

MODESCO NYANDER APPELLANT VS. REPUBLIC OF LIBERIA

APPELLEE

APPEAL

LRSC 9

HEARD: November 11, 2010 DECIDED: January 21, 2011

MADAM JUSTICE WOLOKOLIE DELIVERED THE OPINION OF THE
COURT

A forty-four (44) year old female identified as Annie Kpakalah, a resident of Monrovia was found dead on the outskirts of Leleh, Bong County on the 4th of September, 2007, at the hour of 12 P.M. A preliminary investigation conducted by the Liberia National Police linked two persons. The indictment charged Modesco Nyander of Gatayea and Milton Dormue of Tarsai, both of Kpaai District, Bong County, Republic of Liberia for the crime of murder. The indictment charged that the Grand Jurors, good and lawful citizens of Bong County, Republic of Liberia, duly qualified, selected, sworn and empanelled to inquire into matters brought before them on behalf of the Republic of Liberia, did upon oath present Modesco Nyander of Gatayea and Milton Dormue of Tarsai, both of Kpaai

District, Bong County, Republic of Liberia for the crime of Murder.

SECTION 14.1 of our Penal Code states that a person is guilty of Murder if he/she:

(a) "Purposely or knowingly causes the death of another human being

(b) Causes the death of another human being under circumstances manifesting extreme indifference to the value of human life. A rebuttable presumption that such indifference exist, arises if the defendant is engaged or is an accomplice in the commission of..."

The indictment charging the defendants, alleges that the defendants Modesco Nyander of Gatayea and Milton Dormue of Tarsai, both of Kpaai District, Bong County, Republic of Liberia, conspired to commit murder, and on the 4rd day of September, A.D. 2007, between the villages of Gatayea and Leleh, Kpaai District, Bong County, Republic of Liberia, said defendants realizing that the deceased had a huge amount of money of about L\$15,000.00 (Fifteen Thousand Liberian Dollars) or more to go and buy palm oil at Gatayea, had co-defendant Modesco Nyander escort the deceased from the village of Tarsai while on her way to Leleh. Between these two villages and between the hours of 8:00 and 9:00 a.m., defendants without the fear of God and man purposely, intentionally, unlawfully, criminally, willfully, illegally and feloniously with premeditation conspired and murdered said Annie Kpakalah on the aforesaid 4th day of September, A.D. 2007, and took her money.

That the co-defendant Modesco Nyander did admit to the Police/ C.I.D that he escorted the deceased prior to her death when she was killed with an unknown instrument.

That prior to her death, co-defendant Milton Dormue phoned to the deceased informing her that there was a Club in Gatayea Town involved in the processing and selling of palm oil, and that the deceased should meet him in Gatayea to buy the oil. He warned that any delay would cause them to sell the oil to other customers.

Having gotten this call from co-defendant Milton, the deceased proceeded to Tarsai, only to be told by co-defendant Milton that there was no palm oil; however, he prevailed on her to spend the night with his wife, which she did. The next day, the 4th day of September, A.D. 2007, Annie Kpakalah was murdered between Leleh and Gatayea, after being escorted by co-defendant Modesco Nyander.

That prior to the death of Annie Kpakalah, co-defendant Modesco Nyander also phoned her informing her to come to Tarsal to buy oil. According to co-defendant Modesco Nyander, palm oil was specifically kept there in Tarsai by both defendants for the deceased to come and buy. That the said defendants knowingly, planned and conspired to murder the deceased and take away her money that she had carried to buy

palm oil and which they did do and commit on the above mentioned day and date, contrary to the form, force and effect of the statutory laws of Liberia.

"The Grand Jurors, aforesaid, do then upon their oath aforesaid, do further present defendants Modesco Nyander of the Town of Gatayea and Milton Dormue of the Village of Tarsal, Kpaai District, Bong County, Republic of Liberia, at the time and place aforesaid did do and commit the crime of Murder contrary to the form, force and effect of the statutory laws of Liberia."

