Musa Solomon Fallah APPELLANT / DEFENDANT VERSUS Republic of Liberia APPELLEE / PLAINTIFF

APPEAL FROM THE CRIMINAL COURT "E", MONTSERRADO COUNTY, REPUBLIC OF LIBERIA.

LRSC 13

Heard: Resubmitted March 28, 2011 Decided: July 21, 2011
MR. JUSTICE JA'NEH DELIVERED THE OPINION OF THE COURT.

Musa Solomon Fallah, the Appellant in these appeal proceedings, was tried and convicted in 2006 for raping a nine year old girl, referred to in this case as "X.R." Said trial was conducted at Criminal Court "A" during its February 2006 Term with His Honor, James W. Zotaa Jr., presiding. Subsequently, Criminal Court 'E' granted exclusive jurisdiction over sexual offences, was created.

During appellate review of this case in 2007, the Supreme Court of Liberia overturned the conviction and ordered a *trial de novo.* The Supreme Court reasoned that Appellant did not receive adequate representation at the trial. The Supreme Court said the lack of adequate legal representation

"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."

In an Opinion by Mr. Justice Korkpor, Sr., handed down on August 9, 2007, this Court commented on representation, observing as follows: *"...having appointed Counselor 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 Counselor to consult privately with the appellant, study and familiarize himself with the case before any further proceedings are had, in keeping with Chapter 2, 1 LCLR, Section 2.2 (4), Criminal Procedure Law. But this was not done. Under the circumstance, it is clear that Counselor 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."

By remanding the case for new trial, this Court was reaffirming its long established principle enunciated in a plethora of cases, including *Quai vs. Republic,* 12 LLR 402, 404 (1957). In *Quai,* the Supreme Court held that *"where a criminal proceeding is conducted in forma 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."* [Emphasis supplied].

Pursuant to the August 9, 2007 Supreme Court's Mandate, a trial *de novo* commenced at the Criminal Court "E", the new Sexual Offences Court, during its February 2009 Term with Her Honor, Ceaneh D. Clinton-Johnson, presiding. At the conclusion of the new trial on July 1, 2009, conducted in camera, the petit jury again returned a unanimous verdict of guilty against Appellant Fallah. Judge Clinton-Johnson in her final judgment affirmed the verdict, convicted Appellant Solomon Musa Fallah of first degree rape and sentenced him to life imprisonment. Appellant has again appealed to this Court.

We deem it appropriate to remark here that the intent of in camera testimony is to protect the identity of a sex abused victim. The procedure seeks to remove both the actual and psychological fears associated with a child abuse victim facing an alleged perpetrator. The applicable law authorizes the trial court to conduct trials 'in camera' when *'required by the State and where the court determines that the victim or a witness warrants protection.'* The in camera testimony is also intended to remove the grave prospects of easy identification with the risk of making the victim a community stigma and a subject of public scandal. The law in vogue also imposes a duty on Liberian courts to act by removing the names of sex victims from the minutes of court to ensure strict confidentiality and non recognition of the victim.

Consistent with the object of the law, we have therefore assigned a pseudo name "X. R." to the sex victim in these appeal proceedings. For the purpose of protecting the identity of a sex victim, our laws require that courts make them literally unidentifiable. To achieve this objective, Liberian courts have the authority to keep, preserve and maintain strictly confidential the name of sex abused victims. Accordingly, a victim's

name shall not be a subject of public information and knowledge. Chapter 25.3(e) of the Judiciary Law, providing for the establishment of Criminal Court "E" states as follows:

"The Court shall have authority to prohibit the publication of the names and addresses of rape victims and/or expunging of their names from the public records, as necessary for their protection and the prosecution of the offenders."

Inspection of the records certified to this Court reveals that Musa Solomon Fallah was arrested in early March 2006. His arrest was consequent upon the allegation that Appellant committed the heinous crime of raping a nine (9) year old child, 'X R'. The Grand Jury, sitting during the February A. D. 2006 Term of the First Judicial Circuit for Montserrado County, upon its finding, indicted Appellant Fallah and charged him with rape in violation of chapter 14, section 14.70 of the New Penal Law of Liberia.

Section 14.70 of the Penal Code (2006) provides,

"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) substantially without the victim's consent;

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

The indictment substantially alleged that on the 11 th day of March 2006, in the City of Monrovia, Montserrado County, Republic of Liberia, the Appellant without the fear of the statutory laws, with criminal and wicked intent compelled, forced, and grabbed the private prosecutrix, 'X. R.', nine years of age, and criminally and wickedly *"did rape and have devious sexual intercourse with the minor child when he used his penis into the vagina of Minor "X. R." and as a result, she bled profusely; thereby the crime of rape the said defendant did*

do and commit...."

Appellant vigorously challenges his conviction and sets forth seventeen (17) assignments of error against the final judgment. Specifically attracting our consideration is Appellant's assignment of alleged errors to in camera testimony of a child abuse witness in light of the Confrontation Clause contained in the Liberian Constitution, the use of prior testimony in the trial de novo, and insufficient evidence.

These alleged errors are contained in counts 1, 2 and 4, as well as 14 and 16 of Appellant's Bill of Exceptions.

In count one, Appellant argues as set forth:

1. That Your Honor erred when on May 19, 2010, you denied the appellant's objection to the qualification of prosecution's 2nd witness as found on sheet two (2), [and when] you granted the application of prosecution to have the alleged victim testify in camera which was clearly in violation of the 1986 Liberian Constitution; [For said provision essentially] states that an accused person shall have the right to confront his accusers; to which ruling defense excepted and same was noted.'

As set forth above, Appellant's contention appears to present our first question as stated:

Does Section 25.3(c) of the Act creating Criminal Court 'E' permitting 'in camera' deposition, violate the constitutional right of confrontation guaranteed to the accused in all criminal cases?

