LEVI TOLBERT, Appellant, v. **REPUBLIC OFLIBERIA**, Appellee.
APPEAL FROM THE CIRCUIT COURT FOR THE NINTH JUDICIAL CIRCUIT, BONG COUNTY.

Heard: May 3, 1982. Decided: July 8, 1982.

1. Where a matter contained in an appellant's bill of exceptions is not argued or contained in the appellant's brief, the point is deemed to have been waived and will not be entertained by the Court.

2. Failure to challenge the panel or challenge a juror shall be deemed a waiver of the right to object and shall foreclose the right to move for a new trial on such ground or to raise the objection at any subsequent time.

3. The only endorsement required by law on an indictment to make it valid after it has been drafted and signed by the county attorney is "true bill" and the signature of the foreman. The filing date and the notation of the clerk is not required by statute to make an indictment valid.

4. In order for a party to be allowed to argue an issue before the Supreme Court, the party must have first raised the issue at the trial and allowed the trial judge to enter a ruling thereon, and thereafter note his exceptions, thereby saving the point for appellate review; otherwise, the Court will disallow the issue being raised before them.

5. If a party to a criminal case feels that a witness called at the trial to testify for the prosecution should not testify for the same reason that the witness did not testify before the grand jury, he should object to the witness taking the stand on such ground so as to have the trial judge ruled thereon. If he fails to do so, he cannot raise the issue on appeal for the first time.

6. In prosecution for murder, the trial court may properly permit the introduction of testimony of witnesses for the prosecution whose names did not appear on the list of witnesses sworn before the grand jury.

7. The Supreme Court will not take cognizance of exceptions taken and set forth in the bill of exceptions or assignment of errors unless they are supported by the records at the trial.

8. Irregularities alleged to have been committed by the office of the clerk of the trial court, in the course of receiving an indictment must be brought to the attention of the court before trial, by way of a motion to dismiss the indictment.
9. Objection to an indictment must be made and heard before defendant is called to plead.

10. In the absence of a statutory requirement, it is unnecessary to file with the indictment a bill of particulars containing the names of witnesses or evidence on which it is expected to secure the conviction of the accused. Thus, unless a bill of particulars is demanded by an accused, it need not be required. Accordingly, a failure to furnish a bill of particulars not applied for is not ground to dismiss an indictment or to discharge an accused.

11. A criminal defendant who alleges irregularities in the presentment of an indictment must secure from the clerk of court, who is the custodian of the court's records, a certificate to support the allegations. If he fails to do so, the motion making such allegations will be denied.

12. A motion for a bill of particulars may be made only within ten days after arraignment or at such other time after arraignment as may be ordered by the court.

13. Where the defendant has been brought under the jurisdiction of the court by means of process and has been furnished with a copy of the indictment, alleged irregularities of the clerk of court in the filing of the indictment will not affect the jurisdiction of the court, and any such irregularities may be considered waived if not questioned before trial.

14. Where the trial is regular and the proof clear, the judgment of the lower court ought to be sustained.

15. It is the privilege of the accused not to be called as a witness and not to testify, and no presumption of guilt shall arise with respect to the exercise of this privilege.

16. Once the prosecution establishes its case, the accused remains quiet at his peril and, if he fails to explain incriminating facts and circumstances in evidence in the trial that which lay peculiarly within his knowledge, he takes the chance of any reasonable inference of guilt which the jury might properly draw from the whole evidence.

17. When an accused voluntarily testifies, he is subject to the same rules as other witnesses, and his failure to deny a material fact within his knowledge previously testified to against him, warrants the inference that it was true.

Appellant was charged with the crime of murder during the February Term A. D. 1980 of the Ninth Judicial Circuit, Bong County. A jury was empanelled and, upon a regular trial had, a verdict of guilty was brought against him. From the final judgment of the trial court affirming the verdict and sentencing the appellant to death by hanging, appellant noted his exceptions and announced an appeal to the Supreme Court. Appellant contended that there were irregularities which the trial judge refused to investigate, and that the lower below had not acquired proper jurisdiction over the subject matter because of said irregularities. The Supreme Court, finding no reversible error during the trial, affirmed and confirmed the judgment.