Based on this indictment, the defendants herein were arraigned before his Honor, J. Boima Kontoe, in the Ninth Judicial Circuit, Bong County, sitting in its May Term 2008. There and then the defendants pleaded, "Not Guilty."

With this indictment, prosecution set out to prove a case of conspiracy in the killing of Annie Kpakalah, their theory being that defendants Milton Darmue and Modesco Nyander both played a role in murdering the late Annie Kpakalah as a result of clever conspiracy and connivance, in that Milton Dormue succeeded in convincing and persuading the deceased to visit him with a huge sum of money with the understanding that he had arranged and she would be buying palm oil. He later contacted codefendant Modesco, appellant herein, to murder the deceased and take her money and other personal effect. Appellant was the main person who escorted the deceased to the place she was found murdered.

The prosecution paraded nine witnesses and two rebuttal witnesses to prove the charge of conspiracy and when the prosecution ended with its testimony and presentation of evidence, the defense moved the court for judgment of acquittal stating that the prosecution had failed to prove a prima facie case. The prosecution resisted the motion and the Judge ruled denying the motion, stating that the sum total of the prosecution evidence was sufficient in the absence of contrary evidence.

The defense then took the stand and produced ten witnesses, after which they rested. When the parties rested with the production of evidence, the jury deliberated and brought a verdict of "guilty" against the appellant Modesco Nyander and a verdict of

"not guilty" for co-defendant Milton Dormue. Thereafter, a judgment was rendered by the court, sentencing appellant Medesco to life imprisonment.

Co-defendant, Modesco Nyander, has appealed noting the following exceptions:

"1. That the allegations laid in the indictment against defendant Modesco Nyander to the effect that he escorted the late Annie Kpakalah on the 4th day of September, A.D. 2007, in Torsa and murdered her on the road was never proven at the trial. Hence, the verdict was manifestly against the weight of evidence adduced at the trial."

2. That on sheet 8 of May 21, 2008, the State's principal witness, CID Commander of Bong County, testified in alia that there were eyewitnesses who saw defendant killing decedent; yet at the trial, no such witnesses ever appeared to testify. Hence, Your Honor erred in affirming the verdict not supported by the evidence.

3. that Your Honor erred when you amended the indictment to properly correct the material variance between the indictment as to the time of the incidence and the testimonies of witnesses, especially so defendant having interposed a defense of alibi.

4. That Your Honor's charge to the jury was not in consonance with advance and the principle of law controlling the crime of murder.

5. That the indictment having stated that Modesco Nyander and Milton Dormue conspired to murder Annie Kpakalah, it was an error for Your Honor to affirm the verdict of guilt against one of the defendants while the other was acquitted by the same jury.

6. That Your Honor overruled several important questions posed to the prosecution's witnesses on the cross, and allowed the prosecuting Attorneys to ask irrelevant and incriminating questions to defense witnesses."

The bill of exceptions having been approved by the trial Judge, we have taken recourse to the records of the trial court certified and sent up for our review.

Proof of murder is based on direct or circumstantial evidence. Direct evidence is presented when the evidence directly proves a fact, without an inference or presumption, and which in itself, if true, conclusively establishes the fact. Circumstantial evidence is the establishment of proof by a chain of circumstances pointing to the existence or non-existence of certain facts; it is based on inference and not on personal knowledge or observation. *Glav vs. R.L.*, 15LLR 181,193-194(1963). Black's Law Dictionary 8th edition, page 595.

The body of a 44 year old female found dead lying along the road between Gatayea and Leleh, and there being no direct or eye witness to the cause of death, the prosecution sought to establish the cause of death of the deceased by circumstantial evidence. A coroner investigation was conducted and the report concluded that the body was a female who was murdered. The deceased neck and arm were broken, she had a cut under her chin and scratches on her body with her legs scraped. There was indication that there was a struggle before she was over-powered and killed. A stick with blood and a pen knife lay beside her body. The CID conducted further investigation and also concluded that the deceased was killed. They thereafter began an investigation to determine the perpetrator of such heinous crime. After its investigation the CID the state came up with the theory of conspiracy by the defendants to kill the deceased and take away her money.

