YASSAH DIYAN GLEWU, Appellant, v. **REPUBLIC OF LIBERIA**, Appellee.

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

Heard: April 26, 1982. Decided: July 9, 1982.

1. A counsel who wishes to employ the use of certain words in an instruction to a jury, must submit a written request to the court.

2. A confession of admission in open court by the accused, without any force or threat of force or promise of reward, is valid evidence in the prosecution for murder.

3. The grant or refusal of a new trial generally rests with the sound discretion of the trial court, and the appellate court has no right to review the exercise of such discretion unless it appears that it has been abused to the prejudice of the defendant.

4. Mere language, however aggravated, abusive, opprobrious or indecent, directed at the slayer of the speaker, is not a sufficient legal provocation to create an ungovernable passion as would negate malice and premeditation to reduce a killing with a deadly weapon from premeditated murder to manslaughter.

5. For a provocation to reduce murder to manslaughter, it requires a consideration of the element of time between the alleged provocation and the slaying, together with the type of weapon used, and the number of times it was used to commit the act. Where there is sufficient cooling time to allow a defendant to reconsider and to enunciate the contemplated act of homicide, the defense of provocation is not available to excuse murder.

6. Where the trial is regular and the finding of the jury is proper as to the guilt of an accused, the Supreme Court has no power to reduce the crime charged in the indictment on grounds of provocation when such defense was never pleaded at the trial and considered by the jury.

Appellant was indicted, tried and convicted of murder by the Tenth Judicial Circuit, Lofa County. During the trial, appellant took the stand and admitted killing the decedent. The jury, after hearing the evidence of both sides, returned a verdict of guilty against the appellant. From the final judgement rendered by the trial court affirming the verdict, exceptions were noted and an appeal announced to the Supreme Court. Appellant filed a

twelve-count bill of exceptions, but failed to submit a brief. Among the contentions raised in appellant's bill of exceptions was that notwithstanding appellants admission to the killing of the decedent, he did so on provocation and should, therefore, have been entitled to mitigation, thus reducing the crime from murder to manslaughter.

The Supreme Court determined that the sole question presented by this appeal was the degree of provocation that the law considers as sufficient to reduce a crime from murder to manslaughter. After a full review of the records, the Supreme Court held that the evidence produced by the State, including the dying declarations of the decedent, was conclusive, overwhelming and sufficiently conclusive as to exclude every rational doubt that the appellant was guilty of murder. Additionally, the Court held that by appellant's own confession in open court, which was made without any force or threat of force or promise of reward, that he killed the decedent, was valid evidence in the prosecution of murder and sufficient to support the guilty verdict brought by the jury.

Finally, the Supreme Court found from the evidence adduced at the trial that decedent and the appellant had no altercation immediately prior to the shooting; that the appellant shot the decedent several times; and that after killing the decedent, the appellant went on shooting around the village at large. The Court opined that this conduct of the appellant manifested a depraved and malignant heart and justified the conviction for murder. The Court noted that when all of the surrounding circumstances were taken together, including the appellant's testimony that he was looking for no one else other than the decedent, it was difficult to accept his claim that verdict of murder should have been mitigated to manslaughter.

The Court then opined that where the trial is regular and the finding of the jury is proper as to the guilt of an accused, it has no power to reduce the offense charged in the indictment and proved to a lesser offense, especially so when such defense was never pleaded at the trial and considered by the jury. The judgement of the trial court was therefore affirmed.

Robert W. Azango appeared for appellant. The Minister of Justice, *Isaac C. Nyeplu,* appeared for appellee.

MR. CHIEF JUSTICE GBALAZEH delivered the opinion of the Court.

This is an appeal from a conviction of murder which emanates from the Tenth Judicial Circuit Court for Lofa County, sitting in the Criminal Assizes of the May Term, 1971.

On March 16, 1971, during the February Term of court, the defendant, now appellant, was

indicted by the grand jury of Lofa County in connection with the death of one Mama Viliga. The indictment alleged that in November, 1970, the appellant, with-out legal justification or excuse willfully and maliciously with premeditation, shot the decedent several times with a certain deadly weapon (LNG Riffle), thus inflicting mortal wounds in and upon her body and from which she died instantly, contrary to the penal laws of Liberia.