Certified records to us show that at the 84 th Day's Jury Sitting on the 21 st day of May, 2009, Prosecution requested the court to qualify its second witness, 'X. R.' It appears that the alleged victimwitness was taken to a specially designed room with electronic communication equipment which allows those in the courtroom to see the witness testifying but without physical contact. Defense strongly objected to the witness testifying outside the usual stand within the courtroom. The court overruled the defense objection, prompting Counselor Elijah Y. Cheapoo to make the following submission:

`Defense counsel says that they can hear clearly from the room the voices that are coming from there; but they cannot identify [any of] those voices to be that of 9C.R.'s or not. Further, the video posted in the court room shows three objects and the defendant cannot identify `X.R' among those objects. This is our dissatisfaction with the manner of the defendant not being able to confront 9C.R.' who accused him....'

Further objecting, the defense said: *'In view of the above, and until the constitutional right of the defendant to confront the accused is met, the so-called X R. who is in darkness, cannot be qualified....'*

In light of defense objection, the trial court ruled:

"In view of the submission just made by defense, the technicians are hereby instructed to ensure that XR. ' is clearly visible on the cctv [closed-circuit television]. The clerk will now go ahead for the qualification of the witness; and [it is] so ordered."

The trial judge noted but overruled the defense objection to the in-camera testimony by the witness. The judge indicated that defense should know that the issue of 'in camera' testimony has been settled by the Supreme Court of Liberia. The learned judge nevertheless neglected to cite the case in reference. However, the witness thereafter testified in camera.

How be it, this Court takes judicial cognizance of the Act establishing Criminal Court 'E', which, it appears, the trial judge relied upon. Section 25.3(c) of said Act provides:

"Except for cases of rape, which under Section 14.70 of the Penal Law are required to be held in camera, the trial of Sexual Offense cases may be held in camera where the alleged victim is under 18 years of age and the protection of the victim warrants an in camera trial; provided that other sexual offense trials may be held in camera where required by the State and where the court determines that the victim or a witness warrants protection."

On appeal, defense has strongly attacked the 'in camera' testimony citing Article 21 (h)

of the Liberian Constitution (1986), requiring in relevant part that:

".....In all criminal cases, the accused shall have the right...to confront witnesses against him..."

Defense therefore urges this Court to declare the in camera testimony made in the case under review as an incisive violation of the Appellant's right contemplated under the Liberian Constitution to confront his accuser.

In 1960, Mr. Justice Pierre speaking for this Court in *Kaifa v. Republic* 14 LLR 17, 21-22 (1960), commented on Section Seventh (7th) under Article 1 of the Liberian Constitution of 1847 (amended through 1972), a passage similar in content and expression to the provision of the current Constitution quoted above. Firstly, the 1847 provision as referenced reads: *".....every person criminally charged, shall have a right to be.... confronted with witnesses against him...."*

Elucidating these constitutional rights in *Kaifa,* this Court said: *"...Under [the] terms of the Constitution, persons held for capital offenses... have a right to be confronted with the witnesses who will testify for the State against them..."*

Elaborating further and simultaneously issuing a stern admonition to preserve these constitutional guarantees, the Supreme Court again emphasized that: *'All of these safeguards are guaranteed by the basic law to insure protection of the rights and privileges of citizens; and when any of the several of these enumerated rights is infringed, the victim of such infringement suffers as grievous a wrong as the founders of this Nation suffered in the land wherein they were denied these basic human rights.'* [Emphasis supplied].

Violation of the constitutional right of confrontation as alleged in the assignment of errors is a question of first impression. Our jurisprudence, including the cases referenced herein, has spoken broadly and not with specificity to the constitutional right of the accused to confront his or her accusers; *Saar v. Republic,* 29 LLR 35, 44 (1981). It would appear that questions as to the material elements the accused must be accorded at all times in the proper exercise of his or her constitutional right to 'confront' his or her accuser, and where not observed, said right would be deemed

violated, is a question of first instance. Hence this Court could not address any such questions being under a duty to obey settled rule and principle controlling.

Unable under these circumstances to discover a case in our jurisdiction which adequately addresses the essentials of confrontation, we will look to common law jurisdictions, consistent with the reception statute as well as with practice and procedure.

There is support for this reliance on other common law jurisdictions in a litany of Opinions handed down by this Court. It is the rule of general application in our jurisdiction that unless expressly contrary by the laws in vogue, common law and usages of the courts of England and of the United States, other authoritative treaties, principles and rules set forth in case law and in Blackstone and Kent Commentaries, when applicable, are deemed as Liberian Laws; *The Liberia Trading and Development Bank (TRADEVCO) v. Mathies et. al,* 39 LLR 637, 640-1 (1999).

Exploring the confrontation question along this line, we have examined two United States Supreme Court cases: *Coy v. Iowa,* 487 U.S. 1012 (1988) by Mr. Justice Scalia and more recently by Madam Justice O'Connor: *Maryland v. Craig* (497 U.S. 836 (1999). We find these two cases on the question of Confrontation.

In *Coy,* the Appellant was arrested in 1985 and indicted for sexually assaulting two 13-year- old girls. The victims testified that while they were asleep, the Appellant entered their camping tent which was placed in the backyard of the house next door to Appellant's residence.

Pursuant to an Iowa State Statute (Act of May 23, 1985, Section 6, 1985 Iowa Acts 338, codified at Iowa Code Section 910A. 14 (1987), Prosecution for the State of Iowa moved the court at the commencement of the trial to permit private prosecutrixes to testify either via closed-circuit television or behind a screen. Granting the application, the court permitted placement of a large screen between the appellant and the witness stand. The result was that while the screen enabled the accused to see the witnesses, to the contrary, victim witnesses could not see the accused at all. The child witness and

both the prosecution and defense counsels would withdraw to a separate room; while the judge, the jury and the defendant remain in the courtroom. The child witness, seated in the separate room, would then be examined and cross-examined. The procedure also ensures that a video monitor records and transmits the child witness' testimony to those in the courtroom including the defendant. The defendant remains in electronic communication with his or her lawyer throughout the deposition. Also during the exercise, all objections raised would be ruled on by the judge as if the witness were in open courtroom. The defendant was subsequently convicted.

