

FREDERICK K. A. SWARAY, Appellant, *v.*

REPUBLIC OF LIBERIA

APPEAL FROM THE CIRCUIT COURT FOR THE
FIRST JUDICIAL CIRCUIT, CRIMINAL ASSIZES,
MONTSERRADO COUNTY.

Heard: October 11, 1979. Decided: December 20,
1979.

1. A police officer who inflicts injury or commits other illegal acts against the person of a suspect in his custody shall be held criminally liable and shall be punished in keeping with the relevant provision of the penal law governing such offense.
2. Testimonies from a previous trial of a case involving the same parties on the same matter may be introduced as evidence in the subsequent case where the witness in question or the evidence is otherwise unavailable for the next trial; and this is an exception to the hearsay rule.
3. While it is true that a copy of a document is inadmissible as evidence unless the original is accounted for, yet, in view of the testimony of the person who prepared the document, such testimony is admissible and does not warrant a reversal of the judgment.
4. The granting or denial of a motion for judgment of acquittal is left to the sound discretion of the court, and may be granted where the evidence is legally insufficient to sustain the charge; but the court may also, in its discretion, reserve decision on the motion until after the verdict
5. Where several persons are jointly indicted and tried for an offense which may be committed by one person alone, the jury may convict one or more and acquit the others unless the evidence against all of the defendants is the same.
6. Under our legal system, an accused is presumed innocent until proven guilty; it is therefore illegal to extract evidence from him through the use of force or other brutal means.

Appellant was a police officer of the Criminal Investigation Division (CID) who was charged, along with three other defendants, for the murder of a suspect in police custody. The evidence revealed that the suspect died as a consequence of severe beatings and torture. At the trial, two of the defendants were acquitted; appellant was convicted. He appealed his conviction on four grounds; (i) that the trial judge erred in denying his motion for judgment of acquittal (ii) that the trial judge erred in denying his motion for new trial, (iii) that the trial judge erred in admitting a copy of the medical report of death; and (iv) that the verdict was contrary to the weight of the evidence. On all four grounds, the Supreme Court approved the rulings and position of the trial court.

E. Wade Appleton and *Moses K. Yangbe* appeared for appellant. Solicitor General *E. Winfred Smallwood* and *M. Fulton W. Yancy, Jr.*, appeared for appellee.

MR. JUSTICE HENRIES delivered the opinion of the Court.

On March 11, 1974, at 5:30 p.m., Dr. Zolu Traub reported to the police sub-station in Congotown that he had lost a pistol, and he turned over to the shift commander, Cpt. Momo Sirleaf, three suspects, Rufus Barclay, Henry S. Duncan and Sundagar Matthew. They were undressed to the waist; and corporal punishment, four lashes each, was administered to them by Patrolmen Robert Stewart and David Jackson. At about 11:30 p.m. when the appellant was on duty, the suspects were turned over to him, and it is alleged that he, James Dyson and John Logan kicked and flogged them with an automobile fan belt and a piece of plank while their feet were tied with a rope. The next morning at about 6:00, one of the suspects, Henry Duncan, died. An autopsy was performed and it revealed

that there were multi-ple abrasions on the back, neck, chest, hands, head and thighs of the decedent, and that death was caused by cerebral contusion with multiple bruises and severe subcutaneous hemorrhage.

Frederick Swaray, James Dyson and John Logan were indicted and tried for murder in the Circuit Court of the First Judicial Circuit, Montserrado County. The jury acquitted Dyson and Logan, and found Swaray guilty of murder. It is from this judgment that he has appealed.

The appellant contended that the trial judge erred in denying the motions for new trial and for judgment of acquittal, and in admitting into evidence the medical report, and that the verdict was contrary to the evidence adduced at the trial. He therefore prayed for a reversal of the conviction.

Taking the last issue first, let us review the evidence by summarizing some of the testimonies of the witnesses. At the outset; it should be pointed out that the appellant was a lieutenant in the Criminal Investigation Division of the National Police, Dyson was a fireman, and Logan worked for the National Public Safety Institute. Dyson and Logan had no connection with the CID. Here is the summary of the evidence adduced at the trial:

- 1) Sgt. Momo Sirleaf, who received the suspect from Dr. Traub, testified that after some preliminaries were conducted and the accused were turned over to the appellant, the decedent, Henry Duncan, was taken to the CID room behind closed doors and was being beaten by Swaray and Logan. He heard the decedent crying. Later, the appellant went out of the room perspiring and sent Logan to buy some beer. Sgt Sirleaf said he told them to stop beating Duncan, but they paid no attention to him; and since appellant and Logan were not under his control, he could not compel them to obey him. He testified that appellant Swaray was a lieutenant and he, Sirleaf,

is only a sergeant. He also testified that Duncan was well when he was taken to the substation.