At the call of the case, the appellant declared himself *in forma pauperis* and was accordingly assigned the county's de-fense counsel. Whereupon he was arraigned and he pleaded not guilty. Issues having been joined between appellant and the Republic of Liberia, a trial jury was selected, sworn and empanelled to try the issues. The prosecution produced three witnesses who testified in favor of the State, and, with the admission into evidence of the instrument used to effect the commission of the crime, the prosecution rested evidence. The defense produced four witnesses, including the appellant himself who admitted murdering the decedent, thus confirming the offense with which he (appellant) was charged. The other three witnesses denied any knowledge of the circumstances which led to the shooting of the decedent by the defendant. With the testimonies of those witnesses the defense rested evidence. The judge then charged the jurors who later retired into their room of deliberation and returned with a verdict of guilty against the appellant. The appellant excepted to the verdict and filed two post trial motions: one for a "new trial" and the other in "arrest of judgment". Both motions were resisted, heard and denied and consequently defendant was sentenced to death by hanging. It is from the judgment and rulings that the defendant took exceptions and has assigned twelve counts of errors in his bill of exceptions against the trial judge.

We pause to note here that appellant's bill of exceptions is not supported by a brief. Counsel for appellant instead contends that, notwithstanding appellants admission to the killing of the decedent, he did so on provocation and should therefore be entitled to mitigation, thus reducing the crime from murder to manslaughter.

On the contrary, the appellee has submitted a brief, replete with legal citations, and has urged this Court to affirm the appellant's conviction, in that his act constitutes murder with malice aforethought. The appellee has also asked the Court to consider the appellant's admission made against himself. Hence, the sole question on this appeal is this: what is the degree of provocation that the law considers as sufficient to reduce the crime of murder to manslaughter?

We will now consider at this time the merits and demerits of appellant's bill of exceptions, the relevant counts of which we quote for the purpose of this opinion, as follows:

"1. Because defendant/appellant says and maintains that Your Honour committed a reversible error to have over-ruled the objection of the defense to the question by the State witness. Ques. Mr. Witness, please refresh your memory and say for the benefit of the court and jury what was the reaction of the defendant after the commission of the crime? To which defendant excepts. . . ."

As to count one, we are of the opinion that the same does not constitute a reversible error. The witness was asked to tell whether or not he observed any reaction of the defendant after he killed the decedent. We hold that it was consistent with the indictment charging the defendant with willful and malicious murder to determine whether or not he showed any outward signs of remorse or regrets after the killing; 3 RCL, § 4(c), at 943; *Obi v. Republic,* 20 LLR 166 (1971).

In our view, counts 2, 3, 4, 5, 6, 8, and 9 do not raise any substantial issues sufficient to claim out attention. Therefore, we do not deem it necessary to pass on them. *Johnson* v. *Mattar Brothers,* 20 LLR 425 (1971).

"7. And also because Your Honour committed a reversible error to have overruled the objection of the defense to a question put to the defense by the State. 'Ques. Mr. witness, in your testimony in chief you admitted pointing a gun at the decedent and shooting her, how many times did you shoot her?' Objection: To which defense excepts ..."

In count seven the question asked was relevant to the prosecution for murder with malice aforethought in that where, as here, it is contended that the killing of decedent arose from provocation, the number of times that the defendant shot the decedent may show to the jury that the defendant had harbored previous ill will towards decedent.

"10. And also because Your Honour committed a reversible error in charging the empanelled trial jury, when in fact defendant requested Your Honour to instruct and read his law that he cited and explain to them the classes of homicide."

With respect to count ten, appellant argued that the court did not instruct the jury as to the classes of homicide in keeping with the defense's theory of the case. Here is the relevant portion of the court's instruction:

"Counsel for defendant requested the court to charge you that although the defendant admitted killing decedent, he was provoked and justified. This means that I can kill a person if that person should do something to me and the law says that I have the right to do it, because if I do not do it, the person may kill me; further that if under a situation, I cannot

control myself and kill a person, the law says that it would be one of four kinds of killings: murder, manslaughter, excusable..."

