Jurors, good and lawful men of the County of Maryland, Republic of Liberia, being duly chosen, selected, sworn and empanelled to inquire in and for the body of the people of the County of Maryland, Republic of Liberia, in the name and by the authority of the people of the County and Republic aforesaid, upon their

oaths aforesaid, do present as follows to wit: That Nathaniel Ford Bruce, defendant, a resident of the settlement of Pleebo, County of Maryland, Republic of Liberia, on October 11, 1949, in the settlement of Pleebo, County and Republic aforesaid, then and there being, did unlawfully, wilfully and feloniously make three false radiograms and one letter and thereupon did forge the names of the National Standard Bearer of Liberia, the National Chairman, and the National Secretary of the True Whig Party, which false radiograms and letter were purported to have been sent to him, the defendant, and to Joseph G. Kai of the said settlement of Pleebo, by the National Standard Bearer of Liberia, the National Chairman, and the National Secretary of the True Whig Party, informing the said Joseph G. Kai of their consent to carry his name on the True Whig, Party ticket for election to the National Legislature of Liberia in the year 1951, and requesting the said Joseph G. Kai to send up resolutions with an amount of two hundred dollars as party taxes, which sum of money would make him, the said Joseph G. Kai, eligible for election, and authorizing the said Nathaniel Ford Bruce, defendant to receive and obtain said amount together with the said resolutions and bring them up to Monrovia to be presented to the National Standard Bearer of Liberia, the National Chairman and the National Secretary of the True Whig Party, which said false radiograms and letter were presented to the said Joseph G. Kai, on the above mentioned date by the said defendant, and the said Joseph G. Kai did pay over to the said Nathaniel Ford Bruce, defendant, the said two hundred dollars in good and lawful money of the United States of America current in this Republic, and the said defendant, with intent to defraud, did induce persuade and influence the said Joseph G. Kai to accept such forged instruments as being good and genuine, and thereby to cheat the said Joseph G. Kai fraudulently of the said amount, contrary to the form, force and effect of the statutes in such case made and provided, and against the peace and dignity of the County and Republic aforesaid.

"And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present that the aforesaid defendant, Nathaniel Ford Bruce, a resident of Pleebo, County and Republic aforesaid, at the place and date aforesaid, then and there did unlawfully, feloniously, fraudulently and falsely offer and utter the three forged radiograms to the said Joseph G. Kai of the settlement of Pleebo, as being good and genuine, and inducing, influencing and persuading the said Joseph G. Kai to accept them as such, thereby causing the said Joseph G. Kai to further give him additional amounts such as forty-eight dollars for his passage by airplane, and twenty-five dollars for radiogram expenses, which he, the said defendant, alleged that he had incurred, which amounts aggregated seventythree dollars good and lawful money of the United States of America, current in this Republic, received and obtained by the defendant as a further result of said forged instruments in which the said defendant, with a fraudulent

design to obtain money, and with intent to cheat, did falsely make, contrary to the form, force and effect of the statutes in such cases made and provided, and against the peace and dignity of the County and Republic aforesaid.

"And so the Grand Jurors aforesaid, upon their oaths aforesaid, do say that the said Nathaniel Ford Bruce, defendant, a resident of the settlement of Pleebo, County of Maryland, Republic of Liberia, on the day and date and year aforesaid, at the place aforesaid, in form, manner and by means aforesaid did do and commit the crime of forgery, contrary to the form, force and effect of the statutes in such cases made and provided, and against the peace and dignity of the County and Republic aforesaid."

The records certified to us disclose that, when appellant Bruce was brought to trial upon the foregoing indictment, he entered a plea of not guilty, thus requiring the State to prove his guilt. After a few days trial before his Honor, Nathan Barnes, a petty jury, duly empanelled to try the issue joined between appellant and the Republic, returned a verdict of guilt against appellant, upon which verdict the trial judge rendered final judgment, sentencing appellant to three months' imprisonment. From this verdict and the judgment rendered thereon the defendant has appealed to this Court.

A transcript of the records was forwarded to this Court from the court of origin, and the case was called for hearing during our October, 1953, term. Upon the call of the case, appellant did not appear either by counsel or in person, whereupon the Solicitor General of Liberia, representing the appellee, filed the following motion to dismiss the appeal :

"And now comes Momolu S. Cooper, Esq., Solicitor General of the Republic of Liberia, of counsel for appellee, and most respectfully prays this Court to dismiss the appeal in the above entitled cause and for reasons showeth unto Your Honors the following:

"Appellee says that at the call of this case at the present term of Court the appellant neglected to appear either in person or by counsel to prosecute his appeal in keeping with the law controlling appeals before this Court.

