Musa Solomon Falah of Central Prison, City of Monrovia, Liberia APPELLANT
Versus **Republic of Liberia** by and thru the Ministry Of Justice, Monrovia, Liberia APPELLEE

APPEAL

HEARD: APRIL 2, 2007 DECIDED: AUGUST 9, 2007.

MR. JUSTICE KORKPOR, SR. DELIVERED THE OPINION OF THE COURT

Incidents of rape have increased in our society, especially since the civil war. This unwholesome prevalence caused spontaneous public outcry which resulted in the amendment of Chapter 14, Subsections 14.70 and 14.71 of the Penal Code of Liberia on December 29, 2005, and published by the Ministry of Foreign Affairs on January 17, 2006. The amended act provides as follows:

AN ACT TO AMEND THE NEW PENAL CODE CHAPTER 14 SECTIONS 14.70 AND 14.71 AND TO PROVIDE FOR GANG RAPE

IT IS ENACTED BY THE NATIONAL TRANSITIONAL LEGISLATIVE ASSEMBLY of the Liberia National Transitional Government of the Republic of Liberia in Legislature Assembled:

Section 1:- Effective Date of Amendment

That immediately after the passage and publication in handbills of this Act, Chapter 14 of the New Penal Code is hereby amended.

Section 2:- Sections 14.70 and 14.71 are hereby repealed and are replaced by the following:
14.70

1. Offence: A person who has sexual intercourse with another person (male or female) has committed rape if:

(a) (i) He intentionally penetrates the vagina, anus, mouth or any other opening of another person (male or female) with his penis, without the victim's consent: or

(ii) He/She intentionally penetrates the vagina or anus of another person with a foreign object or with any other part of the body (other than the penis), without the victim's consent.

(b) The victim is less than eighteen years old, provided the actor is eighteen years of age or older.

Gang Rape: A person has committed Gang Rape, a first degree felony, if: He or she purposely promotes or facilitates rape or agrees with one or more persons to engage in or cause the performance or conduct which shall constitute Rape.

3. Definitions:

(a) Sexual Intercourse

(i) Penetration, however slight, of the vagina, anus, mouth, or any other opening of another person by the penis; or

(b) Consent

(i) For the purposes of this felony, a person consents if he/she agrees by choice and has freedom and capacity to make that choice.

(ii) There shall be a presumption of lack of consent in the following Circumstances:

(a) Any person, at the time of the relevant act or immediately before it began, was using violence against the victim or causing the victim to fear that immediate violence would be used against him/her.

(b) Any person, at the time of the relevant act or immediately before it began, was causing the victim to fear that violence was being used, or that violence would be used, against another person;

(c) The victim was detained at the time of the relevant act;

(d) The victim was asleep or otherwise unconscious at the time of the relevant act;

(e) Because of the victim's physical disability, he or she could not have been able at the time of the relevant act to communicate to the perpetrator whether he or she consented;

(f) Where the victim had been administered or caused to take without his or her consent, a substance which, having regard to when it was administered or taken, was capable of causing or enabling him or her to be stupefied or overpowered at the time of the relevant act;

(g) The defendant intentionally induced the victim to consent to the relevant act by impersonating as a person known personally to the victim

4. Grading and Sentencing

(a) Rape is felony of the first degree where:

(i) The victim was less than 18 years of age at the time the offense was committed; or,

(ii) The offense involves gang rape as defined in subparagraph 2 above; or,

(iii) The act of rape complained of results in either permanent disability or serious bodily injury to the victim; or,

(iv) At the time of the relevant act or immediately before it began the defendant threatened the victim with a firearm or other deadly weapon.

(b) The maximum sentence for first-degree rape shall be life imprisonment, and for the purposes of bail it shall be treated as capital offenses under section 13.1.1; Capital Offenses of the Criminal Procedure Law.

(c) Rape is a second-degree felony where the conditions set out in section 4(a) (i)-(iv) above are not met. The maximum sentence for second-degree rape shall be ten (10) years imprisonment.