On appeal before the State of Iowa Supreme Court in 1986, Appellant's conviction was affirmed. The State Supreme Court reasoned that the ability of the accused to cross-examine witnesses having not been impaired, use of the procedure did not constitute violation of the Confrontation Clause. On the due process argument, the Iowa Supreme Court held that the procedure permitted by the State Statute was not inherently prejudicial and therefore did not violate the principle of due process.

But appellant caused the case to be moved to the U.S. Supreme Court. He principally contended that the procedure violated his Sixth Amendment right to confrontation which he claims clearly grants criminal defendants what the accused termed *'a right to face-to-face confrontation.'* He argued that the procedure defeats the presumption of innocence as it tended to make him to appear guilty. Appellant's claim that the procedure violated his right to due process was also raised before the U.S. Supreme Court.

Two years later in 1988, the Highest Court of the United States reversed the Iowa Supreme Court. In a majority Opinion by Mr. Justice Scalia, the U.S. Supreme Court held that no "individualized findings" having been made during the trial evidencing that the particular witnesses *'required special protection',* appellant's constitutional right *'to face-to-face confrontation'* was violated.[Our Emphasis].

Also two years later in 1990, the U.S. Supreme Court in *Maryland v. Craiji,* granted a petition for a Writ of Certiorari in favor of the State of Maryland. In its petition, the State had urged the U. S. Supreme Court to review and vacate the ruling entered by the

Court of Appeals of Maryland which earlier reversed the ruling of the Maryland Court of Special Appeals affirming Craig's conviction by the trial court on multiple charges of sexually abusing a 6-year old child.

Prior to commencement of the trial, state prosecutors invoked the benefit of a Maryland statute. The statute permitted a judge to receive testimony of an alleged child abuse victim by one way closed circuit television. The Maryland Statute directed that the court make findings to warrant a decision to use the procedure on the ground that the child victim, if he or she were to stand and testify in the ordinary courtroom setting, could suffer emotional distress that the child cannot reasonably communicate.

But the State Court of Appeals of Maryland reversed Craig's conviction and remanded for new trial. While it disagreed with Craig's contention that the Confrontation Clause requires face-to-face courtroom encounter between the accused and accusers 'in all cases, the State Court of Appeals nevertheless determined as inadequate the Maryland State's showing that the trial court complied with the *`high threshold'* requirement directed by the U.S. Supreme Court in *Coy v. Iowa,* cited supra in this opinion.

According to the Maryland State Court of Appeals, in order to properly invoke the use of two-way television procedure, the victim must first be questioned in the presence of the accused and only after a court has found on the question whether a child would suffer emotional distress if the procedure were disallowed.

The U. S. Supreme Court specifically addressed Craig's contention on the question *"whether the Constitutional Clause (stated above) categorically prohibits a child witness in a child abuse case from testifying against a defendant at trial, outside the defendant's physical presence, by one — way closed circuit television".* In an opinion by Madam Justice O'Connor, the U.S. Supreme Court rejected Craig's argument and held:-

"Although face-to-face confrontation forms 'the core of the values furthered by the Confrontation Clause,' we have recognized (Green, 399 U.S.(1934 that it is not the sine qua non of the confrontation right. "(Delaware v. Fensterer, 474 U. S. 15, 22,(1985).

According to the U.S. Supreme Court, *[T]he Confrontation Clause is generally satisfied when the defense is given a full and fair opportunity to probe and expose [testimonial] infirmities [such as forgetfulness, confusion, or evasion] through cross-examination, thereby calling to the attention of the fact-finder the reasons for giving scant weight to the witness' testimony.'*. Accordingly, *'substantial compliance with the purposes behind the conformation requirement'* is met where the witness has been placed under oath, was cross-examined and his or her demeanor viewed by the jury. In this case, the accused 'retains the essence of the right of confrontation, including the right to observe, cross-examine, and have the jury view the demeanor of the witness.

Madam Justice O'Connor, rejecting the view held by Maryland State Court of Appeals, insisted that the U.S. Supreme Court did not intend nor hold that the Confrontation Clause guarantees criminal defendants the *'absolute'* right to a face-to-face meeting with witnesses against them at trial. To the contrary, according to Madam Justice O'Connor, the *Coy* case simply suggested that an exception to confrontation right *'would surely be allowed only when necessary to further an important public policy.'* [our emphasis].

The U.S. Supreme Court explained that the Maryland Statute under review provided for a procedure which required the trial court to make individualized findings showing that abused child witnesses 'needed special protection'. According to the Court, the state procedure which preserves all of the elements of the confrontation right does not violate the Confrontation Clause; those elements were; (1) insuring that the witness will give his statements under oath, effectively admonishing said witness about the seriousness of the matter and also guarding against lie by the possibility of imposition of penalty for perjury; (2) compelling the witness to submit to cross-examination, an exercise generally regarded as the 'greatest legal engine ever invented for truth discovery; (3) permitting the jury to observe the demeanor of the witness in making his statement, thus aiding the jury in assessing the witness' credibility.

Satisfied that Maryland's procedures conform to the requirements herein above stated, the U. S. Supreme Court reversed the State Court of Appeals and directed further proceedings consistent with its Opinion. In the same breath, the Court frowned on what it termed *'legislatively imposed presumption of trauma'* of a potential victim witness as

a basis for allowing CCTV testimony of a child victim.

