JOHNNY E. B. STUBBLEFIELD, Appellant, v. **REPUBLIC OF LIBERIA**, Appellee.

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

Argued December 9, 1948. Decided January 6, 1949.

A person criminally charged is entitled under our Constitution to have compulsory process to obtain witnesses in his favor, and it is error to deprive him of such. Where the sheriff did not attempt to summon a witness, it was error for the court during the trial to refuse to suspend the trial in order to obtain said witness.

On appeal from conviction of assault and battery with intent to kill, *judgment reversed and case remanded.*

Richard A. Henries for appellant. *D. B. Cooper,* Solicitor General, for appellee.

MR. JUSTICE SHANNON delivered the opinion of the Court.

Appellant, defendant in the court below, was indicted, tried, and convicted of the offense of assault and battery with intent to kill before the Circuit Court for the First Judicial Circuit, Montserrado County, Criminal Assizes, presided over by His Honor W. 0. Davies-Bright, circuit judge by assignment. Appellant took exceptions and prayed an appeal to this Court. The bill of exceptions presented to us for our consideration contains seven counts, the first two excepting to rulings entered by the trial judge upon objections made by the prosecution to questions propounded by the defense to witness James Moore, one of the private prosecutors, whilst on cross-examination.

The first of the two questions sought to elicit from said witness whether or not the act charged against the defendant was committed "with malice aforethought," and against it the prosecution interposed objections tending to show that the question of malice, according to sundry opinions of the Supreme Court, is one of law and should not be answered by the witness, but rather should be left to be determined from the facts and circumstances given in evidence, particularly from the character of the weapon used and the degree of injury inflicted. In addition, the prosecution contended, the question required expert testimony. The second question was, "Did the defendant use upon you or any of the other private prosecutors a deadly

weapon?" The position of the trial judge in deciding against these questions upon the grounds that they required expert testimony and usurped the function of the jury is well founded in law and is therefore supported.

The following is the third count of the bill of exceptions :

"On the 12th of February 1948, the defendant appellant made the following observation and request of Court: 'defendant at this stage says that witnesses Joseph, Greboe and Amy Mingle persons referred to by both the prosecution and the defendant during this case as being on the spot, when the alleged incident took place, were by defendant requested to be summoned to appear at Court on the morning of the loth February 1948, to testify on behalf of defendant. The Sheriff's returns shows that he could not find Joseph and Greboe, but does not show that he has made any effort to have Amy Mingle who is a very material witness and whose name also appears on the writ of summons summoned. The defense respectfully says that the testimony of these three witnesses are indispensible in his defence and therefore asks that the court will not conclude the case without the testimony of three witnesses being given for and on behalf of the defendant.' The court denied the said request, to which defendant excepted. (See records February 12, 1948.)"

The records certified to us disclose that when this request was submitted by the defendant, the prosecuting attorney, before resisting it, requested the court to have the defendant give the whereabouts of the supposed, as he called it, witness Amy Mingle so that the sheriff might diligently search for her and to have the defendant state the evidence which the three witnesses, who in the mind of the prosecution did not exist as evidenced by the sheriff's returns, would give, so that the prosecution could determine whether or not it would concede said testimony. Upon the court granting the request of the prosecution, the defense counsel said that to the best of his knowledge Amy Mingle was at Owensgrove. As to the demand that the defendant state the evidence which the three witnesses would give, the defense made the following statement as of record :

"Joseph and Greboe having both been referred to by the private prosecutrix and the private prosecutors as being the two whoever were fighting on that evening makes it crystal clear that Joseph and Greboe do exist. The defendant in his testimony referred to and stated that it was Joseph who came to his rescue, and that both Greboe and Joseph were on the scene. They will enlighten the court as to how it happened that the private prosecutors and prosecutrix became burnt."

Because of this record thus made by the defense, the prosecution waived objections and joined in requesting the court to suspend the case until the following morning at nine o'clock with a view particularly of finding Amy Mingle whose whereabouts had been given by the defend-ant; but notwithstanding this, the trial judge refused the application and ordered the case proceeded with. The trial judge seemed to have taken the position that the defendant ought to have secured these witnesses before the trial commenced and that since he had not done so he left no other impression but that they were not important or material witnesses. We find ourselves unable to agree with this position, especially in face of the fact that these persons were referred to during the trial by both sides as being present at the time and place the offense charged was alleged to have been committed.

The Constitution is so jealous of the rights of a person criminally charged that among the privileges and rights conserved to him are the right "to have compulsory process for obtaining witnesses in his favor; and to have a speedy, public and impartial trial by a jury of the vicinity," and the right not to "be deprived of life, liberty, property or privilege, but by judgment of his peers, or the law of the land." Lib. Const. art. I, §§ 7, 8, I Lib. Code 4. We are of the opinion that the request of the defendant for suspension of the trial until the next morning with a view to securing the attendance of his witnesses was sound and reasonable and the prosecuting attorney must have conceded this when he yielded and joined the defendant in making the request; its denial was, to say the least, a deprivation of defendant's constitutional rights, which should be frowned upon and deprecated. The motion for new trial ought therefore to have been granted.

We are in substantial harmony with the ruling given by the trial judge on the motion in arrest of judgment. We might mention, however, that there appeared to be discrepancies in the several copies of the indictment furnished, but since the original was not before us and since we have decided to remand the case for a new trial we hesitate to make any comments thereon. These discrepancies are responsible for count two of the defendant's motion in arrest of judgment. The attention of the prosecution is called to it for such action to be taken as may clarify the situation.

Because of what has been said herein, we have arrived at the conclusion that the judgment of the court below should be reversed and the case ordered remanded for new trial; and it is hereby so ordered.

Reversed.