At the trial, prosecution produced witnesses who testified that the deceased went to Tarsai on Monday based on a call from the co-defendant Milton Dormue. Upon her arrival, the deceased did not meet Milton Dormue at his home. After being told, much to her disappointment, that there was no oil, the deceased then spent the night at co-defendant Milton's home with his wife and the next morning, the 4th of September 2007, proceeded to go to Leleh to find oil. On her way, passing through Gaytaya, she met the appellant who it was testified escorted her. The prosecution also brought witnesses to testify that the appellant did say that he escorted the deceased part of the way from Gaytaya to Leleh.

In an effort to rebut that he escorted the deceased, the appellant brought two witnesses

to testify that they were with the appellant on the day that the deceased passed through Gaytaya on her way to Leleh, and though she stopped and spoke with them, the appellant did not escort the deceased but remained with them and subsequently they had some food cooked. After eating, one of the witnesses, Augustine, left to go on the farm and the appellant remained in the company of the other witness, Naomi the rest of the day.

Co-defendant, Milton Dormue produced numerous witnesses who gave testimony to the effect that he was involved with them in carrying out some youth activities on the 3rd and 4th of September 2007, therefore, he could not have been involved in the killing of the deceased on 4th of September.

The jury, having heard the testimonies presented in court by both the prosecution and the defense witnesses, deliberated and brought a verdict of guilty against the co-defendant/appellant Modesco and not guilty against co-defendant Milton Dormue. The Judge upheld the verdict and adjudged the appellant guilty of murder sentencing him to life imprisonment.

Count 1 of the bill of exceptions, stated supra says the allegation that appellant had escorted the late Annie Kapkalah on the 4th of September 2007, in Tarsai and murdered her on the road was never proven at trial. The verdict was manifestly against the evidence adduced.

A review of the records show that the prosecution produced evidence that the appellant stated to numerous onlookers and the coroners waiting for the Police/CID to come from Gbarnga that he had escorted the deceased, his sister, from Gataya to the out-sketch of the town, the edge of the field in Gataya. These witnesses testified that when appellant came on Wednesday morning, the 5th of September, the day after the deceased was found, he was anxious, stating that he had escorted his sister the day before and he wanted to see the body to identify whether she was the one found dead. Initially, the Justice of the Peace, Joseph Fare, one of the coroners, refused to allow the appellant to go near and see the body, keeping all onlookers in abeyance until the CID arrived from Gbarnga. However, the onlookers prevailed on the JP to allow Modesco

see the body as all were anxious to have the body identified. Having seen and identify the body, the appellant informed the onlookers that the deceased was his sister, Annie Kapkalah, whom he had escorted the day before. He asked if anyone had a phone so he could call to Monrovia to inform the relatives. One of those present, Mulbah Torwallee, lent him his phone to call. This testimony of prosecution witnesses Kerkulah Payjue was typical of the prevailing testimonies of prosecution:

This is what I know. It was on Wednesday morning, during the time they killed this girl on Tuesday, the next day was Wednesday and we saw Modesco in the morning. He came to our town in the morning and he said that he came to escort one of his sisters on this road. But since [h] heard that they killed someone on the road, [he] came to find out. Now when he Modesco got to the town, he was very hot that morning. He said he wanted to see the body, whether it might be his sister that was brought halfway by him. Myself I saw with my eyes, the Justice of the Peace put people behind Modesco and they went to where the body was and he saw the body. He came back and said that was his sister that he brought halfway yesterday. We asked him whether he knew the name of the woman. He said yes, her name is Annie Kpakalah. While he was coming back, he asked for telephone to call the other family in Monrovia. During that time, there were not many phones, but we borrowed Mulbah Torwaalee's phone and he called. We that were present were more than forty persons. We gave the phone to Modesco and he called to the family in Monrovia. When he opened the phone on loud speaker, we heard people crying

The testimonies of appellant's two witnesses, Naomie and Augustine was that the defendant did not escort the deceased but the prosecution brought a rebuttal witness who was not with the appellant and his witnesses when the deceased passed through Gaytaya. He testified to what the defendant had told them during the investigation.