Under the Penal Law in vogue at the time of the commission of the crime in question, homicide was divided in four (4) categories: (1) murder; (2) manslaughter; (3) excusable homicide; and (4) justifiable homicide. Penal Law, Rev. Code 27: 231. Murder is also defined as the killing of any human being without legal justification or excuse and with malice aforethought. *Ibid.,* 27:232; whilst manslaughter is defined as the killing of any human being without legal justification or excuse, but without malice; or the unlawful killing of any human being by an aggressor in a sudden affray. *Ibid.,* 27:233; *See* also *Padmore* v. *Republic,* 3 LLR 418 (1933).

We cannot agree with the appellant that the judge erred in giving the above instruction to the jury. The instruction covers the prosecution's and the defense's theories of the case. Furthermore, counsel who wishes to employ the use of certain words in an instruction to a jury has a duty to submit a written request to the court. There was no such written request given to the trial judge. Not having availed himself of this privilege, the appellant's argument is untenable. *See* Civil Procedure Law, Rev. Code 1: 20.8.

"11. And also because Your Honour committed a reversible error to have denied the defendant's motion for new trial, to which defense excepts."

Count eleven contends that the trial court erred when it denied the defendant's motion for a new trial because according to the defendant, there was no corroboration of the testimonies of the State's witnesses. In this connection, let us take a look at the entire evidence adduced at the trial so as to enable us to decide whether the judge erred in denying the motion or whether the evidence was sufficient to convict the defendant.

Yarkpawolo Queque who was the first witness for the State testified substantially to the effect that the defendant was his son-in-law and the decedent was his daughter and that both briefly lived in Monrovia during the early days of their marriage where there erupted some misunderstandings between them. He further testified that as a result of these quarrels, she left the defendant's home and refused to return to his bed and board. Even though the defendant was still in deep love with her yet the decedent insistently refused to accept defendant any more. Despite this fact of Viliga's (the decedent's) refusal, the family encouraged Biyan (the defendant) to spend the night with them until the next morning when they (the parents) would convince Viliga to follow him and that it was that evening while Viliga was singing and dancing with others, when the father heard the sound of two gun shots and Viliga's voice yelling: Oh! Biyan killed me." Yarkpawolo Queque further told the

court and jury that after killing the decedent, Biyan, the appellant, ran into the woods and continued shooting at large. On cross examination, the witness was asked whether, as father of the decedent, he had knowledge of previous altercation between decedent and Biyan and he replied that although there had been some misunderstandings between them, the same was settled; that he did not know of any misunderstanding between them immediately before the appellant killed Viliga. He identified the murder weapon as being the same weapon that Biyan had and used when they met in Zorzor.

The second witness for the prosecution was Flomo Pewee and his only testimony which we find germane to the issue at bar is that he went on the scene of the crime and saw the decedent's body and that it had a gunshot wound on the chest and another mark on the temple, thus establishing a *corpus delicti* and prima *facie* case of criminal homicide.

The third witness for the State was Yarkpawolo Pewee. His testimony essentially corroborated with that of Yarkpawolo Queque. He said that when Biyan came for his wife and she refused to go, they told him to go in front and that she would come. When Biyan agreed, he said, they suspended the matter and went to dance. "There we were dancing", he said, "When Biyan came and shot the woman on the back. We all ran away or scattered. Afterwards, we came back, I saw the woman lying down and the gun cartridge bust her head to the ground. There we were until when the Government came to see after her; when they asked who killed the woman, we said it was Yassah Biyan Glewu." Yarkpawolo Pewee was asked on cross examination whether "there arose any altercation between the decedent and the defendant". He said there was no altercation between the two parties. He was asked further on cross examination whether anyone else, beside him, was present. He replied that when the gun shot news was heard he could not remember anybody, because he was running for his life. For jury clarification, the witness was asked whether, after the first sound of the said gun he heard any other sounds of gunshot. He said there were other sounds of shooting by Biyan around the town after he had shot and killed the woman.

In addition, the excited utterance of the decedent before her instant death as testified to by the prosecution's witness Yarkpawolo Queque must be taken into consideration, when she said, "Oh! Biyan (meaning the defendant) killed me."

