FUWEH TEH and **KAMEL WAHHAB**, Appellants, v. **REPUBLIC OF LIBERIA**, Appellee.

APPEAL FROM THE CIRCUIT COURT OF THE THIRD JUDICIAL CIRCUIT, SINOE COUNTY.

Argued November 21-24, 1949. Decided December 16, 1949.

1. In criminal law the burden of proof is on the state to establish the guilt of the accused beyond a reasonable doubt.

2. Defendant is not required to prove the defense of alibi beyond a reasonable doubt.

On appeal from conviction for assault and battery with intent to do grievous bodily harm, *judgment reversed.*

D. B. Cooper for appellants. *The Solicitor General* for appellee.

MR. JUSTICE SHANNON delivered the opinion of the Court.

The appellants in this case were indicted before the Circuit Court for the Third Judicial Circuit, Sinoe County, at its November term, 1948 for the crime of assault and battery with intent to do grievous bodily harm. At the ensuing February term of said court they were brought to trial before His Honor Judge Bright presiding by assignment, and each having been convicted and sentenced to pay a fine of seventy-two dollars or suffer imprisonment for a term of one calendar year, they took exceptions and have brought this appeal on a bill of exceptions containing five counts.

The first of these submits that the verdict of the empanelled jury "is against the weight of evidence adduced at the trial and contrary to the instructions of His Honor the trial judge in his charge." Since the second, third, and fourth counts question the correctness of said verdict, we will dispose of them in conjunction with the first count and to do this we will give a succinct summary of the evidence in the case as culled from the records : On a certain day in October, 1948, the evidence of private prosecutor Menyonneh Sayenh as well as that of Wenneh Jar shows that they both entered the premises of Wahhab Brothers, of which Kamel Wahhab, appellant, is a member, in order that the private prosecutor might demand payment of an amount due him as caretaker or supervisor of the store of Wahhab Brothers at Butor in said

county. It is shown by this evidence that, upon seeing the private prosecutor and Wenneh Jar wending their way to the store of the said Wahhab Brothers, the store was closed and appellant Kamel Wahhab proceeded upstairs in the building, whereupon the private prosecutor and Wenneh Jar followed him. But before they could reach the floor on which Kamel Wahhab was, they heard him shouting to them to go back downstairs, and at that time when they were retracing their steps defendant Kamel Wahhab called defendant Fuweh Teh and instructed him to run them downstairs, which the said Fuweh Teh did by pushing private prosecutor Menyonneh Sayenh down the stairs which resulted in his falling and receiving "grievous bodily harm."

Added to this evidence, the prosecution placed on record the evidence of Moryu Brown and Slami Paryonneh, both of whom testified (1) that Wuweh Teh admitted that he pushed the private prosecutor down the stairs but upon instructions of Kamel Wahhab, his employer; and (2) that upon referring the question to the said Kamel Wahhab in order to ascertain why he gave such an instruction, he replied that it was because "the private prosecutor had no business going upstairs in his room."

Against this evidence, the defendants succinctly denied (1) that Fuweh Teh ever pushed the private prosecutor down the stairs and (2) that Kamel Wahhab did give the instructions to have the private prosecutor pushed down said stairs on the ground that at the time that the private prosecutor was on their premises he, the said Kamel Wahhab, was away with his brother Joseph Wahhab, visiting another Syrian merchant friend. In addition, the defendants introduced several witnesses who testified that on the day and at the time that the private prosecutor received this wound he was heavily drunk and obviously could not tell exactly what had happened. It is worthy of note that the prosecution's own witnesses testified that the private prosecutor was then drunk.

It is settled in criminal law that every person is presumed to be innocent until the contrary is proven and that the burden of this proof rests with the prosecution throughout the trial except where the accused seeks to excuse or justify, which is not present in this case. This proof must also be beyond a rational doubt which would exclude any hypothesis of the innocence of the accused. *Dunn v. Republic, 1* L.R.R. 401 (1903) .

Further than this, we have the following:

"The burden is on the state to establish the guilt of accused, that is, to prove every

fact and circumstance which is essential to the guilt of the accused, or, as frequently stated, to prove every essential element of the crime charged, and to prove each item as though the whole issue rested on it, except in so far as a statute establishes a different rule. Stated in another way, the rule is that the law does not cast on accused the burden of satisfying the jury of his innocence. The burden of proof does not shift on the establishing of a prima facie case by the state, but continues on the state throughout the trial and until the verdict is rendered and defendant's guilt is established beyond a reasonable doubt. . . ." 16 C.J. *Criminal Law* § 993 (1918).

During the trial and through the evidence of witnesses Fuweh Teh, Margaret Thomas, Punella McCarthy, and Goe-Wee, as well as his own, defendant Kamel Wahhab made strong efforts to show that he did not give any instructions to Fuweh Teh to push the private prosecutor down the stairs nor could he have given said instructions because at the time of the incident he was at another place, which made it both improbable and impossible physically for him to have been present to give said instructions. The Solicitor General strongly argued before us that to show an accused as an accessory or an aider and abettor, it is not necessary to prove that he was present on the scene at the time of the commission of the alleged offense. Whilst we may agree with this legal proposition in its general application, we are nevertheless unwilling to concede that it can apply in this case where the crux of the charge against Kamel Wahhab, one of the defendants, is that he was present on the scene, or in the house, and did "feloniously, wickedly, wilfully, maliciously incite, move, procure, aid, counsel, hire, instigate, command and induce the said Fuweh Teh . . . to commit the said crime of Assault and Battery with Intent to do Grievous Bodily Harm." To accept said proposition in this case would create a paradox for we would be admitting that said Kamel Wahhab instructed Fuweh Teh to push the private prosecutor down the stairs, even though Kamel Wahhab was absent.