5. Other Miscellaneous Provision

(a)The trial of all cases under section 14.70 shall be heard in Camera.

(b) Section 14.78 (3) and 14.78(4) of the New Panel Code are hereby repealed.

ANY LAW TO THE CONTRARY NOTWITHSTANDING.

The Appellant, Musa Solomon Fallah (Defendant below) was indicted during the February, A.D. 2006 term of the First Judicial Circuit Court, Criminal Assizes "A" Montserrado County for the crime of rape. The Indictment under which he was arrested alleged that the Appellant had sexual intercourse with one Ruth David, a nine-year old girl by penetrating her vagina with his penis which caused her to bleed profusely. Upon arraignment, the indictment was read to the Appellant who entered a plea of not guilty. He, at the same time, informed the trial court that he had no

money to hire a lawyer of his choice. A situation of *informa pauperis* having been presented by the Appellant with no objection from the State, the Court appointed Counsellor Elijah Y. Cheapoo, Defense Counsel, to represent the Appellant. This is consistent with Chapter 2, 1 LCLR, Section 2.2(4), Criminal Procedure Law, *Appointment of Defense Counsel for those financially unable to retain legal counsel* which provides: *"In all cases where the crimes charged are triable only in the Circuit Court, at any time when an accused advises that he is financially unable to retain legal counsel and that he desires to have legal counsel assigned to represent him, as soon after his request as practicable, he shall be brought before the court then having jurisdiction over him to decide whether the county Defense Counsel shall be assigned to represent him. If the court is satisfied after appropriate inquiry that the accused is financially unable to retain legal counsel, it shall assign the county Defense Counsel to represent him, and the accused shall be allowed reasonable time and opportunity to consult privately with such counsel before any further proceedings are held. Counsel so assigned shall serve without cost to the accused and he shall have free access to the accused, in private, at all reasonable hours while acting as legal counsel for him. The assignment of Defense Counsel shall not deprive the accused of the right to engage other legal counsel in substitution at any stage of the proceedings."*

On May 17, 2006, when the case was called, the Appellant waived jury trial. On the same day, the trial judge, His Honour James W. Zotaa, after being notified, acknowledged that there was on the case file, a motion to dismiss the indictment. In the motion to dismiss, the Appellant prayed court to dismiss the case because, according to him, the new rape law was unconstitutional. The trial judge however, ordered that the trial be proceeded with and that he would address himself to the motion to dismiss the indictment later during the trial. The Appellant's Counsel excepted to the order of the trial judge deferring the motion to dismiss the indictment to a later date; he contended that his motion to dismiss the indictment should have been heard, as a matter of law, before trial.

At the conclusion of evidence by both sides, the court sitting without jury found Appellant guilty of rape. Concerning the Appellant' s contention that the rape act was unconstitutional as raised in the motion to dismiss indictment which the trial judge had deferred, he ruled that constitutional issues are for the Supreme Court to decide; that the trial court lacks authority to declare an act of the legislature unconstitutional. However, the trial court reduced the charge from first degree felony to second degree felony and sentenced the Appellant to seven (7) years imprisonment. Both the State, as well as the Appellant, excepted to the judgment; the Appellant announced an appeal to the Supreme Court, while the State chose to file a motion for the trial court to rescind the aspect of its ruling sentencing the Appellant to seven (7) years instead

of life imprisonment. We quote the four-count motion to rescind filed by the State as follows:

"MOVANT'S MOTION
"Movant in the above entitled cause of action most respectfully prays Court and Your Honor to rescind Your Honor's Ruling into these proceedings for the following legal and factual reasons showeth, to wit:-

"1. And also because Movants says that under Chapter 14 Section 14.70 and 14.71 of the New Penal Code of Liberia for Rape and Gang Rape, approved December 29, A.D. 2005, published by authority, Ministry of Foreign Affairs, January 17, 2006, Rape is a felony of the First Degree where the victim was or is less than 18 years of age at the time the offense was committed, and that the maximum sentence for first degree rape shall be life imprisonment."