G. Bona Sagbeh appeared for appellant. *Isaac C. Nyeplu,* Minister of Justice and Acting Solicitor General*, Richard McFarland,* appeared for appellee.

MR. JUSTICE SMITH delivered the opinion of the Court.

In the City of Gbarnga, Capital of the County of Bong, and in her own bar, located on Collins Street in that City, commonly known and called "The Office", was found the body of a young lady, about five feet and six inches in height, lying on the floor on her belly with her hands toward the door with a bullet mark in the left forearm, two under her left breast and another further down on the same side. She had fallen over her left hand as a result of penetrating gunshot wounds. The shells had dropped to the floor. The deceased was the proprietor of the "Office", Mrs. Beatrice Walker-Tolbert, wife of Appellant Levi Tolbert. She had been shot three times by her said husband with a 5 caliber .38 revolvers on December 16, 1979. On that day, her sun went down whilst yet it was just the dawn of her day.

The body of Beatrice Walker-Tolbert was examined by a qualified pathologist, who found several lacerations and penetrating wounds and injuries on the body. The pathologist found that, "the immediate cause of death of the late Beatrice Walker-Tolbert was due to massive internal bleeding resulting from the fatal injuries to her internal organs caused by gun shots from a weapon of low-mussel velocity".

During the February, A.D. 1980 Term of the People's Ninth Judicial Circuit Court, Bong County, the grand jury, inquiring for the people of Bong County, and in the name of the Republic of Liberia, found an indictment against the said Levi Tolbert, charging him with the crime of murder. The charge part of the indictment reads as follows:

"I N D I C T M E N T"

The Grand Jurors, good and lawful citizens of Bong County, Republic of Liberia, duly

selected, sworn and empanelled to inquire into matters brought before them after due deliberation upon their oaths, do present Defendant Levi Tolbert of Gbarnga City, Bong County, Republic of Liberia, for an infamous crime to wit: Murder.

That Defendant Levi Tolbert aforesaid has violated Title 26 of the New Penal Law, page 69, Sec.14.1, Sub-chapter (a) and paragraph (a), which reads thus: "A person is guilty of murder if he: a) purposely or knowingly causes the death of another human being'.

1. That Defendant Levi Tolbert aforesaid, previous to the finding of this indictment, on Sunday Morning, December 16, 1979, in the shop commonly known as "The Office", located on Collins Street, in Gbarnga City aforesaid, defendant willfully, unlawfully, deliberately, feloniously, with premeditation and malice aforethought and with intent to kill, defendant aforesaid took a deadly weapon known to the grand jurors, aimed at and shot Mrs. Beatrice Walker-Tolbert in the left breast, as well as the back of the said Mrs. Beatrice Walker-Tolbert, with the revolver aforesaid; the said shooting caused mortal wounds on the body of the decedent aforesaid, as a result she languished and died in the peace of God; then and there, at the time and place aforesaid in manner and form aforesaid, the atrocious crime of murder Defendant Levi Tolbert did do and commit, contrary to the form, force and effect of the statute laws of Liberia, in such cases made and provided, and against the peace and dignity of the State.

And the grand jurors aforesaid, upon their oaths afore-said, do present Defendant Levi Tolbert aforesaid for the crime of murder, which he did do and commit, contrary to the form, force and effect of the statute laws of Liberia, in such cases made and provided and against the peace and dignity of this Republic".

During the August, A. D. 1980 Term of the People's Ninth Judicial Circuit Court, Bong County, on the 2nd day of September, 1980, this case came on for trial. The defendant, appellant herein, was arraigned and he entered a plea of "not guilty." A trial jury was thereupon selected, sworn and empanelled to try the issues thus joined between the appellant and the State.