"Wherefore, appellee prays the dismissal of the appeal, and that Your Honors will order the court below to resume jurisdiction over said cause and to enforce the final judgment rendered against the appellant in the court below."

Since the motion was argued by counsel for appellee, and since appellant did not indicate his whereabouts or his intention as to prosecuting his appeal, the Court was left with no alternative but to grant the motion, dismiss the appeal, and order the judgment of the lower court affirmed. *Bruce v. Republic, 11* L.L.R. 441 (1954).

However, it appears that, during the time the motion was being heard, information filtered to appellant that his case was being heard in the Supreme Court, and he made his way to Monrovia immediately, arriving here on about the day when the decision was being given. Appellant immediately prepared a motion for rehearing and, in harmony with Rule "9" of this Court (2 L.L.R. 666), submitted same to Mr. Justice Davis, who, in a note dated January 25, 1954, indicated his consent for a rehearing. The following is the note of Mr. Justice Davis, addressed to the clerk of this Court:

"Having read a petition submitted to me by Nathaniel Ford Bruce, appellant in the case of forgery decided against him on January 22, 1954, for reargument in keeping with Article `9,' Paragraph "1" of the Revised Rules of this Court, as found on page 666 of Volume 2 of the *Liberian Law Reports,* I desire a re-argument because of the contents of said application. By authority of Section '2' of the same article, therefore, I do hereby indicate and record my said desire. Please note and, in the meantime, place a filing date upon, and file said application, and bring same to the attention of the rest of the members of the Court, to whom I am this day sending copies of this notice."

Appellant filed with his motion for rehearing a certificate from a qualified lawyer of the bar of Maryland County, namely, Attorney John R. Cooper, who was serving as defense counsel at the time of appellant's trial.

Appellant seeks a rehearing on the following counts:

1. When this cause was heard in the court below, because of appellant's financial incapacity he was unable to procure counsel. He was therefore represented at the trial *in forma pauperis,* assisted by the good will of some sympathizers. The same reasons which prevented his procuring counsel in the court below rendered him unable to do so in this Court. He has been without employment for more than two years; and, therefore, he feels that, in order to insure an impartial trial before this Court, counsel should have been provided for him by the State, particularly when being tried for a felony.

2. Appellant was never notified of the assignment of his case so that he might bring

the facts to the attention of this Court.

3. Even the submission of this motion to this Court is due to the kindness of friends, since appellant is still unable to finance his defense.

4. Dismissal of this appeal without representation of counsel would cause hardship which would be obviated if this Court would grant a rehearing.

Appellee, on the other hand, contended that the appellant did not present valid grounds for a rehearing, absent any allegation that "some palpable mistake is made by inadvertently overlooking some fact, or point of law." In so contending, appellee relied upon a Rule of this Court, the full text of which is as follows :

"RE-ARGUMENT.
"1. Permission for—For good cause shown to the court by petition, a re-argument of a cause may be allowed when some palpable mistake is made by inadvertently overlooking some fact, or point of law.

"2. Time of—A petition for re-hearing shall be presented within three days after the filing of the opinion, unless a special leave (is) granted by the court.

"3. Contents of petition—The petition shall contain a brief and distinct statement of the grounds upon which it is based, and shall not be heard unless a justice concurring in the judgment shall desire it. The moving party shall serve a copy thereof upon the adverse party as provided by the rules relating to motions." R. Sup. Ct., IX (2 L.L.R. 666).

To settle this issue, it becomes necessary to ascertain whether there is any law in this country authorizing the State to provide counsel for a person accused of a crime who cannot provide counsel for himself because of financial inability; and whether appellant was represented *in forma pauperis* in the court below. In 1936 the Legislature created the office of Defense Counsel, whereby any person criminally charged who, because of financial inability, could not procure counsel for himself, was to be represented by said Defense Counsel. L. 1935-36, ch. XX, §§ 1, 2.