Under our Jurisdiction, in order for any evidence to be weighty and relied upon, especially in criminal matters, said evidence must be corroborated. The prosecution paraded more than seven witnesses who testified that the appellant told them he had escorted his sister on the morning of September 4, 2007, to Leleh from Gatayea. This Court has said, "in a jury trial, only the jury is clothed with the authority to examine and

review the evidence produced by the parties, determine the weight and credibility to be given to such evidence, and to determine the verdict to be given therefrom; the appellate court will not normally question this discretion." *Constance and Continental General and Life Insurance Company vs. Aiavon et. al.* 4OLLR, 295,297 (2000).

Count 2 of the appellant's bill of exceptions raised the issue that the prosecution CID Commander testified that there were eye-witnesses who saw the appellant killing the deceased; yet at the trial, no such witnesses ever appeared to testify. Hence, the trial court erred in affirming the verdict not supported by the evidence.

A review of the testimony of sheet 8 of May 21, 2008, referred to by appellant shows that he had a mistaken understanding of the language, "who saw Modesco lastly escorting Annie to her death" Nowhere in the records before us did the prosecution try to prove that there was an eye —witness to the murder or that the determination of the jury's verdict or the trial court's judgment were based on direct evidence proving that the appellant did kill the deceased. The CID Commander's reference was to those persons who confirmed that the appellant did say he escorted the deceased the day she was found dead; a chain in the prosecution circumstantial evidence which sought to prove the appellant guilty of the murder of Annie Kpakalah.

The appellant also assigned as error, the granting by the Judge the prayer of the prosecution to amend the indictment to properly correct the time of the incident and the testimonies of witnesses, especially so when the defendant had interposed a defense of alibi.

Our Statute, 1LCLR, title 2, Criminal Procedure Law, §14.7 states:

1. "Formal defects. The court shall permit an indictment or complaint to be amended at any stage of the proceedings to correct a formal defect.
2. Amendment to conform to evidence. When upon the trial of an indictment or complaint, there appears a variance between the allegation therein and the evidence offered in proof in respect to any fact, name or description not material to the charging

of the offense, the court may, if the defendant will not be prejudice thereby, direct that the indictment or complaint be amended to conform to the proof on such terms as the court deems fair and reasonable, but an indictment or complaint shall not under any circumstances be amended under this paragraph to charge an offense different from or additional to the offense originally charged."

In this case, the amendment to change the date the deceased was found dead could not have been prejudicial to the defendant. As the judge in the trial court ruled, the testimonies of both the prosecution and defense point to the body of the deceased being found on Tuesday, which was the 4th, of September, 2007. Appellant himself testified that the deceased while on her way to Leleh passed him and two others in the town of Gaytaya on the morning of Tuesday the 4th of September. It was the evening of the same Tuesday, September 4, 2007, that the deceased Annie was found dead beside the road leading into Leleh. The alibi that appellant sought to establish was to deny that he escorted the deceased that morning of the 4th while she was on her way to Leleh but that he was in the presence of two persons after the deceased proceeded to Leleh. The deceased body was found between Gaytaya and Leleh the evening of the 4th, a date that was never in dispute. We fail to see how the appellant was prejudiced by the amendment of the indictment which changed the date of death of the deceased from the 3rd to the 4th of September, 2007.

The appellant has also noted in his exception that the Judge's charge to the jury was not in consonance with the principle of law controlling the crime of murder and that the Judge overruled several important questions posed to the prosecution's witnesses on the cross, and allowed the prosecuting Attorneys to ask irrelevant and incriminating questions to the defense witnesses.

Appellant has not stated with specificity what was in the Judge's charge that was not in consonance with the law controlling the crime of murder. He also has not noted the exceptions to these important questions overruled on the cross or those irrelevant and incriminating questions put to defense witnesses.