It was also strenuously argued that for the defense of alibi to avail defendant Kamel Wahhab of any benefit said alibi must be established beyond a reasonable doubt. Let us see how far we can accept this.

"In some jurisdictions, the burden of proving an alibi rests on accused. However, failure to sustain the burden does not relieve the prosecution from the burden of proving the guilt of accused ; and any evidence of alibi is to be considered with the rest of the evidence in the case in determining whether there is a reasonable doubt of guilt. Nor is the burden resting on the state shifted by insisting erroneously that accused is interposing the defense of alibi ; and although defendant, where the case is otherwise made out against him, is bound to offer some evidence in support of his

alibi, the state, in all cases where his presence at the time and place of the crime is necessary to render him responsible, must prove that he was there as part of its case; and if from all the evidence there exists a reasonable doubt of his presence, he should be acquitted." 16 C.J. *Criminal Law* § 1604 (1918).

On the point of alibi we have also the following :

"Where the crime charged involves the presence of accused at the time of its commission, the burden rests primarily on the prosecution to show that fact beyond a reasonable doubt. Once the prosecution makes a prima facie case of accused's presence, however, the burden devolves on accused, if he relies on an alibi, to adduce sufficient evidence to defeat the state's prima facie case or to establish his defense. The evidence of alibi must be addressed to the exact time when the offense was committed ; and it must show, not merely the improbability of accused's presence at that time, but the impossibility thereof. However, the fact that defendant fails to establish the defense is not to be taken against him; even in that event the burden still rests on the prosecution to prove his guilt beyond a reasonable doubt.

"Defendant is not required to prove the defense of alibi beyond a reasonable doubt; it is sufficient for him to establish it to the reasonable satisfaction of the jury. And in most jurisdictions even this is not required; it is enough that the evidence, taken as a whole, whether adduced by the prosecution or by defendant, is sufficient to raise a reasonable doubt as to defendant's presence at the scene of the crime or as to his guilt generally. In contrariety to this last rule, it is held in some cases that a defendant putting forth the defense of alibi must establish it by a preponderance of evidence." *Id.* § 1588.

In order to show that Kamel Wahhab gave the instructions to Fuweh Teh to push the private prosecutor down the stairs it must also be established conclusively and beyond a reasonable doubt that he was present.

It does not require any effort to say that the evidence of Kamel Wahhab, taken together with that of Fuweh Teh, Margaret Thomas, Punella McCarthy and Goe-Wee, has been strong in tending to prove that he, the said Kamel Wahhab, was not on the premises when the private prosecutor and Wenneh Jar visited the Wahhab Brothers' store, but rather was at another Syrian's place drinking coffee in company with said Syrian, Joseph Wahhab, his brother, and Mesdames Margaret Thomas and Punella McCarthy. To give weight to this evidence, as well as to show both the improbability and physical impossibility of the said Kamel Wahhab being present on the Wahhab

Store premises to give the instructions and directions imputed to him, the testimony of the two ladies, which was not rebutted by the prosecution, shows that whilst they were at this other Syrian's place, the private prosecutor got there in a rather drunken state and with a wound on his face and with a complaint that one of Wahhab's boys had wounded him. This creates a serious and grave doubt, which must operate in favor of the said Kamel Wahhab.

In view of this doubt, which reflects unfavorably upon the testimony of the prosecution, we do not hesitate to say that in this respect there is another doubt created which must operate in favor of said Fuweh Teh, especially in favor of his own avowed denial of the charge against him, which denial was supported by the testimony of Goe-Wee.

The drunken condition of the private prosecutor which has been testified to by the defense and admitted by the prosecution is sufficient to leave an impression that said private prosecutor actually did not know what was happening or did happen on that day and at the time of the incident which resulted in his receiving the wound which he attributes to Fuweh Teh acting upon the alleged instruction of Kamel Wahhab.

Whilst it is true that the admissibility of evidence rests with the court and its credibility and effect with the jury, yet this provision of the law is not to be interpreted to mean that the court is without right to set aside a verdict and award a new trial where in its opinion said verdict is expressly contrary to the evidence in the case and against the legal instructions of the court. In this case, the trial judge, upon request of the defense, instructed the jury upon the law of alibi with its application to the facts in the case; but, despite said instructions, the jury brought in a verdict of conviction. Notwithstanding, the judge felt himself without right to set said verdict aside and award a new trial because, as gathered from the wording of his ruling on the motion for new trial, in doing so he would be encroaching or infringing upon the right of the jury to pass upon the credibility and effect of evidence. To accept this theory would utterly obviate provisions in law for new trials, where an application is made therefor on the grounds that the verdict is either contrary to the evidence in the case or against the legal instructions of the court or both.

Because of the above, it is our considered opinion that the judgment of the court below should be reversed and the appellants, defendants below, discharged without day. And it is hereby so ordered.

Reversed.