"2. Further above, Movant contends and says that in Your Honour's Ruling, you averred that the case revealed that the Private Prosecutrix was raped by the Defendant but the circumstances surrounding the Rape made it a second degree Rape therefore, the Respondent was sentenced to seven years imprisonment in contravention of the Statute."

"3. And also because Movant says that you inadvertently overlooked the law controlling when you said in your Ruling "wherefore and in view of the foregoing, the evidence adduced by the Prosecution revealed that the Defendant was linked with the commission of the crime of RAPE, but the circumstances surrounding the rape made it a second degree Rape therefore, the Respondent was sentenced for Rape of the second degree."

"4. Movant further contends that Your Honour also inadvertently overlooked the fact that the Private Prosecutrix is nine (9) years old, thus making the rape first degree felony."

WHREFORE, and in view of the foregoing, Movant prays Court and Your Honour to rescind Your Honour's Ruling sentencing the Defendant to seven (7) years imprisonment. Movant prays Your Honour that the Defendant be sentenced to life imprisonment as in keeping with the New Rape Law of Liberia."

The Appellant was permitted by the trial Court to spread his resistance to the motion to rescind, and his resistance was essentially that the trial court lacked jurisdiction to hear and determine the motion because the court having entered final judgment adjudging the Appellant guilty, exceptions having been noted by both the Appellant and the Appellee, an appeal having been announced by the Appellant to the Supreme Court and an approved bill of exceptions having been filed, the lower court had lost

jurisdiction over the case and therefore should not hear and determine the motion to rescind.

The trial court denied the Appellant' s resistance and granted the motion to rescind, modifying his previous ruling in which the Appellant was sentenced to seven (7) years imprisonment. We quote excerpt from the ruling on the motion to rescind:

"....This Court says that it has serious problem as to the constitutionality of the rape bill, but this court has no authority to pass on the said constitutional issue. Courts do not legislate laws, but follow and interpret the plain meaning of statute. The new rape statute provides for life imprisonment if the defendant is found guilty and if the victim is less than sixteen (16) years old and the defendant is above 18 years old. Again, this Court says that it has serious problem with the rape bill, but because the law provides for life imprisonment, this court, without considering any form of pressure and by its own judicial thinking hereby rescinds the judgment sentencing Musa Solomon Fallah to 7 years imprisonment to life imprisonment. The judgment now is that the defendant is guilty and is to serve life imprisonment. And it is hereby so ordered...."

The Appellant noted exception to the ruling and filed a four-count bill of exceptions. We quote Counts one and two of the bill of exceptions which we consider relevant to the determination of this case:

"1. That Your Honour erred, when you entertained the Prosecution's Motion to rescind your first ruling in this case and you did illegally rescind said first ruling, when in fact you were out of jurisdiction to do so."

"2. And also Your Honour erred, when you rescinded your previous ruling and illegally ruled and sentenced the Appellant to life imprisonment when in deed and in truth the rape act you relied on contravenes the 1986 Liberian Constitution."

Subsequently, the Appellant filed a brief in which he raised the same contentions contained in his bill of exceptions. During argument before this court, the Appellant contended that the trial judge contradicted himself by ruling that he had serious problem with the constitutionality of the rape bill and at the same time used the same rape law to convict and sentence the Appellant. The Appellant's position is that once the trial judge found that he had problem with the constitutionality of the rape law, he should not have used the same law to convict the Appellant. The Appellant also contended that the evidence in the case was not sufficient to warrant the conviction of the Appellant, in that, the testimonies of the prosecution witnesses varied; that the

indictment claimed that the alleged victim was 9 years old, but at the trial prosecution did not prove the alleged age of the victim.