- b) William Flomo, a police officer who was on duty, testified that at about 2:00 or 3:00 a.m. he heard noise; he opened the door to the CID office and saw three men, one lying down, one kneeling, and the other standing against the wall. He saw appellant striking matches on the skin of the man lying down on the floor. He also told appellant to stop beating the accused.
- 3) Moses Bedell, driver of the fire truck stationed at the substation, testified that at 5:30 a. m. while washing his face, he heard someone crying upstairs and he smelled somebody's hair burning. He decided to investigate and when he went into the CID Office, he saw the appellant with matches in hand burning Duncan's hair. He asked appellant why he was doing that and appellant replied "he stole gun and for this gun palaver I did not sleep; he carried me all around town in the night." Moses Bedell also testified that he saw co-defendant John Logan beating the decedent and that co-defendant Dyson was also present at the beating. He inquired as to why Dyson was there, and Dyson replied that the appellant called him and sent him to get sand and water to sprinkle on the boy's back and they started beating him. Bedell testified that he got angry and took from Logan the instrument he was using to beat the suspect. Bedell also testified that this was not the first time that Swaray and Logan had beaten people accused of stealing, and being a junior officer he saw no need to report them.
- 4) Sundagar Matthew, one of the suspects, testified to the several interrogations conducted during the night. He also heard Duncan crying in the CID room while Swaray was interrogating him. He heard

Duncan tell Swaray that the gun was at Dr. Traub's home. Swaray took Duncan to the doctor's home, but the gun was not found. Upon their return, he heard the appellant say to Duncan, "You know you have sold the gun, and you are fooling us, but I will show you myself." Later one of the firemen brought some sand and water which were sprinkled on Duncan's back while he was tied, and both the appellant and the policeman beat him.

Matthew intervened and asked them to stop beating Duncan "otherwise something serious might happen." Then Duncan said that he had sold the gun to one of his friends at the University. They went to the University but did not find the person who is supposed to have bought the gun.

Upon their return, they resumed beating Duncan. Later Rufus Barclay was taken to the University to find the gun, and before they left, the appellant handcuffed the de-cedent to another prisoner in the cell. He also said that the reason for telling Swaray that the gun was at these differ-ent places was to allow them to rest from the severe beating.

After appellant and Barclay had left, Duncan called Matthew and asked him for some water to drink, and told him that he did not think he would live because the beatings were too severe and injurious to him. Matthew gave Duncan some water which he drank. Seeing his condition, Matthew began to cry, and asked the policeman on duty to take the handcuff off Duncan to allow his blood to circulate, but this was not done. Later Duncan died.

- 5) Dr. Traub testified that at about 5:00 a.m., Duncan was taken to his home by Swaray and Logan, where they searched for the gun but did not find it. As they were about to leave, Duncan said that he did not want to go back to the substation because they

would beat him, but the doctor said that the officers were intelligent people and would not beat him.

- 1) Rufus Barclay, the other suspect, testified that after they were turned over to the appellant, he called John Logan who came in and tied his feet and those of the decedent. They were beaten and stepped upon; they asked for water, but the officers said no. "We said my people, we will die and co-defendant Swaray said yes, if you people cannot bring Dr. Traub's gun we will beat you until one of you die. The fireman went outside and brought sand and sprinkled it on our backs, and they beat us the whole night, no food, no water." When asked with what they were beaten, he replied with a fan belt, rope and plank. He said that when they first arrived at the police station, they were beaten with the fan belt; and after they were taken into the CID room, Swaray took out a plank from his drawer and used it to beat them.

This is the evidence, together with the medical report, which the prosecution presented. Both Appellant Swaray and John Logan testified for themselves, and they denied beating, burning and kicking Duncan. One Malvenia Cooper also testified for the defense, and said that when she went to the police station with a complaint she saw that the suspects had been beaten.

It is our opinion that this evidence which is unimpeached and unrebutted does support the verdict brought in by the jury.

We shall now pass on the question of the admissibility of the medical report, which was objected to because the document sought to be admitted was a copy instead of the original report. It should be pointed out here that two trials were held. At the first trial this document was offered into evidence and marked. In addition, the pathologist who prepared the report testified and confirmed his findings as to the condition of the body and the cause of death. At the

second trial, the pathologist was out of the country, and hence did not appear in court.

While it is true that a copy of a document is inadmissible as evidence unless the original is accounted for, *Tugba v. Republic* 12 LLR 218 (1955), yet, in view of the testimony of the pathologist himself, we do not find the error to be such as to warrant a reversal of the judgment. Moreover, according to 29 AM. JUR. 2d, *Evidence*, §§738 and 739, 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. Accordingly, we find no error in the admission into evidence of the pathologist's testimony in the second trial.

