ROBERT GIBSON, Appellant, v. **REPUBLIC OF LIBERIA**, Appellee.

APPEAL FROM THE CIRCUIT COURT OF THE FIRST JUDICIAL CIRCUIT, MONTSERRADO COUNTY.

Argued November 23, 24, 1953. Decided January 22, 1954.

Where an indictment is defective, a motion in arrest of judgment will be granted.

Defendant was convicted of mayhem. The trial court denied defendant's motion for a new trial and in arrest of judgment. On appeal to this Court, *judgment reversed* and motion granted.

Samuel C. M. Watkins for appellant. *The Solicitor General* for appellee.

MR. JUSTICE SHANNON delivered the opinion of the Court.

Robert Gibson was indicted for mayhem by a grand jury of the Circuit Court of the First Judicial Circuit, Montserrado County, at its May, 1951, term. Upon arraignment at the ensuing August term he entered a plea of not guilty. Trial before a jury resulted in a verdict and judgment of guilty, from which the present appeal is before us.

The indictment charged :

"That on the eleventh (11th) day of February in the year of our Lord nineteen hundred fifty one (A.D. 1951) at Bomi Hill Area, Montserrado County, Republic of Liberia, Robert Gibson, defendant aforesaid, then and there being with force and arms unlawfully, maliciously, violently, wickedly and feloniously in and upon the body of Burton Reeves did made an assault; and with a certain deadly instrument which the defendant aforesaid known as a Belgian Rifle, did unlawfully, maliciously, violently, wickedly and feloniously aim at, shoot off, to, against and upon the body of the said Burton Reeves ; and by reason of the unlawful, wilful, malicious, wicked, violent and felonious shooting to, against and upon the body of the said Burton Reeves by the said defendant aforesaid, the said Burton Reeves did receive a fatal wound and a fractured leg as a result of the said unlawful acts of the defendant aforesaid, with intent in so doing unlawfully, maliciously and feloniously to disfigure him the said Burton Reeves and to diminish his physical vigor ; then and thereby the Crime of MAYHEM said defendant did do and commit contrary to the form, force and effect of the Statute laws of Liberia in such cases made and provided, and against the peace

and dignity of this Republic."

The defendant, in pleading not guilty, did not deny that he shot Burton Reeves, but claimed that he did so in self defense, and denied that he had committed the amputation which constituted the gravamen of the alleged mayhem. Concededly, at the time and place of the shooting, nobody was present except the defendant and the complaining witness, Burton Reeves.

At the trial the complaining witness testified as follows:

"We were working at the sawmill at Bomi Hills. The time I was employed there was when I knew Gibson, defendant. He was working with the company also. One day the superintendent of the sawmill reported to us that the defendant had wrongfully taken his pickup. This brought about an argument between him and the defendant, and defendant then went and sued Blackmore here in Monrovia. When defendant sued Blackmore, the company sacked him, and I did not know anything about it until the superintendent told me at my working place. On Sunday, February II, 1951, we went to work. There is a spring across the road, and on the other side is a wild field where we used to cut the logs. Defendant's house is on the other side of the spring, and it is from that spring that defendant drinks ; and all of us that work on the field drink also from the same spring. When we went to work that morning I started my power saw and started working. It was between the hours of nine and ten that I went to the spring to drink water. When I got to the spring, I met defendant in the water, putting his empty barrel in the water, and I spoke to him. I then went ahead of him and drank and the two of us got out of the water together. There is another road that leads down the spring which takes us to the latrine. I took this road and went to the latrine. Defendant went to his house for his gun. When I came from the latrine I got on the motor road and started going. Defendant came and called, saying : 'Reeves.' I stood up. Defendant said : 'I want to speak with you.' He and I began talking. He asked me where I was coming from. I told him that I was coming from the latrine. Defendant said to me : 'Haven't I told you all that none of the company's boys should come over here, because they were stealing my cassavas? Didn't you hear when I spoke those words?' Then I said : Tut where is the cassava, Gibson?' Defendant said : `Whether any cassava is there or not, if you give me cheek I will shoot you.' I thought he was just jesting, because shooting a human being is not like shooting an animal. I said to defendant Gibson : 'Stop that kind of a joke,' but, before those words could come out of my mouth, defendant fired on my foot. After I fell I said to defendant Gibson : 'Why did you shoot me?' Defendant said to me : 'Didn't you say that you are a big shot in the company?' He further said : 'If you talk