The records certified to this Court do not conclusively indicate whether appellant was represented in the court below *in forma pauperis.* When the case was called, announcement was made that the defendant was represented by Attorneys John A. Dennis and Francis R. T. Gardiner. But the certificate issued by the then Defense

Counsel, Attorney John R. Cooper, and filed by appellant with his petition, shows on its face that appellant, at the call of the case, was represented by Mr. Cooper who, by leave of court, was assisted by Attorneys Dennis and Gardiner. These two conflicting statements created a problem which required almost Solomon's wisdom to solve. We were about to favor appellee's contention that, since no proof of representation by the Defense Counsel appeared in the record as such, the certificate should be ignored and appellant's contention disregarded. However, we opened the records in *Tendi v. Republic,* 12 L.L.R. 109 (1954.), *infra,* which involves the crime of murder, coming from the same circuit, and tried by Judge Dessaline T. Harris, now Mr. Justice Harris. We discovered that the records in the *Tendi* case did not show that the defendant was represented by the Defense Counsel, although the Solicitor General as well as Mr. Justice Harris, who, as Circuit Judge, tried the case, both stated that Mnah Tendi, the defendant in that case, was represented *in forma pauperis* and defended by the Defense Counsel. Thus, in the present case a doubt was created, which, according to settled principles of law, must operate in favor of the accused. We therefore consider it proper to hold that appellant was represented in the court below *in forma pauperis;* and that, since he was represented *in forma pauperis* in the court of origin, he was entitled to representation in this Court at the expense of the State.

The foregoing facts and circumstances might not strictly tend to prove that a fact or point of law was overlooked, simply because it was not presented in the usual way at the call of the case, so as to have been considered by the court before rendering the original decision. Nevertheless, it is our opinion that, since any decision given upon such a fact or point of law in this case is calculated to affirm the constitutional right of an accused to be heard, we are authorized by Rule "9" of this Court to proceed with the hearing of this petition and give such ruling as the ends of justice demand. For if, in the administration of justice, the courts were to eliminate, or for a moment lose sight of, the due process rule, or the principle which requires inquiry before judgment, chaos and calamity would be the result, and the courts would cease to be watchdogs of the Constitution.

Our colleague, Mr. Chief Justice Russell, has not been able to agree with our conclusions, and is of the opinion that the petition for rehearing should not be granted because the facts and circumstances presented therein were not raised at the first hearing. But this case does not fall within the usual class of motions for rehearing, in which the merits are examined and fully heard with briefs from both sides.

In the instant case, the record was never even opened, to say nothing of passing upon

the merits of the law and facts involved. As soon as the case was called and appellant failed to answer, appellee's counsel took advantage of the law which provides that the failure of appellant to appear constitutes grounds for dismissal of the appeal. The court, unapprised of the facts now brought to light by petitioner, had no alternative at that time but to dismiss the appeal. Now that these facts have been disclosed and formally presented to this Court, we are bound to act. To ignore these facts simply because they were not presented at the first hearing would not only work injustice, but under the circumstances would violate the constitutional guarantee to be heard before being condemned.

We agree with our learned and revered colleague, the Chief Justice, that according to the letter of the law we should take cognizance only of the records certified to us from the court of origin. But, like Saint Paul, we say in this instance that the letter killeth but the spirit maketh alive. Here is a party accused of an infamous crime, who alleges that he was represented *in forma pauperis* in the court below, and files a certificate from a sworn officer of the court, the Defense Counsel, that he was so represented. The records certified to us do not show that he was thus represented, but only that he was represented by Attorneys Dennis and Gardiner. Ordinarily that would discredit the certificate of the Defense Counsel as well as appellant's statement. In this case, however, we have a transcript of records in another case, tried in the same circuit with the same clerk keeping the record which likewise fails to show that the Defense Counsel represented the defendant therein. Mr. Justice Harris who, as Circuit Judge, tried the case, knows of his own certain personal knowledge that the defendant was represented *in forma pauperis,* which fact the Solicitor General also admitted in his argument at this bar. Does it not follow, then, from the careless manner in which the clerk omitted the fact that the Defense Counsel represented Mnah Tendi, that the same clerk in like manner could have carelessly omitted said fact from the records of the case herein? This circumstance, if viewed judiciously, must create a doubt; and in a criminal proceeding a doubt operates in favor of the accused. If we decided that, because the records in the case herein show that appellant was not represented *in forma pauperis,* but was represented only by Attorneys Dennis and Gardiner, we would be forced to decide that the defendant's allegations, as well as the certificate of the Defense Counsel, are false in this respect; and we would likewise be compelled to accept the concededly false conclusion that Mnah Tendi was not represented *in forma pauperis* because the records certified to us in that case show that she was represented by Attorney John A. Dennis. While we hold in high esteem the views and opinion of our revered colleague, we are still unwilling to join him in denying appellant's petition for rehearing.