In Mourad vs. OAC, 23LLR 183, 187 (1974), Mr. Justice Azango delivering the Opinion

for this Court about the Court's concern of lawyers who loosely and vaguely state counts in their bill of exceptions, wrote:

"We wish to reemphasize that there is a tendency on the part of counsel and of trial judges to shift responsibility to this Court. Hence we must again point out, not only is counsel required to set forth distinctly in the bill of exceptions the ground upon which an exception is taken, but the trial judge may not properly approve a bill of exceptions by stating: "Approved so far as is supported by the records." It is improper to place upon this Court the burden of searching the records in order to discover the exceptions taken and the grounds therefor. This Court will not consider any exception in a bill of exceptions when the ground is not distinctly set forth. A bill of exceptions must state distinctly the ground upon which the exception is taken."

This Court has also said that "exceptions taken and noted in trial but not included in appellant's bill of exceptions are considered waived." *R.L. vs. Sone and Corneh*, 35 LLR 126,132 (1988); *Francis vs. Mesurado Fishing Company, LTD.*, 2OLLR 542, 551 (1971). We therefore are in no position to review those irrelevant and incriminating questions allegedly posed to the defense witnesses by the prosecution.

Importantly, appellant has assigned as error, the Judge's affirmation of the verdict of "GUILTY" brought against him by the jury when the verdict of "NOT GUILTY" was brought in favor of co-defendant Milton Dormue whom the indictment said conspired with appellant to murder Annie Kpakalah,

We must ask whether an indictment which alleges conspiracy by two individuals in the commission of a crime, and one of the individuals is acquitted, the jury can bring a guilty verdict against the other?

From the records, the prosecution proceeded on the theory of conspiracy, seeking to prove that the co-defendant Milton Dormue succeeded in convincing and persuading the deceased to visit him with huge sum of money to buy oil and that co-defendant Milton conspired with the appellant to murder the deceased and take away her money and other personal effects, but the jury acquitted Milton Dormue based on alibi and

convicted Modesco the appellant.

Criminal conspiracy is a specific intent crime which arises from mutual agreement between two or more individuals to do or accomplish a crime or unlawful act. The gist of the criminal conspiracy is the specific, mutual agreement to perform the crime in question. In order to convict a defendant of conspiracy to commit murder, the prosecution must establish that that the defendant entered into an agreement to commit murder and that he or she did so with the specific intent to commit murder. *Lawrence vs. Republic of Liberia*, 2LLR 65, 68-69 (1912).

We have referred to our opinions for an answer to this question but have come across none that deals directly with this issue in counts 5 of the bill of exceptions. We have taken recourse however to our statute and other jurisdiction in dealing with the issue of the plurality requirement of conspiracy.

For a long time the Rule of Consistency was held by many courts in the United States in disposing of this issue. Under this Rule, a conviction of one charged conspirator could not stand where the only other charged conspirator was acquitted of conspiracy. The Rule adopts the fundamental view that at least two persons are required to constitute a conspiracy.

Modern Criminal Law Casebook, 4th Edition (2006), authored by Wayne R. Lafave, discusses the new approach to conspiracy taken over the past decade as follows: "Nearly all jurisdictions with modern codes have elected to follow the "Model Penal Code" recommendation that conspiracy be redefined as a unilateral rather than bilateral or multilateral crime. By concentrating on individual, rather than group liability, the guilt of a particular actor is made independent of that of his co-conspirator(s). Such treatment is said to be important when, for example, defendant's only co-conspirator (a) is legally irresponsible or immune or incapable of committing a particular offense, (b) has feigned agreement, usually as part of some law enforcement scheme, or (c) is unknown, unapprehended, unindicted, unconvicted, or acquitted. A unilateral definition of conspiracy means that none of these circumstances will preclude defendant's conviction where the evidence is otherwise sufficient. Each of the

possibilities mentioned in (c) above, especially the possibility of an acquitted co-conspirator, raises questions of consistency of disposition if the defendant is convicted. The framers of the Model Penal Code were cognizant of possible objections of this character, but they regarded disparate outcomes as preferable to the discharge of an offender whose own culpability was clearly established. The Code recognizes that inequalities in the administration of the law are, to some extent, inevitable, that they may reflect unavoidable differences in proof, and that, in any event, they are a lesser evil than granting immunity to one criminal because justice may have miscarried in dealing with another." Colum. L. Rev. 1122, 1135-37 (1975).