The Appellant also further contended that when a bill of exception is approved and filed, the trial court loses jurisdiction over a case and cannot entertain any other and further proceeding concerning the same matter. The Appellant maintained that under Section 4,(b) of the rape act of 2005, rape is treated as capital offense and not bailable. According to the Appellant this is inconsistent with Article 21(d), of the Liberian Constitution (1986).

The Appellee counter argued that the State established prima facie evidence in the Court below. The Appellee further argued that by entertaining the motion to rescind, the trial judge committed no error because the law is that courts can rescind their own judgments in term time. The Appellee also further argued that the trial judge committed no error by not ruling on the motion to dismiss the indictment before the commencement of trial.

Having considered the positions, arguments, and contentions of the parties, the relevant issues for the determination of this case are:

1. Whether or not the trial judge committed error by not passing on the motion to dismiss the indictment filed by the Appellant before proceeding further with the trial?

2. Whether or not the announcement of an appeal and the subsequent filing of an approved bill of exceptions, barred the trial court from entertaining and passing on the motion to rescind filed in this case?

3. Whether the Rape Act of 2005 is repugnant to, and inconsistent with Article 21(d) of the Liberia Constitution and therefore unconstitutional?

4. Whether or not the State produced prima facie evidence to warrant the conviction of the Appellant?

5. Whether or not the Appellant, who pled *informa pauperis* and was therefore assigned Defense Counsel to represent him, received adequate legal representation to warrant the affirmation of the guilty judgment passed upon him by the lower court.

We shall decide the issues in the order presented. On the issue of whether or not the trial Judge committed error by not passing on the motion to dismiss the indictment

before proceeding further with the trial of the case, we hold that the trial Judge committed no error. While it is true that pretrial motions are generally heard and determined before the main case is proceeded with, our *Criminal Procedure Law*, 1 LCLR, Section 16.7 (4) empowers the trial Judge to defer the determination of a motion to dismiss an indictment. It states:

"A motion to dismiss made before trial raising defenses or objections shall be determined before trial unless, the court orders that it be deferred to determination at the trial of the general issue....." [Emphasis Supplied].

The trial judge elected to defer the determination of the motion to dismiss the indictment; the discretion is given him by the above quoted statute. He was therefore not without the pale of the law by doing what he did. And we note that while making his final ruling, in other words at the time of the trial of the general issue, the trial Judge passed on the substance of the motion to dismiss the indictment. He held that the constitutionality of all statutes is passed upon by the Supreme Court and not the lower court; that the motion to dismiss the indictment having challenged the constitutionality of the new rape law, it is the Supreme Court and not the lower court that should pass on this issue. We agree with the action of the trial judge deferring the determination of the motion to dismiss indictment. We also agree with him on the substance of his ruling on the issue raised in the motion to dismiss the indictment.

The second issue is whether or not the announcement of an appeal and the subsequent filing of approved bill of exceptions barred the trial court from entertaining and determining the motion to rescind filed in this case.

In: Raymond International (Liberia) Ltd. Vs. Dennis 25 LLR 131, 142 (1976), this Court held that a judge is permitted under both statutory and common laws to modify or rescind any ruling or judgment he renders in the term in which he is sitting, but this must be done properly, that is, upon notice duly served on the parties to the litigation.

In the case before us, the records show that the motion to rescind was duly served on the Appellant. Moreover, we observe that the motion to rescind was filed on June 14, 2006 while the Appellant's bill of exceptions was filed on June 22, 2006. This means that the motion to rescind was filed more than one week before the filing of the bill of exceptions. To accept the Appellant's argument that because a bill of exceptions was filed, so the motion to rescind should not have been entertained would mean that the Court below should have turned blind eyes to the Appellant' s motion to

rescind which was filed and served long before the filing of the bill of exceptions. This, in our view, would have amounted to the denial of the prosecution's right to be heard. Courts are masters of their own records and where some pertinent matter of facts or laws which have been inadvertently omitted and which, when considered, would affect the judgment are brought to their attention, they are bound to consider them. It was not wrong, therefore, for the trial judge to have entertained the motion to rescind.