Unarguably, Article 21 (g) provision of the Liberian Constitution stating: *' ...In all criminal cases, the accused shall have the right to confront witnesses against him'* is substantially similar to the Sixth Amendment of the United States Constitution by stating inter alia; *'[in] all criminal prosecutions, the accused shall enjoy the right to be confronted with the witnesses against him.'*

As in the Craig case, the trial court in the case under review, evidenced by sheet two (2) of May 19, 2010 minutes of court, granted the application by Prosecution, over Appellant Fallah's objection, to allow the alleged victim child to testify in camera. Appellant Fallah's objection is anchored in similar allegation that the use of closed-circuit television (CCTV) procedure employed by the trial court violated his constitutional right to confront his accuser.

It is well to remark here that the law in vogue in Liberia is similar to that of the Maryland State law. It provides that *"the trial of sexual offences cases may be held in camera where the alleged victim is under 18 years of age and the protection of the victim warrants an in camera trial, provided that other sexual offence trials may be held in camera where requested by the state and where the court determines that the victim or a witness warrants protection."*

From the text of Section 25.3 (c), of the Act creating Criminal Court 'E', the court ought to make such a finding to justify a decision that a potential child victim witness would suffer 'serious emotional distress' and might just not be able to communicate within a reasonable fear free environment if put on the stand in the presence of the accused abuser to introduce courtroom testimony.

We must state here that there is no showing in the certified records before us that Appellant Fallah raised any contention about the necessity to use closed-circuit television without prior finding by the Criminal Court "E" to warrant same. What counsel for Appellant Fallah vehemently contends however is that in camera procedure violated his constitutional right to confrontation faithfully guaranteed under Article 21 (g) of the current Constitution of Liberia.

We are, no doubt, guided by the principle enunciated in the *Craig* case. Consistent therewith, Appellant Fallah's contention that 'in camera' testimony of nine year-old sex abused child `X.R.' violated his constitutional right of confrontation is hopelessly unfounded. We hold that the Appellant's constitutional right to confront his accuser was adequately preserved when he was accorded due opportunity to listen to testimony and allowed to vigorously cross examine the witness. In further protection of the constitutional right of Appellant, the trial jury was afforded the opportunity to see and observe the witness' demeanor and body gesticulations. As a critical part of the process, the jurors were allowed to quiz the witness as triers of fact. Under the circumstance, it would seem satisfactory to this Court that all of the critical factors of the Confrontation Clause were duly preserved. The essential ingredients of the confrontation clause having been substantially attended to, we decline to accept Appellant's argument as tenable. Count 1 (one) in the assignment of errors alleging violation of Appellant's confrontation right therefore tumbled, never to rise again.

We now direct our attention to counts to (2) and four (4) of the assignment of errors. Therein Appellant formally lodges a complaint against the trial judge in the manner following:

"2.That Your Honor erred when you overruled defense objection and made a pronouncement that no part of the previous trial should be mentioned on ground that the trial was de novo. 'Counsel for defense excepted and same was noted as seen sheet six (6) of May 19, 2009 sitting.'

"4. [Further to count two above], Your Honor also erred when you sustained an objection of prosecution to [defense] question [as follows]: "[Madam witness] you mentioned ten thousand (10,000) in your testimony in chief that you claimed Solomon Fallah's people said they were going to give you if you forgave Solomon Fallah. In the former trial you told court and jury that it was four thousand (4,000). Please tell court and jury which is true?" Defense excepted to this ruling and same was granted."

In the two counts quoted above, defense has forcefully questioned the legal propriety of the judge's disallowance of any reference by defense counsel in the *trial de novo* to

testimonies and depositions made by witnesses at the previous trial. The position taken by the court now being questioned by Appellant raises our second question: *Is reference to previous testimony in a trial de novo violative of the rule of evidence in our jurisdiction?*

A glance at the trial records reveals that during cross-examination, the defense posed the following question to one of Prosecution witnesses in respect to alleged blood stain:

"Question: Madam Witness, you talked about panty and you identified said panty during this trial. Am I correct?

"Answer: Yes.

"Question: Please tell the court and jury whether the panty that you talked about and identified [was the same] in your possession during the 2006 trial of this court.

Sustaining Prosecution's objection the court ruled:

"The objection is hereby sustained and Counselor Cheapoo is again advised to refrain from mentioning of any previous trial of this nature and control his question as to this trial...."

It is not merely the sustaining of Prosecution's objection that appeared to have prompted the defense challenge; but in addition, it appears that the trial court took a position captured in its ruling, which in effect, prohibited any reference to testimony offered in the previous trial. Infact the court warned against any further mention of testimony or records of the first trial during the current trial de novo proceedings. Disallowing defense question posed to Witness `X.R.', the court said:

"From time to time, this court has reminded the defense counsel [to refrain] from [mention of] any record of the previous trial [for that] is contemptuous of the Supreme Court [in the] records of trial de novo. Defense is further warned to desist from [reference to] any previous records [for to do so] will prejudice this case. Defense is warned to desist from any mention of the previous panel to be made again."

Maintaining this position throughout the proceedings, the court also sustained objection to the following question:

"Madam witness, you mentioned 10,000 (ten thousand) in your testimony in chief that you claimed Solomon Fallah people said they were going to give you if you forgive Solomon Fallah. In the former trial, you told the court and jury that it was four thousand. Please tell the court and jury which [one] is true?" [see: sheet four, 83` d Day's Jury Sitting, Wednesday, May 20, 2009].

Her Honor, Judge Ceineh D. Clinton-Johnson was clearly in error hence we are not in accord when she disallowed all prior testimonies and/or references to depositions made in the previous trial. Under circumstances which seem similar to the case at bar, the overriding view is to allow testimony under varying circumstances from a previous trial.

Two cases are quite instructive in this respect and are worth mentioning: *Swarav v. Republic,* 28 LLR 194 (1979) and *U.S. v. Azure,* No. 87-5043, U.S. Court of Appeals, Eight Circuit (1988).

In *Swarav,* Appellant Frederick Swaray, a police officer, was tried along with three others for the murder of a theft suspect, Henry Duncan. The suspect died while in police custody due to severe beating and torture. The officer alone was convicted.