again I will finish you up.' Then I said to him : `I rather you finish me up than for me to remain in such condition.' After saying that, defendant said that he went there to drink, and, after drinking, both he and myself walked off from the creek together. When he got up to my house my wife was sitting near the house. He spoke to her but she did not answer, and he spoke a second time. Still she failed to answer. In that time, I turned in to my house and said to her : 'Don't you hear this man talking to you?' and she said : 'Oh, I had my eyes closed thinking. I did not hear,' after which she answered him, and he continued in the direction he was going, and I took a chair and sat by her. In five or six minutes Reeves returned, going to the place he was working. After he was gone about eight or nine minutes, I saw the cassava trees in my farm shaking. Usually when that takes place, I always go with my gun and at times I am lucky to get game, that is by shooting ground hogs or other small animals. But to my surprise, when I got there, at least almost on the scene, I discovered it to be a man rooting up my cassavas. I made a few steps backward quietly, and then turned around to go to my house and get some boys to catch the person ; but, seemingly, immediately after I turned, he saw me. I then called for the boys at my place. He got up with the cassavas that he had already rooted and started out in my direction. Just as he got almost on me I shouted out for the second time; but, with a long machete in his hands, he made towards me. Just in time I fired the gun and he fell on his face. The cutlass fell before me and the cassavas on the side of the road from which he sprang. After this happened I went up to the superintendent. Whilst going, just as I got to the creek, a jeep passed me. However, I continued. After the driver got to where Reeves was, he turned the jeep around, and both the jeep and myself got to the place where Reeves was working at the same time. Meeting one of the company's drivers I told him that an accident had taken place. I further said that one of the men went to my place and stole cassavas, and, when I got after him, it looked like he wanted to kill me, and, unfortunately, he got shot, and that it was for him to see that he was taken to the hospital. Monday morning I came down to Monrovia by the first opportunity in a pickup and reported to the police authorities. That is all."

After this testimony by the defendant a rigid cross examination ensued and defendant made a great effort to justify or excuse the illegal act. We are not convinced that he succeeded. It is difficult to believe that a man of the average intelligence which this defendant displayed could come to court on a charge of mayhem, seeking to justify his act as self defense, and leave at his farm the machete or cutlass with which he alleged that the complaining witness had attacked him, and which allegedly left no room for defendant's withdrawal or retreat, and no alternative but to shoot. We do not understand how he made no effort to produce the weapon and have it identified as the property of the complaining witness.

On cross-examination when asked : "Where are the cassavas which you said private prosecutor Reeves had dug when you got on the scene with your gun?" the defendant answered : "The cassavas have decayed, but the place they were placed can be shown if the court gives me somebody to go along with me."

The following question and answer are pertinent :

"Q. You have said that, after you broke Reeves's leg, you came and reported the matter to the police. I suggest that, when you came, you brought with you the instrument and the cassavas with which Reeves was possessed.

"A. I did not."

We ask what the purpose was in keeping the cassavas until they decayed if they were not intended to be used as evidence in proof of defendant's claim that the complaining witness was stealing cassavas at the time when the shooting occurred ; and what the purpose was in withholding the cutlass or machete from evidence if defendant was warding off an attack.

Defendant was clearly guilty of some offense. But whether he was guilty of mayhem is debatable. In the first place we cannot understand how an indictment for mayhem could have been framed without an allegation of the dismemberment of a limb, or of some act on the part of the defendant that resulted in the disfigurement of the complaining witness or the diminishing of his physical vigor. And so also was it beyond the charge as laid in the indictment to have received evidence of the dismemberment of any part of the private prosecutor's body, or of his disfigurement and the diminution of his physical vigor. Crim. Code, sec. 6i. Such evidence was therefore beyond the scope of the charge in the indictment.

The contention of the defendant, therefore, in Count "3" of the motion for a new trial, which reads as follows : "And also because, although defendant was indicted and tried for MAYHEM, yet the evidence adduced at the trial tended to prove Assault and Battery with Intent to Kill, for which he was not charged ; in this the jury should have returned a verdict of acquittal. According to the Criminal Code, where a deadly weapon was used and the victim suffered a wound as a result therefrom, the defendant shall in such a case be tried for assault and battery with intent to kill."

has substantial merit; for no one should be convicted of an offense with which he

has not been charged ; and the charge must necessarily be laid in the indictment or information in order to give the defendant notice. Although this sound position was rejected below, the trial court returned to it in the motion in arrest of judgment, Counts "3" and "4" of which read as follows :

"3. And also because defendant submits that the said indictment is further defective and bad on its face because it does not state in certain terms that the private prosecutor was really disfigured or maimed or even that, as a result of the said wound, as alleged, his leg, or any other member, was severed from the rest of his body either by means of amputation or otherwise, so as to give the defendant notice of what he intended to prove in keeping with law.

"4. And also because defendant submits that the indictment as drawn was based on a charge of assault and battery with intent to kill, and not on a charge of mayhem ; for it does not show on its face that the said private prosecutor was disfigured or maimed which are essential and indispensable ingredients in an indictment for mayhem."

The trial judge overruled the motion in arrest of judgment and entered judgment against the defendant, sentencing him to one year's imprisonment in the common jail of Montserrado County.

It is our opinion, however, that, because of the defective indictment, the motion should have been granted without prejudice to the institution of proper proceedings against this defendant. Since the arrest of judgment would have been granted at the instance of the defendant, he would be barred from any plea of double jeopardy.

The defect in the indictment in this case could not be cured by the verdict as contended by the prosecution and held by the trial judge.

The judgment of the court below is therefore reversed. The motion in arrest of judgment is hereby granted and the defendant ordered discharged forthwith.
Reversed.