Defendant Yassah Biyan Glewu took the stand to testify for himself. He repeated essentially what Yarkpawolo Queque, the star witness for the State, had stated on direct examination for the prosecution regarding the cantankerous relationship that existed between him and the decedent while they were living in Monrovia as husband and wife. He said that after the parents of the decedent agreed to marry their daughter to him and bore all the expenses to have her transported to Monrovia, they were so quarrelsome that he sent word for the

mother of the decedent to come for her; that the mother came for her daughter and while they were returning to the interior, they took all of his cooking materials; that he became outraged by what they had done to him after incurring so much expenses to keep the woman. He said that they left on Friday and Thursday the following week he went to the interior for his wife; that as soon as he reached the interior and told the mother that he came for his wife, the parents of the woman and all the people in the village came together and informed him that the woman did not want him anymore. Yassah Biyan Glewu further testified that after many attempts to persuade Viliga ended in futility, her people told him to go until her heart cooled and that they would escort her to Monrovia within two weeks; that when he insisted on her going, the father threatened to refund his expenses to terminate the matter. When he left for Monrovia, he said, the decedent's father went to him at the end of the two weeks as stipulated between them, but failed to bring Viliga along, saying that Viliga would come at the end of the harvest. At this point, Yassah Biyan Glewu said he returned to Zorzor for the second time to bring the woman, whereupon, he saw the woman's father, Yarkpawolo, who told him then to proceed with him to the village to discuss the matter; that when he met his wife, she refused to speak to him and when he asked her to go to bed with him she also turned him down. Glewu also said that the house which he built for Yarkpawolo Queque had been used by Viliga and her boyfriend, but did not mention whether the boyfriend was in the house that day.

He said that after every attempt to beg the woman failed that night, they all went to dance and the women were singing against him. He said that he called Yarkpawolo Pewee, the leader of the group, and told him to advise his people to stop singing against him; but he, Yarkpawolo Pewee, laughed and told him to ignore them. He said that when he was standing and the people were dancing before the door in the middle of the village, they all saw him and yelled at him; and when they yelled, his heart was beating and he became exceedingly mad. He said that he took a careful look among them and when he found the decedent Viliga sitting down, he took a proper look at where she was sitting down and shot her. He went further to say that he did not want to kill many people as he could have done that easily with his automatic riffle. He said after killing Viliga he took the Zolowo Road with intention of coming to the district commissioner to report himself.

The second witness for the defense was Worlobah Kpaiwolo, who testified that he was not there when the crime was committed and did not know why the defendant called him as his witness; that he was in Monrovia when he heard that Glewu killed Viliga. The witness was discharged at this point and another witness, Mama Yallah, was called by the defense. Mama Yallah likewise denied any knowledge of the killing or the surrounding circumstances.

A review of the entire records in this case satisfies this Court that the evidence of the State,

including the dying declarations of the decedent, was conclusive, overwhelming and determinative as to exclude every rational doubt that the defendant was guilty of murder. A dying declaration is a statement admissible into evidence in trials of homicide when made by the deceased person whose death is the subject of the charge as to the cause and circumstances of the death; the deceased having at the time abandoned all hopes of recovery. OSBORNE CONCISE DICTIONARY 127 (6th ed.). The universal acceptance of this rule is based on society's belief that dying persons will almost always tell the truth either for fear of eternal punishment or because the dying person has nothing to lose by telling the truth. *Berrian* v. *Republic,* 2 LLR 258 (1916); *See* also WHARTON ON CRIMINAL LAW, § 66; and GREENLEAF ON EVI-DENCE, § 156.

Additionally, by his own confession in open court which was made without any force or threat of force or promise of reward, the defendant said he killed the decedent. In the light of the decisions of this Court in the cases of *Dennis and Dennis* v. *Republic*, 3 LLR 45 (1928) and *Glay* v. *Republic,* 15 LLR 181 (1963), supported by the Civil Procedure Law, Rev. Code 1: 25.8, we consider such admission as valid evidence in the prosecution for murder.