The records reveal that during the first trial of this murder case, a medical report was offered into evidence. Its author, a pathologist, appeared in court, testified and confirmed his findings set out in said medical report and the proximate cause of death of the murder victim.

But when the Supreme Court remanded the case for new trial, as was done in the case at bar, the medical doctor could not attend to the new trial as he was without the bailiwick of the Republic. Prosecution sought to admit the medical document into evidence at the new trial. The trial judge overruled defense objection to the admissibility of the medical instrument and assigned its admissibility as reversible error. But the Supreme Court of Liberia did not see the contention by the defense counsel

as legally founded.

In the *Swarav* Opinion by Mr. Justice Henries, this Court said:

`...the law recognizes that it is sometimes impossible to produce a witness who has testified at a former trial, as where the witness dies, becomes insane or is out of the jurisdiction. In such a case, where the second action is between the same parties and involves the same issues, and where the party against whom the evidence is offered had the opportunity to cross-examine the witness who gave the testimony, such testimony given at the former trial is admissible in the later trial. Such testimony is an exception to the hearsay rule, and it is admitted on the principle that it is the best of which the case admits." Ibid. 199.

Also in *Azure,* referred to herein, the Eighth Circuit of the United States Court of Appeals upheld a decision entered by the district court dismissing Appellant Azure's challenge to the court's admission of excerpts of his prior sworn testimony at the first trial.

It is revealed that Appellant Azure elected not to take the stand during his second trial. He contended that prosecution's use of testimony from his first trial substantially negated his privilege against self-incrimination. Appellant contended that his prior sworn testimony was not proper rebuttal. It was shown that appellant had called one Bill Bercier to testify in his defense at his second trial. Witness Bercier who lived with Azure and was home during the evening of December 8 th testified that he did not see or hear the victim until 9:00a.m on December 8th.

When defense rested, the government introduced Azure's previous testimony in which he admitted taking the victim home with him on the night of December 8, while the rest of the children remained at their mother's house. But the U.S. Court of Appeals accepted the prior testimony over Azure's objection as proper rebuttal testimony. The function of rebuttal, according to the Court, is to explain, repel, counteract or disprove evidence of the adverse party. United States v. Luschen, 614F.2d 1164, 1170 (8th Cir.), cert. denied, 446 U.S. 939,(1980). The Court observed that Bercier's testimony tended to show that the victim was not home on the night of December 8th. According to the

Court, admitting Azure's prior testimony which seem to counteract his witness' testimony was no error. (See United States v. Arthur., 602 F.2d 660, 663 (4th Cir.), cert. denied, 444 U.S. 992,(1979).

Bringing this principle to bear on the case at bar, counsel for Appellant Fallah sought to disprove the evidence introduced by one of prosecution's witnesses. The witness testified to certain facts during the new trial in respect of a matter which testimony contradicted, at least on its face, previous testimony offered by the same witness during the first trial. Defense sought to question said witness by referring to what was said by the same witness at the last trial. This seems to be a proper inquiry into the inclination of the witness to telling the truth or otherwise before the trial jury.

We therefore agree with Appellant that those questions were proper and the witnesses should have been ordered by the court to provide responsive answers thereto. Only when the entire facts are introduced during trial to shed full light on the subject of the proceedings can one be certain that the case has truly been placed before the court and submitted to the ambit of the trial jury. In that case, the jury would be properly and adequately placed to exercise its province by giving due credibility to the story of each of those appearing before it.

We therefore have no hesitation in declaring that the trial judge committed error when she did not allow questions posed by the defense during cross examination for reason that those queries bore on testimonies offered at a previous trial. At the previous trial, for instance, one of prosecution's witnesses testified that a representative group of Appellant Fallah offered LD10,000.00 (ten thousand Liberian dollars) to the victim's parents.

According to this witness, the amount was intended to have the case dropped from Prosecution. To the contrary, the same witness, testifying during the new trial, testified to the offer being made by the same persons but stated the figure to be LD4,000.00 (four thousand Liberian dollars).

Clearly, the two testimonies deposed by the same witness are inconsistent as to the

amount prosecution claimed was offered to abate prosecution. It would have been proper if the court had allowed the defense to highlight this inconsistency as much as it could under the circumstances of this case.

The trial judge was therefore in error when she disallowed those cross examination questions. We however decline to accept that the inconsistency and difference in figures as revealed during the new trial is adequate consideration to defeat the material allegation that defense made frantic endeavors at compromising Prosecution of the ghastly crime of rape. We observe here that this grave allegation against Appellant stood out un-refuted by the defense.

To our mind, the essential question in this respect should be whether money was offered by Appellant or, as reported by Prosecution, by those representing themselves to be appellant's proxies. So, while we are in agreement with Appellant that his questions should have been allowed, this Court declines nevertheless to support Appellant in his claim that same amounts to reversible error. We cannot accept this argument. To the mind of this Court, the amount of money offered does not materially matter given the lapse of time which could account for the witness forgetting the actual amount. What is important and remains unrefuted was that money was offered.

A principle enunciated in the case *Stubblefield v. Republic,* reported in 35 LLR 275, 286(1988), is worth mention although it was a theft matter. In that case, the appellant was convicted on a proven figure far below what was stated in the indictment. Appellant mounted a vigorous challenge contending that variance existed between the material allegation and the evidence offered in proof. According to the Appellant, this difference in the two figures was a material variance which ought to have operated in his favor such as to set aside the judgment of conviction.

Under the principle of said case, we disagree with Appellant Fallah's argument as this Court did with Appellant Stubblefield's argument in 1988. We reaffirm the principle in *Stubblefield* that the figure in no way departs from the offense or its materiality.