Concerning the third issue whether or not the rape act of 2005 is repugnant to, and inconsistent with Article 21(d) of the Liberian Constitution (1986) and therefore unconstitutional — we hold that the rape act of 2005 is not inconsistent with Article 21(d) of the Constitution. Article 21(d) of the Constitution provides:

"All accused persons shall be bailable upon their personal recognizance or by sufficient sureties, depending upon the gravity of the charge, unless charged for capital offenses or grave offenses as defined by law". (Emphasis supplied).

And Section 4(d) of the Rape Act states:

"The maximum sentence for first-degree rape shall be life imprisonment, And for the purposes of bail it shall be treated as per capital offenses under section 13.1.1; Capital Offenses of the Criminal Procedure Law."

We do not see how the rape act quoted above is in conflict with Article 21(d) of the Constitution also quoted above. In order to provide sterner penalty for violators of the law on rape, the Legislature decided to treat certain acts of rape as "grave offenses" and for purposes of bail, treat them in keeping with Section 13.1.1; Capital Offenses of the Criminal Procedure Law. The Legislature has the inherent power given to it by the Constitution to "...establish various categories of criminal offenses and provide for the punishment thereof..."Article *34(j) Liberian Constitution (1986).* That the legislature in its wisdom decided to make certain acts under the rape law felony of the first degree and provide that for such acts the accused shall not be admitted to bail does not make the section of the rape law unconstitutional. While Article 21(d) of the Constitution guarantees the right of bail to all accused persons upon their personal recognizance or by sufficient sureties, that right is not absolute. As the very Article 21(d) spells out, that right depends on the gravity of the offenses charged. In other words, some offenses are bailable while some are not bailable, and the determination is largely left to the legislature to make.

Besides, this Court has always treated the matter of declaring an act of the Legislature with caution and had often refused to declare an act of the Legislature unconstitutional unless its invalidity is clear beyond doubt.

In this case: *Bryant vs. Republic, 6 LLR, 128, text at 136 — 7, (1937),* Mr. Justice Tubman, speaking on similar issue of declaring an act of the Legislature on constitutional said the following:

"... while it is an axiomatic principle of the American system of constitutional law which has been incorporated into the body of our law that the courts have inherent authority to determine whether statutes enacted by the legislature transcend the limits imposed by the Constitution and to determine whether such laws are not constitutional, courts in exercising this authority should give the most careful considerations to questions involving the interpretation and application of the constitutional questions with great deliberations, exercising their power in this respect with the greatest possible caution and even reluctance, and they should never declare a statute void unless its invalidity is, in their judgment, beyond a reasonable doubt; and it has been held that o justify a court in pronouncing a legislative act unconstitutional the act must be so clear as to be free from doubt, and the conflict of the statute with the constitution must be irreconcilable, because it is a decent respect to the wisdom, integrity, and the patriotism of the legislative body by which all laws are passed to presume in favor of its validity until the contrary is shown beyond reasonable doubt. Therefore, in no doubtful case will the judiciary pronounce a legislative act to be contrary to the constitution. To doubt the constitutionality of a law is to resolve the doubt in favor of its validity."

The fourth issue is whether or not the state established a prima facie evidence to warrant the conviction of the Appellant. Prima facie evidence, is [e]vidence good and sufficient on its face; such evidence as in the judgment of the law is sufficient to establish a given fact or the group or chain of facts constituting the parity's claim or defense, and which if not rebutted or contradicted, will remain sufficient.

This Court, in Republic vs Chakpadeh, 35 LLR, 715, 723 (1988) held that prima-facie evidence as "evidence sufficient to establish the fact unless rebutted. Let us now see whether the prosecution in this case produced such evidence that meets the standard equated with prima-facie evidence as defined by law.