Critics of the Rule of Consistency believe that it overemphasizes joint criminality and underemphasizes proof of individual intent; while others think it is inconceivable to say that a jury in a joint trial could convict one of only two alleged conspirators while finding the other charged individual not guilty."

The case *United States vs. Andrews* 850 F.2d 1557 (11 th Cir.) (1988), was cited, where the majority of the Bench ruled, "Consistent verdicts are un-required in joint trial for conspiracy: where all but one of the charged conspirators are acquitted, the verdict against the one can stand." Judge Clark dissented, quoting an earlier decision:

"A conspiracy cannot be committed by a single individual acting alone; he must act in concert with at least one other person. The acquittal of one conspirator would thus be immaterial where there are several other named conspirators, or other conspirators charged but unknown to the jury. But were all but one of the charged conspirators are acquitted, the verdict against the one will not stand."

"It is inconceivable, he said, that the Supreme Court meant to say that the Jury could convict one of only two alleged conspirators while finding the other charged individual not guilty."

A look at our law relating to Complicity shows that our Jurisdiction leans more to the Model Penal Code for the crime of conspiracy.

Chapter 3. of our Penal Code, Section 3.1 COMPLICITY, provides that a person is guilty of an offense committed by the conduct of another person when he aids such other person to commit it, and it is no defense that the person for whose conduct the person is being held liable has been acquitted, has not been prosecuted or convicted, or has been convicted of a different offense or is immune from prosecution, or for some other reason cannot be brought to justice. [emphasis added]

The indictment states: "That prior to the death of Annie Kpakalah, co-defendant Modesco Nyander also phoned her informing her to come to Tarsai to buy oil. According to co-defendant Modesco Nyander, palm oil was specifically kept there in Tarsai by both defendants for the deceased to come and buy. That the said defendants knowingly, planned and conspired to murder the deceased and take away her money that she had carried the buy palm oil and which they did do and commit on the above mentioned day and date, contrary to the form, force and effect of the statutory laws of Liberia."

Nowhere in the records is it shown that the prosecution presented evidence to substantiate this claim in the indictment that the appellant invited the deceased to Tarsai to buy oil. To the contrary it was Modesco Dormue whom prosecution witness said lured the deceased to Tarsai:

Prosecution first witness/ Lucy Mulbah

"Yes, what I know [concerning] the late Annie Kpakalah and Milton is, I was selling at Palala Market, Annie Kpakalah came from Leleh and she came to me at my market table. While she was sitting with me, she saw Milton in Palala Market. She called Milton; Milton did not hear her. She sent me to call Milton. I called Milton. Milton came and shook Annie's hand. He said Annie, where are you going? Annie said, I am going to Monrovia. Then Milton said where are you coming from and going to Monrovia. She said I came from Leleh. Milton said why are you going to that far distance to buy? He then asked, what did you go to do in Leleh? She answered, I went to buy oil. He then said, why you are going to Leleh when oil is in Tarsai for eight hundred twenty five dollars. Then Annie said I do not know anybody in Tarsai; it is in Leleh that I *know one*

papay; he's the one I can go to. Annie said, so if I come to Tarsal will I be able to find oil there to buy? Milton said yes. Some boys have oil there. I am going to talk with them tonight then Wednesday I will be able to call you. Then he asked Annie whether she has phone. Annie said yes. She took the number from her bag and gave it to Milton. Milton took his diary book from his pocket and wrote the number inside. Then Milton left. The following Monday Annie was in Tarsal. She called me over phone and said that she was at Milton's house. She came and never met Milton home' only Milton's wife she saw at home. Then she told me and said, Milton who called me I came and I never saw him, but he already told me the oil is here. When he comes, I will pay for the oil to leave it here with him. So Wednesday be waiting for me on the road. I am going to Leleh for the other oil, so I can stop here to take the balance one on my way. Be waiting for me on the road on Wednesday because I do not know the hour that I will be coming; then she cut off the phone. I did not hear from her until the next day when I heard about her death news. That is all I know."