We are persuaded by the principle of the Stubblefield case on this question regarding

Prosecution's allegation that Appellant attempted to offer money in order to silence his prosecution. Whether the amount representatives of Appellant attempted to offer was 4,000LD or 10,000D as a sort of appeasement money to the victim's parents, is not the material question. Of material significance is what Prosecution set out to show the jury: that appellant offered money with the sole intent to compromise the case. It is prosecution's theory that only a guilty person would embark on such deadly self-incriminating pursuit. If the verdict is anything to go by, clearly the jury accepted this argument.

We hold that the trial court committed an error by disallowing Appellant's questions as to the exact amount allegedly offered by said Appellant. We have determined however, and in the light of the total evidence adduced during trial, the error of disallowing previous testimony was not of such magnitude as to authorize reversal of the final outcome of this case.

Taking together counts 14 and 16 of the bill of exceptions, Appellant's counsel has complained strenuously that although the total evidence deposed at the trial was far from being cogent and substantive, yet Her Honor, Ceaineh Clinton-Johnson erroneously confirmed the guilty verdict and sentenced him (Appellant) to life imprisonment. In his own words, Appellant's counsel submits as follows:

"14. That Your Honor also erred when you sentenced the defendant to life imprisonment even though the evidence adduced at the trial by prosecution was not cogent enough and substantive as to have given the cause of such biased and impartial judgment/sentence. Defense excepted to this judgment and gave notice to court that appeal to the Honorable Supreme Court would be taken sitting in its October Term, A.D. 2009 which was noticed."; and

"16. The verdict was contrary to the evidence adduced at the trial."

Appellant's arguments in the counts above generate the third (3rd) and final question for consideration by this Court: Did the state present sufficient evidence at trial to sustain juridical conviction of the crime of rape?

Appellant has strenuously challenged the legal correctness of the trial judge's ruling confirming the guilty verdict in light of what he considers as varying testimonies by prosecution's witnesses. Appellant has essentially attacked the quality and sufficiency of the evidence upon which he was convicted.

In addressing this question, we say from the onset that we are in full accord that under the laws controlling, the State is at all times required to offer sufficient evidence or proof as a mandatory requirement to properly authorize a juridical conviction. In *Dunn v. Republic,* 1 L.R.R. 401 (1903), we held that such proof must be beyond a rational doubt which excludes any hypothesis of the defendant's innocence.

In consideration of this contention, this Court has discovered from examining the evidence that the State, in seeking to make a prima facie case, deposed six (6) witnesses including a rebuttal witness.

The victim, said to be nine years old at the time of the alleged rape, testified at the trial. She identified Appellant Fallah as the person who raped her. Recounting the incident, the victim in her own words told the court that Fallah *"started fighting me; and he knocked me down...he [chocked] my neck and put the cloth in my mouth, took [down] my panties from on me...after he finished...., he put his toto in me; after he put his toto in me, he ran away..."* The victim further narrated that her mother subsequently took her to the hospital where she was examined. [Emphasis added].

The victim's mother also testified during the trial. Informing the court about her relationship with the accused, the mother said that Appellant Solomon Fallah is married to her maternal sister. She narrated that the Appellant visited her on March 9, 2006, and requested that `X.R.' go with him to prepare his food; she said *"no problem; she is your daughter"*. But `X.R.' did not return after preparation of the meal. On the next day, March 10, 2006, the witness said she went to the Appellant's residence at which time `X.R.' told her (the mother) that she will go back home when her uncle, the Appellant, returned from his workplace. She further narrated that `X.R.' did come back home in the evening around 4:30 but with appellant's daughter, Tata, who is also her little sister (cousin). But when `X.R.' took Tata home as instructed by the mother, she failed to

return home. According to the victim's mother, one of her friends coming from Appellant's residence stopped by her around 11p.m. This person said to the victim's mother:

"ma, I heard X.R.' crying, but the crying is too strange in my ears...."

The witness therefore decided to visit Appellant's house. She told the trial tribunal:

"I got up and went to the house with victim's pa; [when we] went there that night, we did not see Fallah at the house; then I asked the little girl, Fallah's daughter. I said, Tata, where is your pa. The little girl said: "Aunty, papa put me outside, but papa and "X. R." left in the room... papa sent me to buy candy; [so] I do not know what happened to "X. R." I entered in the room; I saw my daughter lying down on the floor-mat crying and bleeding over it. Then I asked her... "what happened to you?" She was not able to talk because he choked her enough.... I carried her to the Clara Town Clinic bleeding; the people said "this is not our case; you [have to] carry her to Benson Clinic because this is not small toto..."

She confirmed that the victim was later transferred to the Benson Hospital due to the *"gravity of the case"* and examined at said clinic. The witness further testified that she left `X.R.' at the clinic and sent for her father. She also said that she and her father went along to arrest Fallah in Vai town who denied raping "X. R." Thereafter, the mother said the matter was reported to the Police Depot at Slipway and they were transferred to the headquarters of the Liberia National Police. Appellant was then arrested and taken to the headquarters. While at Central, in the presence of the father of the victim's mother, Varney, and a fellow called "Oldman", Appellant Fallah began to beg *"because it is my doing; [the] devil fooled me and I went with the little girl; but I want you to forgive me...."*

The victim's mother further testified:

"My father said, "Fallah, I will not forgive you...that evening, Fallah people came to my house; the people gave me LD 500.00 (five hundred Liberian dollars) to transport myself to carry my daughter to the hospital; my father said this five hundred dollars is FOC (fruit of the crime). They came back and said they want to give me ten thousand dollars (10,000.00) for me to free Fallah...." But

according to mother of the victim, the family rejected the money as they had no intention to compromise the rape matter.

Varney David, one of the Prosecution witnesses, corroborated earlier testimony by the victim's mother that Appellant's brother by the name of Anderson, said to be an employee of the Ministry of Finance, as part of a group allegedly acting on behalf of Appellant, gave the 500 LD to the victim's family *`for the girl to go to the hospital'* and also offered to give LD 10,000.00 should the family accept a compromise of the case. That money was offered on behalf of the appellant to drop the case was further corroborated by Prosecution rebuttal witness, Mayamu Tulay.