During trial, four witnesses testified for the prosecution. The first witness to testify was Ruth David, the alleged nine-year old victim. But before she could take the stand, the Appellant's Counsel objected to her testifying on the ground that she was not of required age under the law. On this point Section 25.18(2) of 1 LCLR, Civil Procedure Law which is also applicable in criminal cases provide:

"2. Incompetency through defect of understanding. A person is disqualified to be a witness if the judge finds that the proposed person is incapable of understanding the duty of a witness to tell the truth. The incompetence of a witness by reason of defect of understanding must be proved by examination before the court. It shall be the duty of the court to examine all children under twelve years of age before administering the oath or affirmation to them.

Because Ruth David was alleged to be nine years old and therefore under the required age of twelve, she was examined by the Court and the Court was satisfied that she could testify in this case.

She took the stand and testified that the Appellant carried her in his room, locked the door and took off her underclothes (panties), "choked" her and put `his thing' in her. The witness further told court that Appellant later opened his door and told her to go outside and not to tell her mother; but she said that she told her mother the same night the incident occurred. While answering question on the cross-examination, the witness said that the incident took place at night at the Appellant's house; that she was crying and that she was taken to the Red Light Hospital after the incident. (See Sheet 5, Wednesday, May 17, 2006, 8th Day's Jury Sitting).

The second witness for the prosecution was Ruth David's mother, Madam Naomi David who testified that sometime in March 2006, her daughter went to play with Tata, Appellant's daughter at about 6:00 p.m.; that later on that evening her daughter came to her and told her that Tata' s father has done something to her; that she asked her daughter "What did he do to you?" And her daughter asked her "If I explain will you beat me?" And she said no. The witness further told the court that her daughter told her that the defendant held her neck and took off her panties and put his penis inside her. The witness also testified that, she rushed her daughter to the Clara Town Clinic where she was advised to first take her to the Police; she said she took her daughter to the Police and the Police instructed her to go to the Benson Hospital, where her daughter was examined. According to the witness, her daughter was bleeding from the vagina so she asked the doctor at the Benson Hospital whether he could tell her the result of the examination and the doctor told her that her daughter has been damaged; that two veins in her daughter's vagina were damaged. The witness testified further that the Appellant, Musa Solomon Fallah, and his people went to beg her and gave Five Hundred Liberian Dollars (L$500.00) to assist her treat her daughter and that because she is poor, she took the money to treat her daughter. Later, according to the witness, the Appellant and his relatives went to her again, this time to give Four Thousand Liberian Dollars (L$4,000.00) so that she can forget

about the case and she refused to accept the money. The witness further testified that she was directed to go to the Female Lawyers Association (AFEL) for assistance. (See Sheets 15 and 16, Friday, May 19, 2006, 10 th Day's Sitting).

The third witness who testified for the prosecution was Miss Marayah Fyneah, Executive Director for Liberia Shelter for Abused Children and Women in Paynesville. She said that on March 29, 2006, Miss Naomi David went to their office with her daughter, Ruth David, and explained that her daughter had been raped and is still suffering from infection in her vagina. The witness said that her organization conducted medical check on the little girl and found out that she was very sick; that since her organization caters to abused women and children, Ruth was taken to the shelter to undergo trauma counseling and daily medical care because of the seriousness of her case and that according to the nurse attached to the shelter, Ruth might not have a child when she is of age. (See Sheets 2 and 3, Wednesday, May 24, 2006, 31 st Day's Sitting).

The fourth and last witness was Dr. Uday Iaj Naidu who said he worked for MSF Swiss and Spain as Medical Coordinator. He testified that Ruth reported at the Benson Hospital and said that she was raped; that the Hospital conducted examination on her and found out that two of her veins in her vagina were broken. The doctor testified to, and confirmed the medical certificate issued by another doctor at the same Hospital. (See Sheets 5 and 6, Tuesday, May 30, 2006, 19th Day's Sitting).