"A party asking for a rehearing will not be permitted to set up new and different grounds in support of his petition from those urged by him in the original hearing. It has, however, been held that after a rehearing has been granted and the cause has been argued on the rehearing, and a manifest error is shown, it should be corrected, though it was not pointed out or discovered in the former hearing, or was then considered, and was erroneously decided." 3 CYC. 214 *Appeal and Error* XVI, B. 4. i.

According to the foregoing, even after a case has been heard upon its merits, facts or errors to which the court's attention was not called may be considered and corrected in a rehearing. In conclusion we shall refer to an opinion delivered by Mr. Justice Russell, now Chief Justice. In *Yancy v. Republic,* 4 L.L.R. 268 (1935), a criminal case involving the obtaining of money under false pretenses, Mr. Justice Russell speaking for this Court, said, at 4 L.L.R. 275-77:

" 'In civil suits both parties are subjects of the State, with equal rights in the eye of the law. For the one or the other a verdict must be found, and this verdict must be on a preponderance of proof, however slight, no matter how long a jury may hesitate, no matter how evenly the scales may for a time hang. The parties, viewing them in the aggregate, enter the contest with advantages about equal, and are entitled to equal privileges. On the other hand, in a criminal prosecution, the State is arrayed against the subject; it enters the contest with a prior inculpatory finding of a grand jury in its hands; with unlimited command of means; with counsel usually of authority and capacity, who are regarded as public officers, and therefore as speaking semi-judicially, and with an attitude of tranquil majesty, often in striking contrast to that of a defend-ant engaged in a perturbed and distracting struggle for liberty if not for life. These inequalities of position the law strives to meet by the rule that there is to be conviction when there is a reasonable doubt of guilt.' (Wharton's *Criminal Evidence,* Vol. I, § 1.)

"A court can never be the agent, or the instrument, of any government; nor can it properly align itself on the side of the prosecution in any case. The proper duty of the court is to defend the rights of the oppressed against the oppressor, the rights of the weak against the strong, be the strong president, emperor, king, prince, potentate, or magnate ; and hence, whenever there is a matter in litigation in which it appears that one side is weak and the other strong, the court must lean, if at all, on the side of the weak until it shall have satisfied itself that every privilege given by the law to the humblest litigant at its bar shall have been allowed him; and if, thereafter, it appears that judgment should be given against him the court will be able so to decide without any qualms of conscience. This incident also enables us to recall here for the

benefit of the judges of our court, and the members of our bars, a certain episode from Prussian history universally conceded to be one of the most brilliant on the pages of the judicial history of the world.

" 'Near Potsdam in Prussia, there lived a miller in the reign of Frederick the Great, whose mill interfered with a view from the windows of the Emperor's Palace at Sans Souci. Annoyed by the obstruction the King sent for the miller and inquired the price for which he could purchase the mill. The miller said that he would not sell it at any price. In a moment of irritation, the King gave orders to pull down the mill. The miller said : "The King may do this, but there are laws in Prussia." He immediately commenced legal proceedings against the King and the court ordered Frederick to rebuild the mill, and to pay the miller heavy damages for trespass. The King was mortified, but he was big enough, great enough, manly enough, to say, "I am glad to find that just laws and upright judges exist in my kingdom." ' "

In the trial of criminal causes the courts should do everything to remove all legal obstacles from the channels through which even-handed justice must flow.

Considering all the facts and circumstances and the controlling law we are of the opinion that the petition of appellant for a rehearing is well taken, and that he should be given an opportunity to be heard before being made to suffer the penalty for an infamous crime. The petition is therefore hereby granted, and a rehearing of appellant's appeal is ordered for the October, 1954, term, of this Court; and it is so ordered.
Petition granted.

MR. CHIEF JUSTICE RUSSELL, with whom MR. JUSTICE BARCLAY concurs, dissenting.

During the October, 1953, term of this Court, the Solicitor General of Liberia, representing the appellee, filed a motion to dismiss the appeal of this case upon ground that the appellant had failed to appear.

On January 22, 1954, this Court passed upon the motion and gave judgment without opinion, dismissing the appeal because of the appellant's failure to appear either in person or by counsel to prosecute his appeal in keeping with the terms and conditions stipulated in his appeal bond. Three days thereafter a motion was addressed to this Court for a rehearing.

Since I disagree with the decision of my colleagues granting a rehearing of this case, I would like to set forth the grounds of my dissent:

Article IX, section 1 of the Revised Rules of this Court provides for a re-argument of a cause when some palpable mistake is made by inadvertently overlooking some fact, or point of law. Thus the question presented for our consideration is what point of law or fact has been omitted, or what palpable mistake was inadvertently overlooked during the hearing and disposition of this case.