During the trial, prosecution deposed Physician Jacobs Oseefeous Binda who told the court that on the 12th of March, 2006, `X.R.' was taken to the MSF Benson Hospital. He said that based on the information presented to hospital, a female nurse conducted an anatomical examination on the victim. According to the witness, the medical examination on `X.R.' revealed that there was redness of the vaginal wall and a laceration on the hymen, indicating that the hymen wall was broken.

The Physician Assistant, elaborating on what could have been the cause for the laceration and also the broken hymen, made the following observations:

"From my medical point of view, I did say at 2 to 6:O'oclock, there was redness which indicates bruise normally in the vaginal area in point should be a pink color not red; and I said at 6 to 11: O'clock there was laceration in the vaginal, which indicates that the hymen was broken. Normally, the hymen should be fully intact without laceration. From my medical point of view, what may have caused the laceration or the redness could be that an organ or any substance was inserted into the vagina."

Another Prosecution witness was Dickson Nimely Jlateh, the investigating police officer from the Women and Children Protection Center, Liberia National Police. Answering a question on how the police investigation established the link between the accused (Appellant Fallah) and the commission of rape, Officer Jlateh explained in the following words: *"...the investigation was able to establish the link between the defendant Musa Solomon Fallah and the victim to the scene of the incident which is Musa Solomon Fallah's room.*

That means the victim alleged that she was sexually abused in Musa Solomon Falla's room; and Musa Solomon Fallah did admit that the victim slept in his room for two nights [Emphasis supplied]

In addition to what appears to be damning depositions by the State severely undermining Appellant's plea of not guilty, Prosecution recalled the alleged victim, as a rebuttal witness. She took the stand and identified Appellant Fallah as the perpetrator of the sexual violence against her person.

This was both the quantity and quality of the evidence adduced at the trial by the State. An objective consideration of this evidence in its totality seems to lead to one conclusion: under the circumstances of this case, it is apparent that the person most likely to have perpetrated sexual assault on the person of the victim was Appellant Musa Solomon Fallah.

It is very important to observe that when the State rested with production of evidence, and following denial by the court of defense motion for judgment of acquittal, Appellant Fallah took the stand and testified in his personal defense in the manner following:

"I was having woman here [called] Tutu Girl. So this woman and myself were together and she showed this woman [`XR.'s mother to me] and said that she is her relative. From there, her relative used to do business going out of town. She used to tell her children to come to my house. Sometime [one] month or month plus. [But] after misunderstanding got between me and my wife, the woman left and went to her home. So I went to this same woman here. I asked her what time the woman coming. She said she did not know anything about my marriage [to the woman]. I asked her what she meant "I do not know anything about your marriage and the woman is your sister". I said I want you go and bring her. During that time, we were in the Club. I am the one who kept the Club money. So I called the woman here. I made her to understand that I am giving money for a year. She said how much you will find for me. I said let my woman come. She said no the money I have for her I should gave it to her. So I said no I want my woman to be here. She is the one who gave you the money. After we talked that, her daughter never used to go to my place. So after that, the little girl started coming to my place; she and my daughter started playing together. From there certain time in the night, if my daughter and I go to bed, the little girl can come at times we have gone to bed already. She [will] say: "Uncle, please

open the door for me." I [asked] saying: "where are you coming from time like this?" She said I am coming from where the people were dancing. I said to her you are not sleeping [here]; I will wake my daughter and say let's carry your sister to her Ma. I did first and second time carry the little girl to her Ma. The woman said [to me finally]: "since this girl is your daughter, why always you can bring this girl back to my house in the night; why you can't allow this girl to sleep there[at your house]? I said no; in the morning if I wake up, I can bath my daughter and carry her to class before Igo to work. She said no; first of all, my daughter said she wants to be with you".

"So the other night after the girl came and I carried her, she [the mother] had said you and the girl sleep there. I said okay because I was jammed with this thing. The very day she slept there the next day was Friday. The girl woke up and went to her mother. The second night, the girl came back to my place but I said let's go to your ma because it was soon. [When we reached the mother] I said this your daughter today again. [This time] she said since in fact my daughter wants to be with you, tomorrow I will carry her clothes there. So the girl and I went back that Friday night. Every day if I am coming from my working place, I will buy food stuff to come and cook. So that Saturday morning after the woman came, she woke me up. I got up. She said I am going to Redlight. I want the girl to go walk around with the other children. Then I said the food I cooked in the night, let me warm the food, let us eat, [then] the girl will come. I warm the food and they ate. The girl leaving said: "Uncle, I am going; I said okay. This was Saturday morning. So I went to my working place. When I came back in the evening, Saturday night, I bathed my daughter and we went to the show. We came back and laid down [for bed]. Sunday after day break, I fixed small thing for my daughter Tata."

"Her ma said [to me] "on Sunday, I can stay long. Just hold this thing. I will soon be back. So I was working on one bus. I saw the woman, the old ma and the girl, her father and one different man. Four of them and the woman came to me and said: "Fallah I want to talk with you. I asked; is it secret? She said yes. I said the people you met here, this man, is my small brother. To me, when I saw your mother coming, I was happy. I taught she was ready to go home to bring my woman. From there, she said my daughter said you raped her. I asked: "Your daughter said I raped her?" I said no; maybe it will be different person. It is not Fallah. The time we were talking, the pappy and the little girl were behind the truck. He was telling the little girl say that is the man. The man I was working for said: "old ma, your carry this girl to the hospital; she said it is not hospital business. I want this man to go to jail. I never returned home. I just find myself in jail. After she jailed me, she came there and said since you said you have money and you are stupid, you will be in jail until you died. That is all that

happened."