The testimonies of witnesses brought by the prosecution seem to have fairly established prima facie evidence against the Appellant which, if the Appellant did not repel or overcome by good and sufficient testimonies of his own, could be sufficient to convict him.

We take particular note of the testimony of Naomi Davies, Ruth's mother, who testified among other things that the Appellant, Musa Solomon Fallah and his relatives first gave her Five Hundred Liberian Dollars (L$500.00) to assist with the treatment of Ruth. She further said that Appellant and his relatives later carried Four Thousand Liberian Dollars (L$4,000.00) to beg her so that she will forget about the case, which money she said she refused. The question that arises is why would the Appellant and his relatives, as alleged by the testimony of Naomi Davies, give money to the victim's mother, begging her to forget about the case if the Appellant did not commit the crime of rape against Ruth Davies.

When the Appellant took the witness stand in his own defense, he testified that Ruth's mother is his sister-in-law and that Ruth on many occasions went to his house to play with his daughter and sometime slept there; that one day Ruth went to play with his daughter and remained until late; that he took Ruth to her house but according to him, Ruth's mother said that Ruth should sleep at his house until the next morning, so he took Ruth back to his house. The Appellant further stated that Ruth and his daughter slept together on a mat on the floor in the same room and the next day, which was Friday, Ruth's mother informed him soon in the morning that she was going to the Red Light, so, she asked that Ruth remains at his place and she would carry Ruth's clothes to his house, since "school was opening on Monday". But according to the Appellant, he told Ruth to go home and return in the evening, since her mother was going to the Red Light and Ruth left and he also left for work. According to the Appellant, this was on a Friday. He said that on Saturday he went to work and when he returned in the evening he heard that Ruth's mother was looking for him; that the next day, Sunday, while at work, Ruth's mother went to his job site with two men and accused him of rape; that he went along with them to the Police Station where he was arrested and detained. (See Sheets 2 and 3, Thursday, June 1, 2006, 21 st Day's Sitting).

We are surprised that the Appellant said nothing about the damning and incriminating allegation that he and his relatives took money to beg the victim's mother for her to forget about the case. And we are even more surprised that the Defense Counsel assigned to the Appellant did not pose any question to him on the direct examination as a "refresher" for the Appellant to comment on the serious allegation that he and relatives gave money to the victim's mother so that she would forget about the case. Our law recognizes that a party who produces a witness has a right to elicit by questions, any fact which the witness omitted in his/her general statement before the cross examination by the other party. Cummings vs. Republic, 4 LLR, 16, text at 24 (1934).

Two other witnesses, Madam Grace Toe and Madam Annie Galah testified for Appellant, but their testimonies did not say anything in the direction of the Appellant. In other words, their testimonies did nothing to aid the Appellant. Madam Grace Toe's testimony was essentially that she and the Appellant are tenants in the same house; that one Friday morning, Ruth's mother, Naomi went to the Appellant's house to get Ruth who had slept there over night to go to school; that the Appellant told Naomi that he was warming food for Ruth to eat before leaving.

As for Annie Galah she only said that the Appelikant is a tenant in her mother's house and that he usually leaves the huse early in the morning and goes to bed very late.

Under our statute, "All evidence must be relevant to the issue; that is, it must have a tendency to establish the truth or falsehood of the allegations or denials of the parties...." Section 25.4 1LCL Revised, Civil Procedure Law. We wonder how and why these two ladies were selected to testify for the appellant in this case when their testimonies have no direct bearing on the cause. Were they selected by the Appellant or in consultation with him? Probably not. And how the Appellant and his counsel expected to get bye without addressing the serious allegation of giving money to the victim's mother for her to forget the case? The answers to these questions suggest that the Appellant did not receive adequate legal representation during the trial.