Prosecution second witness./RebeccaKpalalah

"I went to Monrovia to visit my ma. It was on Wednesday I was coming to Red-Light. Our Ma Nyama Kpakalah sent message by me for me to tell her daughter the late Kpakalah that she really wanted to see her, because Annie had gone on the farm and stayed long, so she wanted to see her. When I came from Monrovia, I met her right on my brother's table. I said it is so good I saw you here, your mother sent a message. Your ma says you should go, she really wants to see you. Annie said, I do not think I will go there; I will not reach to her because I want to go back on the farm. She said when you go tell her the going what I am going, I will not stay long because I have customers. The first trip I did not have customers that was why made me stay long. But this other trip, I will not stay long. Then my sister received a call. They were talking and I only heard her say I will come Friday. After that, she explained it to me. She said, the oil business that I was telling you about, that I will not stay long, that was my oil business Milton just called me for. Milton says that I should go, he has susu oil so I can get some. He said when I do not go, he will sell it. That's it. My husband keeps telling me to leave here so I can't miss my oil. I will be going Friday so I can get my oil. I will not stay long. When he comes he will meet me here because I am not going to stay long. Then after I carried her halfway and she left and I myself left. That is all."

Agreeing with the modern view of lessening the requirement of a multiparty agreement and instead emphasize individual culpability, we must state here that the prosecution was under a duty to establish a prima facie case beyond any reasonable doubt that indeed the appellant did murder Annie Kpakalah.

Murder is defined as the killing of a human being with malice aforethought, an act done with intent to kill, an intentional taking of life of another without just cause. In establishing the crime of murder where there is no direct evidence, circumstantial evidence is often relied on by the prosecution to prove same.

The prosecution did not bring any witness to verify the fact in the indictment that the appellant spoke with the deceased or was in contact with her prior to the morning of September 4, 2007. Reviewing the evidence presented by the state, the prosecution attempted to establish proof of the appellant's intent to commit the crime by giving evidence to the effect that when the deceased passed through Gaytaya and spoke to the appellant, he noticed her carrying a black bag with money to purchase oil in Leleh. He then escorted her and killed her taking away her money and other valuables.

The prosecution also in trying to establish proof of appellant as the perpetrator of the crime presented witnesses to testify to appellant's anxiety and insistence on seeing and identifying the body discovered along the road. Appellant's statement to the onlookers that he and the deceased were sister and brother and he had escorted her on her way to Leleh the day she was found dead made him a suspect. What if the appellant said that simply because he was inquisitive and wanted to see who had been killed? Wasn't there anyone in the village who saw the appellant walk with the deceased?

Another evidence prosecution sought to use in linking the appellant to the murder was the testimony by the brother of the deceased, Sam Kpakalah. Sam testified that the deceased called him and asked him to send him some units so he could give him updates on what was happening in Leleh concerning the handling of the murder of the deceased. Sam testified that no one had his telephone number in the area and the appellant could have only gotten the number from the decedent's phone which was also taken from her when she was killed.

Nyamah, appellant's witness on the other hand said, it was Sam who retrieved the appellants number from her phone after she had taken the phone to him informing him that Modesco, the appellant, had called to tell her about Annie's death. She said Sam thereafter called Modesco, and during the conversation, appellant asked him to put money in his phone. The prosecution gave notice that it would bring a rebuttal witness.

The prosecution rebuttal witness, Alfredson W. Tarkeweyah, testified that when the appellant was quizzed during an investigation, appellant admitted that he had said to the CID previously that after the deceased was identified, he appellant made several calls to family members in Monrovia including Sam, the deceased brother. However, when asked to identify Sam, the appellant identify someone else.