Defense further introduced three additional witnesses. The three witnesses testified essentially informing the trial court about knowing the Appellant as a person who largely respects the law; one of the witnesses claimed she had known the defendant for long years during which time she had not heard of the Appellant being involved in any criminal activity; that it was only on the date of the incident that the victim's mother said that Appellant had raped "X. R." One defense witness, Grace Toe, testified that she saw "X. R." and Fallah's daughter warming rice one morning, and that "X. R." had slept at Fallah's room more than once. She got to know that Fallah had allegedly raped "X. R." when the victim's mother went in the yard with a police officer. In our opinion, a number of material considerations would compel an objective mind to form a belief of Appellant's guilt:

(1) Medical Examination supported by expert testimony clearly established that `X.R.' was the victim of sexual assault. The medical opinion offered into evidence concluded that a substance *"was inserted into the* [victim's] *vagina."* According to the unrefuted testimony, the laceration discovered in the victim's vagina shows that the hymen was broken. In the face of this evidence, we must conclude that a crime was indeed committed. The question then is by whom.

(2) When he took the stand, Appellant Fallah did not deny, but to the contrary admitted, during the trial that the child victim did spend the two nights in his room when this crime is said to have been committed. During cross-examination, Appellant was quizzed about the victim sleeping in his room on March 11, the night Prosecution alleged the child victim was sexually assaulted. Appellant in his answer said: *"She slept there two nights; the very night she slept there, the next day was FRIDAY. Okay [she] slept [there] on Friday too; the next day was Saturday."* Despite admitting that the victim slept at his house on the night the sexual violence was committed, Appellant vehemently denied committing said assault. In this jurisdiction, the uncorroborated testimony of a criminal defendant is insufficient grounds to authorize reversal of a judgment of conviction. Mr. Justice Greaves, in an Opinion by this Court in *Forleh et al vs. Republic* 42 LLR, 23, 38 (2004), held that a defendant may not be set free on the strength of his lone

testimony especially where two or more witnesses have testified against him. This principle is upheld in *Jusu v. Republic* 34 LLR 291, 300 (1987), that the uncorroborated testimony of a criminal defendant is insufficient a ground to authorize reversal of a judgment of conviction. *Zaijlor-or v. Republic* 2 LLR, 624, 625 (1927).

(3) Fallah's family allegedly offered monies to the victim's family for the purpose of appeasement and in order to have the matter removed from prosecution. Although Fallah denied ever sending a family person on such deadly errand of appeasement, yet Appellant Fallah woefully failed to call his own brother who was said to have led this exercise, to testify in support of his stringent denial. In *Saar v. Republic* 29 LLR 35, 55 (1981), this Court held that an essential allegation is deemed admitted where there is no denial in subsequent pleadings by the opposing party. We must also note that there was no mention by Appellant Fallah when he testified, let alone denial of the allegation made by Prosecution, that at his instance, Appellant's representatives offered money to abate Prosecution of a crime he claimed he knew nothing about.

In the face of this mountain of evidence against him, it would appear that Appellant's main contention is that having been charged with the crime of rape, the State was required to introduce only positive evidence or eye witness account of Appellant raping the private prosecutrix, `X.R.'. It is Appellant's argument that such direct proof not having been presented throughout the trial, that the verdict was legally unjustified and the confirming judgment erroneous.

We find this argument too extravagant to sustain. Even if circumstantial as it would appear to be the case at bar, in proof of guilt, direct proof has never always been the necessary requirement. According to this Court in *Taylor v. R.L 14 LLR 524(1961),* it is deemed sufficient where the evidence offered is of such nature as to convince any rational mind of the criminal responsibility of the accused. Clearly, consideration of the unrefuted facts regarding what had transpired at the Appellant's home creates a bond connecting the Appellant to the crime. Therefore, the prosecution's evidence provides a strong basis for criminal liability on the person of the Appellant.

Appellant further contends that even assuming the jury was permitted to infer that he

was the only person (man) spending the night in the room where the crime was reportedly committed, the State failed to introduce positive evidence linking him to the commission of the crime. In order to justify a conviction on indirect evidence, as a matter of law, Appellant argues that said evidence must exclude every reasonable hypothesis of doubt in respect to the guilt of the accused. This mandatory legal requirement in vogue in this jurisdiction was disregarded in the trial of this case; hence, Appellant has vigorously attacked his conviction based entirely on what he terms as weak evidence.

We are also not persuaded by this argument. Mr. Justice Lewis (sitting ad hoc) spoke for this Court on what constitutes proof beyond reasonable doubts. *In Collins v. Republic* 22 LLR 365, 371 (1974), Ad-Hoc Justice Lewis said: `...*the evidence must establish the truth of the facts to reasonable and moral certainty, a certainty that convinces and directs the understanding and satisfies the reason and judgment of those who are bound to act conscientiously upon it. This is proof beyond reasonable doubt...'*

In 1898, this Court laid a principle which has essentially guided disposition of sex assault matters in our jurisdiction. In *Coleman v. Repubic,* 1 LLR, 320 (1898), this Court held that when securing conviction in rape cases, unlike other horrendous crimes, the testimony by a 'ravished' woman in a rape trial, corroborated by evidence of violence as the surrounding circumstances may permit of the case, the public accusation by the victim of her assailant, may suffice. We affirm this principle.

WHEREFORE, and viewing this case in all its features, and considering the evidence and the law controlling, we can say with certainty that the verdict of the jury is in accord with the evidence adduced at the trial; consequently, the rendition thereon of final judgment was compelling, just and legal; the judgment of the court below need to rest forever, never to be disturbed.

The Clerk of this Court shall send a mandate to the court below to give effect to this judgment, including expunging the victim's name from all court's records, consistent with section 25.3 (e) of the Act creating Criminal Court "E", authorizing that names of rape victim be erased or destroyed from all public records. AND IT IS SO

ORDERED.

Counselors J.D. Baryogar Junius and Elijah Y. Cheapoo, Sr., Public Defenders of Montserrado County appeared for Appellant while Counselors Felicia V. Coleman and M. Wilkins Wright of the Ministry of Justice appeared for Appellee.