In fact, our perusal of the case file shows that Counsellor Elijah Y. Cheapoo, Defense Counsel for Montserrado County, who was assigned to represent the Appellant was not even in court when the Appellant and his witnesses testified. According to the minutes of court, 21 st day's jury sitting, Thursday, June 1, 2006, at the call of the case and after the State had announced representation, the trial judge said the following:

"The representation [of the state] as announced is granted. The court says that one of the defense counsel in person of Cllr. Elijah Cheapoo was in court yesterday when this case was re-assigned for today, June 1, A.D. 2006 at 11: O'clock. The said defense counsel is not in court, but this court observes the presence of another defense counsel of the Republic of Liberia ... in person of Cllr. Emmanuel M. Mabande. Cllr. Mabande will therefore continue to sit in for his colleague Cllr. Cheapoo and it is hereby so ordered."

Counsellor Mabande accepted his appointment to act for Counsellor Cheapoo who was absent and immediately after his appointment requested Court for the qualification of the Appellant. Musa Solomon Fallah, Grace Toe and Annie Galah who testified, on the same day, were cross-examined and discharged.

We do not understand why the trial judge chose to appoint Counsellor Mabande to handle this crucial matter and at the crucial time when the Appellant and his witnesses were giving testimonies. We see no indication from the certified records before us that prior to his appointment Counsellor Mabande had participated in this case and was therefore fully aucourant with the case. In deed, Counsellor Mabande was not a counsel of record, for if he had been, he would not have been appointed by court; rather, at the call of the case, he would have announced representation for the

Appellant. So, what was the reason for appointing a lawyer who was a total stranger to the Appellant's case? To our mind, the proper thing was to have suspended the matter, cited Counsellor Cheapoo and reprimanded him for failing to attend upon the Appellant's cause when he had notice to do so.

Alternatively, having appointed Counsellor Mabande to represent the Appellant when the trial judge knew or ought to have known that he was not one of counsel in the case, reasonable time should have been given to the Counsellor to consult privately with the Appellant, study and familiarize himself with the case before any further proceedings are had, in keeping with *Chapter2, 1 LCLR, Section 2.2(4), Criminal Procedure Law*. But this was not done. Under the circumstance, it is clear that Counsellor Mabande was not in the position to provide adequate and competent representation to the Appellant as the law requires, and this, no doubt, affected the Appellant's trial. In our opinion, the lack of adequate legal representation for the Appellant deprives us of knowing whether or not the Appellant has any evidence of his own to rebut, repel or contradict the evidence of the State.

This Court has held that: *"where a criminal proceeding is conducted* informa pauperis, *and counsel is assigned by the court to represent that defendant, the court should assign the most competent available counsel particularly in cases of capital offenses".* Quai vs. Republic 12 LLR 402 text at 404 (1957). The crime with which the Appellant has been charged carries a sentence of life imprisonment, a gave situation which requires nothing but adequate and competent legal representation. And this Court has also held that when a trial judge commits flagrant errors in the trial of a cause, to the prejudice of a party, the Court will reverse the judgment and award a new trial. Yancy & Delaney vs. Republic, 4 LLR, text at 5 1933).

Before concluding this matter, we must comment on the statement in the trial court's ruling on the motion to rescind. The trial judge, His Honour James W. Zotaa stated repeatedly that he has serious problem with the constitutionality of the rape bill. We hold that this statement is reckless and totally out of place. Having correctly stated in the same ruling on the motion to rescind that the trial court has no authority to decide whether or not a statute was unconstitutional, it was improper for him to have stated what can only be his personal view about the rape statute. Indeed, it is only the Supreme Court that is, pursuant to its power of judicial review, empowered to declare any inconsistent laws unconstitutional and not any lower court.

Not only do we disapprove of the utterances made by the trial judge in this case, as indicated above, we also disapprove of his final ruling adjudging the Appellant guilty

of rape for reason of gross inadequate legal representation by the Defense Counsel to which the trial judge himself contributed. The judgment of the lower court which found the Appellant guilty is therefore set aside, reversed and the case remanded for new trial. AND IT IS HERBEBY ORDERED.

JUDGMENT REVERSED, CASE REMANDED.