We must, therefore, hold that the verdict was in harmony with the evidence. We have long established the principle that the jury is to judge the credibility and effect of all testimonies submitted to it. *Coleman* v. *Republic,*1 LLR 320 (1898); *Simpson* v. *Republic,* 3 LLR 300 (1932), where this Court held that it was solely within the discretion of the court to decide the admissi-bility of evidence; but once the evidence was admitted, the weight and the effect to be given to it rested entirely with the jury.

This Court has held that a motion for new trial should be denied where the evidence to support the verdict is clear and convincing as in this case: *Kasimu v. Republic of Liberia,* 25 LLR 80 (1976).
In criminal, as in civil cases, the grant or refusal of a new trial is generally said to rest in the sound discretion of the trial court, and the appellate court has no right to review the exercise of such discretion unless it appears that it had been abused to the prejudice of the defendant, *Killix v. Republic,* 8 LLR 173 (1943). In the absence of such showing, we hold that there was sufficient evidence for the jury to have found, and it did properly find, the defendant guilty of the crime of murder charged in the indictment.

Count twelve of the bill of exceptions attacks the court's denial of the appellant's motion in arrest of judgment as being erroneous.

"12. And also because Your Honour committed a reversible error to have denied defendant motion in arrest of judg-ment. To which defense excepts ...." The controlling statute as

found in the Criminal Procedure Law, Rev. Code 2: 22.2 provides:

"Motion in arrest of judgment. The court on motion of a defendant shall arrest judgment if the indictment does not charge an offense or if the court was without jurisdiction of the offense charged. The motion in arrest of judgment shall be made within five days after verdict or finding of guilty, or after plea of not guilty. The motion shall be heard before judgment is rendered. If judgment is arrested, the court shall discharge the defendant from custody, and if he has been released on bail, he and his sureties are exonerated and if money has been deposited as bail, it shall be re-funded."

A glance at the indictment shows that the appellant was charged with the commission of the crime of murder. The crime having been committed in Zorzor of Lofa County, the Tenth Judicial Circuit Court had jurisdiction over the subject matter and person, and therefore, the motion filed by appellant in arrest of judgment was without the pale of law and was therefore properly denied by the trial court.

Having established that the trial was regular, we will now consider the question of provocation raised by appellant in his argument and to see whether the appellant's conviction for murder should be reduced to manslaughter. It has been held that mere language, however aggravated, abusive, opprobrious or indecent, directed at the slayer of the speaker, is not a sufficient legal provocation to create an ungovernable passion as would negate malice and premeditation to reduce a killing with a deadly weapon from premeditated murder to manslaughter. 2 A.L.R. 3d, § 1295 (1963); and 40 AM JUR 2d., *Homicide,* §§ 54-61 (1968).

For provocation to reduce murder to manslaughter, it requires consideration of the element of time between the alleged pro-vocation and the slaying, together with the type of weapon used, and the number of times it was used to commit the act. Where there is sufficient cooling time to allow a defendant to reconsider and to enunciate the contemplated act of homicide, the defense of provocation is not available to excuse murder. BLACKS LAW DICTIONARY, Fifth Edition, page 1103. This Court has no power to reduce the crime charged in the indictment from murder to manslaughter as prayed by appellant's counsel on the grounds of provocation when such defense was never pleaded at the trial and passed upon by the jury.

In this case, all the witnesses for the State testified that while decedent and the appellant had had previous misunderstandings, there was no altercation immediately prior to the shooting. We also have uncontroverted evidence that the appellant shot, the decedent several times and that after killing the decedent, the appellant went on shooting around the village at large.

The use of such a lethal weapon clearly manifests a depraved and malignant heart to justify the conviction for murder; and when all of the surrounding circumstances are taken together, including the appellant's testimony that he was looking for no one else other than the decedent, it is difficult to accept his claim for mitigation. We hold that where, as here, the trial is regular and the finding of the jury is proper as to the guilt of an accused, this court has no power to reduce the offense charged in the indictment as proved, to a lesser offense. *Brown v. Republic,* 21 LLR 65 (1972).

In view of the foregoing, we are compelled to affirm the judgment of the court below and same is hereby affirmed. The clerk of this court is hereby ordered to send a mandate down to the court below to resume jurisdiction and enforce its judgment. And it is so ordered.
Judgment affirmed.