At the call of this case appellant, who had stipulated in his appeal bond that he would prosecute his appeal and would remain in Court until finally discharged by due process of law, and who, by filing and having served upon his adversary a formal notice of appeal, had completed his appeal, nevertheless failed to appear before this Court upon the call of the case. Because of this failure of the appellant, in violation of the terms and conditions of his appeal, the appellee moved for the dismissal of the appeal, and the motion was granted by this Court. In my opinion there was no palpable mistake or omission of any point of law or fact warranting a rehearing.

Going a step further it must be observed that the appellant contended that, because of his financial state, he was represented by the Defense Counsel in the court below and that therefore counsel should be provided for him by this Court. A certificate in support thereof was attached, bearing the signature of Attorney John R. Cooper as Defense Counsel at the time of the trial in the court below. Regardless of the authenticity of this certificate, I am certain that we should be controlled by the records certified to this Court.

At the call of the case, on August 29, 1951, the Republic of Liberia was represented by the County Attorney and the defendant was represented by Attorney John A. Dennis. As the trial of this case progressed, on August 30, 1951, the prosecution asked leave of court to include Attorney Allen N. Yancy, Jr.; and the defendant asked leave to include Attorney F. R. T. Gardiner, Jr. Both these applications were granted. There is nothing in the records showing that the defendant at any stage of this case was represented by the Defense Counsel, John R. Cooper.

Even if we were to be liberal in our reasoning and conclude that the clerk of court inadvertently omitted from the record the fact that the appellant was represented by the Defense Counsel, nevertheless we are precluded from so doing by the following circumstances.

After the case was concluded and a verdict of guilty was brought in by the jury, the defendant gave notice to the court of the filing of a motion for new trial. The motion for new trial was filed in the office of the clerk on September 8, 1951, and signed by Attorneys John A. Dennis and F. R. T. Gardiner. There is no record of the Defense Counsel, John R. Cooper, signing this motion. Nor does either the notice of appeal or the bill of exceptions show any appearance by the Defense Counsel ; his name does not appear at any place in the record of this case. Courts of justice are bound to take judicial notice of their records only, and this Court particularly is bound to decide all matters upon transcript of the records certified to it and must refrain from doing otherwise.

In my opinion the certificate from Attorney John R. Cooper, Defense Counsel, is spurious. There is no reason to believe that it would be possible for the clerk of court throughout the entire record inadvertently to omit all mention of the Defense Counsel's representation of the appellant if such representation had in fact taken place.

Appellant's submission for a rehearing also set forth that he was not informed of the assignment of his case. We would like to observe that the appellant stipulated to remain in court until discharged. Parties appealing should always be vigilant and watchful, and should never expect the court to do for them what they should do for themselves.

Appellant appealed to the March, 1952, term of the Court; but when the case was called for hearing during the October, 1953, term, he was neither present nor represented by counsel. This indicates abandonment of his appeal under the law, and it must therefore suffer dismissal. 'Moreover the assertions in Counts "3" and "4" of the submission of the appellant for a rehearing are entirely unsupported. The records show clearly that appellant was not declared *in forma pauperis* by the court below in keeping with the act of the Legislature which created the office of Defense Counsel. (L. 1935-36, ch. XX.) Had the defendant declared himself *in forma pauperis* in the trial court, the court's investigation thereof would be shown in the records certified to us. Since all the facts and circumstances of this motion are clouded with doubtful aspects, I am unwilling to agree to a rehearing of this case, the granting of which will make a flood gate hereafter.

If the record certified to us had shown substantially that the appellant had been represented by the Defense Counsel and had been declared *in forma pauperis* in the court below, there would be some merit in the contention that counsel should be

provided for the appellant in this Court. Since this is not the case, I am bound to disagree with the decision, since the appellant has not appeared in this Court, either in person or by counsel, so as to entitle him to the consideration prayed for herein. The fact that appellant appealed to this Court about two years ago and failed to appear is tantamount to an abandonment of his defense.

In conclusion, I shall refer to Rule "9" of this Court, upon which these proceedings are based. We must ask what palpable mistake was made and should be corrected. Can there be a reargument of a case that was never argued? Was any opinion filed in which palpable mistakes require correction?

In view of these questions I am unwilling to attach my signature to the judgment which is signed by the majority of my colleagues; hence this dissent.