We do not see how this rebutted the testimony given by the appellant's witness. She did say that the appellant and the deceased brother spoke after she took her phone to him; subsequently, he called the appellant back after retrieving his number from her phone.

Couldn't the prosecution have established this essential fact by reverting to records made to the deceased brother's phone?

It is also alleged that there was a scuffled and beside the body was a stick with blood, a sizable tape and a pen knife with black handle found beside the deceased. Was there any attempt to link these evidence found to the appellant? Again no mention is made about the state's attempt to show evidence however slightly that the appellant was engaged in scuffle which would have linked him to the investigative report that the deceased died fighting for her life.

It is disheartened that heinous crimes are committed and the state does not make the necessary efforts to investigate and gather evidence sufficient and necessary to make a strong and convincing case. This is a case that caused public uproar among citizens of Bong County and we are taken aback by the callousness in which the State handled this matter. We must emphasize that in order to curb crimes in our society, the prosecution,

particularly the police, must commit to handling criminal matters with due diligence, gathering concrete and tangible evidence necessary to ensure conviction and stop relying on public sentiments for conviction.

This Court has said, "Evidence in a criminal case against an accused must be conclusive, and if it be circumstantial, should be so connected as to positively connect one element within another for a chain of evidence sufficient to lead to conclusion of guilty of the accused." *Davies vs. R. L.*, 40 LLR 659, 680-681 (2001).

We are not persuaded by prosecution's argument that a person said to be anxious to identify a body lying alongside the road and referring the deceased as his sister is sufficient for conviction on the charge of murder.

We note that Counsellor Francis Y. S. Garlawolu was named as one of the counsels for the appellant in the court below. When he appeared to argue this case before us, these questions were put to him:

Ques: Counsellor, were you in this case in the court below?

Ans: Yes, Your Honors, Counsellor Yangbe was the lead counsel.

Ques: Who prosecuted this case?

Ans: Counsellor Serena Garlawolu.

Ques: Do you think it is right or ethical to do that?

Ans: I think it is right. It is wrong when you don't do the right thing.

Rule 35 of the Code of Moral and Professional Ethics of Lawyers in our Jurisdiction, state, "It is the duty of a lawyer to preserve his client's confidences. This duty outlasts the lawyer's employment and extends as well to his employees, and neither of them should accept which involves or may involve the disclosure or use of these confidences,

either for the private advantage of the lawyer or his employees or to the disadvantage of the client...

Clearly it posed a conflict of interest for two spouses to be involved in a case as adversary lawyers. Records in this case show that counselor Garlawolu joined as counsel in the midst of the trial. Obviously he knew that his wife was prosecuting this matter, and it was grossly unethical for him to have represented the defendant as adversary counsel, and such unethical behavior should warrant discipline by this Court.

Rule 32 of the same code states, "No lawyer is obliged to act either as advisor or advocate for every person who may wish to become his client. He has the right to decline employment..."

This Court has said that when neither the defense nor the prosecution in a murder trial exercised due care, diligence, and legal astuteness in protecting its client's or the State's interest, the Court will reverse a conviction and remand the case for a new trial. *Gauhoe and Govzoe vs. Republic of Liberia* 1OLLR, 204, 206 (1949).

In our opinion, the state and defense failed to exercise due diligence in this matter which would warrant this Court to sustain conviction as entered by the trial court. However, this Court in *Bingo vs. Republic of Liberia* 18 LLR 377,383 (1968), stated that though it is evident that the prosecution has failed to prove its case as required by law, when it appears that missing evidence and testimony can be supplied at a subsequent trial, a remand will be ordered, so that substantial justice may be done.

We therefore concluded that this matter be remanded for a new trial.

THE APPELLANT WAS REPRESENTED BY COUNSELLORS M. KRON YANGBE AND FRANCIS Y. S. GARLAWOLU. THE APPELLEE, REPUBLIC OF LIBERIA WAS REPRESENTED BY COUNSELLORS YAMIE Q. GBEISAY, SR., SAMUEL K. JACOBS AND M. WILKINS WRIGHT.