With respect to the denial of the motion for judgment of acquittal, it is contended that the evidence was insufficient and inconsistent to connect them with the commission of the offense, and therefore the motion should have been granted. The law is the granting or denial of a motion for judgment of acquittal is left to the sound discretion of the court, and may be granted where the evidence is legally insufficient to sustain the charge; but the court may also, in its discretion, reserve decision on the motion until after the verdict. *See* Criminal Procedure Law, Rev. Code 2: 20.10; *Republic v. Smith*, 25 LLR. 207 (1976). A review of the evidence adduced at the trial convinces us that the trial judge was legally correct in denying the motion for judgment of acquittal.

As to the motion for new trial, three issues were raised

therein: (i) that the verdict was manifestly against the weight of this evidence adduced at the trial; (ii) that the trial judge erred in his charge to the jury with respect to liability of a leader of a group of persons for their acts; and (iii) that because the other two defendants were acquitted, and the appellant convicted, the jury misconstrued the instructions of the judge.

Having already traversed the question of the sufficiency of the evidence to convict, we will confine ourselves to the other two points. In the first place, the misconstruing of the judge's instructions by the jury is not a ground for the granting of a new trial. *See* Criminal Procedure Law, Rev. Code 2: 22.1 (1), (2). In the second place, the mere fact that the jury acquitted two of the defendants is not sufficient to warrant a new trial, because the statute gives the jury the right to return a verdict or verdicts with respect to a defendant or defendants as to whom it has agreed. *See* Criminal Procedure Law, Rev. Code, 2:20 11(4) It is also a general principle of law that where several persons are jointly indicted and tried for an offense which may be committed by one person alone, the jury may convict one or more and acquit the others unless the evidence against all of the defendants is the same. 23 C.J.S. *Criminal Law*, § 1402 (c). Notwithstanding, if the evidence were the same, acquittal of one defendant does not establish the innocence of the other. Inconsistent verdicts do not provide support for a reversal of a judgment against one who is found guilty upon sufficient evidence to support a conviction as to him. *Dunn v. United States*, 284 U.S. 390, 52 S. Ct. 189, *Chiaravolloti v. United States*, 60 F. 2d 192 (1932). Here the evidence was ample to sustain the conviction of the appellant.

On the question pertaining to the trial judge's charge with respect to liability of the leader of a group, the trial judge said: "Also the law says where defendant is in control of or directing a group, defendant is responsible for the act

of the group. There-fore in determining whether or not this defendant is guilty of murder, it is immaterial whether the fatal blow was one inflicted by defendant or by one of the group in defendant's charge.”

LIBERIAN LAW REPORTS

This charge is in harmony with the law laid down in *Koh-Giddue v. Republic*, 8 LLR 141, 143 (1945). In that case six defendants were indicted for murder, only two of them were arrested and brought to trial; one was acquitted and Koh-Giddue was convicted. Mr. Chief Justice Grimes, speaking for this Court, said: "It appears from the record that the messengers were all acting in concert, and hence the act of one was the act of all. Even more important than that, be it noted, is the fact that all of the messengers are placed under the direction and control of the said Koh-Giddue, the present appellant. Hence, in our opinion, whether Kwee-Sneh died from the wound in the head or from that on the scrotum, appellant cannot be absolved from responsibility therefor."

In the case at bar, defendants Dyson and Logan had no official connection with the Criminal Investigation Division, but the evidence shows that they joined with Swaray, at his invitation and were under his control during the commission of the unlawful acts. The appellant was the only CID agent at the substation at the time, and it was his duty to conduct the investigation. The evidence adduced at the trial shows clearly the extent to which some law enforcement officers would go in order to extract evidence from persons accused of crimes, evidence which in the final analysis is self-incriminating and hence unconstitutional. Under our legal system an accused is presumed innocent until proven guilty. This principle must continue to be a guide in our attempt to bring to justice the offender.

This Court has held time and again that confessions obtained by such brutal methods are unconstitutional. Not only are they unconstitutional, but the acts themselves are immoral and a clear violation of the accused's human rights. There is no legal justification for engaging in such acts. Generally, the granting or refusal of a new trial rests in the sound discretion of the trial court, and the appellate court will not review the exercise of such discretion unless it appears that it has been abused to the prejudice of the defendant. *Killix v. Republic*, 8 LLR 173 (1943). In view of the foregoing, there being no justification and no extenuating circumstance brought out in favor of the appellant which would warrant our reaching any other legal conclusion, the judgment of the lower court is hereby affirmed. The Clerk of this Court is hereby instructed to send a mandate to the trial court commanding the judge therein presiding to resume jurisdiction over this case and enforce its judgment. And it is hereby so ordered.

Judgment affirmed.