The following is a synopsis of the facts in the case as disclosed by the records before us on appeal:

On the morning of December 16, 1979, being a Sunday, about 2:00 o'clock *ante meridian*, according to Witness Tommy Tucker who testified for the prosecution, the only bar in which music was being played that morning was in "The Office", owned by Mrs. Beatrice Walker Tolbert, the deceased. Witness Tucker testified that he went to the said bar and

stood on the porch; that while standing there, he heard a loud voice saying: "Levi, since you say you will kill my sister, you will kill me first". Still standing and pondering over what he had heard, the witness said he saw the appellant coming out of the house and behind him was the lady who was still repeating that Mr. Levi Tolbert would have to kill her first before her sister. It was at this time that he called: "Uncle Levi, may I talk with you?" The witness said he drew closer to the defendant and asked him whether he knew what he was doing, especially so that he was the brother of the President and a Baptist deacon. The appellant replied saying: "my brother just died; I have to die too; but not because I love this woman she must bluff me." He swore upon his oath as a member of the Poro Society that he would kill his wife, burn the bar and then kill himself. The witness testified that the appellant asked Mr. Tucker, the witness: "Do you think it is fair to have good food at home and yet you cannot eat that food?" From this question of the appellant put to the witness, and taking into consideration the time of the morning the quarrel took place, one would conclude that the appellant killed his wife because she may have refused to have sexual intercourse with him that night, which reason is unjustifiable to take the life of a human being. However, the decedent did not live to testify to the fact, nor did the appellant take the stand to dispel the presumption by testifying in his own behalf in support of his plea of not guilty.

During the dialogue between the appellant and Mr. Tucker, the appellant had not yet shot and killed his wife, although he told Mr. Tucker that he had his gun under his t-shirt. Mr. Tucker, however, seeing that the appellant was determined, asked permission of him to talk with his (appellant's) sister-in-law, Miss Walker. The permission was granted by the appellant and Mr. Tucker advised Miss Walker to go and call the police and the manager of water and sewer, while he remained and continued to talk to the appellant. After Miss Walker had left, and before anyone could come, the witness testified, the appellant was still repeating that he would kill his wife and that appellant looked at his wife scornfully and told her: "Since I cannot enjoy you, no one else will enjoy you". Beatrice then replied and said: "Levi, you are taking advantage of me because I do not have brothers, but if you kill me tonight, I will pray for those who do not have a boy child to born a boy child". The witness testified that Beatrice then asked the appellant for the keys to the bar. A few minutes after she had gone into the bar, the appellant asked leave of Witness Tucker and others to talk with his wife, the decedent. When the appellant left, Mr. Tucker testified, it was not long when they heard the sound of a gun again and again, and that he ran home for fear that the appellant would return and kill someone else.

The records in this case reveal that after Appellant Tolbert had shot and killed his wife, he did not leave the shop; he was behind the counter playing a record entitled "Beautiful Lady." He had his hands folded with the pistol when the arresting officer, Major Augustine Sarplar of the Armed Forces of Liberia, arrived on the scene with two other soldiers, all dressed in

mufti. Major Sarplah posted two other soldiers and police officers as a supporting unit nearby while he entered the shop. He bid the appellant "good morning, sir," and he, the appellant, responded and looked prepared for any eventuality. Major Sarplah asked for a bottle of beer to drink, and in the process of getting the bottle of beer, the appellant unfolded his hands and the pistol was exposed. He served the arresting officer with the beer. After paying for the beer, the arresting officer asked for an opener and a glass, which the appellant brought, and the Major started drinking. While the arresting officer was drinking his beer and the other two soldiers in mufti were standing by, the appellant soon suspected and told the Major: "my dear man, you are not here to drink beer this time of the morning; you are here to arrest me". Major Sarplah then asked him why he should be arrested. Appellant then told the Major that he had killed his wife, and at this time he exhibited the pistol by raising it up. Major Sarplah, trying to erase from the mind of the appellant that his trip to the shop was not for the purpose of effecting an arrest, continued to drink his beer and remarked: "Why should I arrest you for killing your wife?" The appellant replied the Major: "I know I will die because I killed my wife". The Major then asked him why he had killed his wife. The appellant said nothing further and both men started looking at each other like "a leopard and a cat", the Major finding a way to seize the gun and effect the arrest and the appellant, on the other hand, being conscious of his imminent arrest, placed himself in a defensive position ready for any attack. When day was clearing, Major Sarplah became mindful that if he permitted the appellant to get out of the shop with the pistol in his possession, many innocent persons might get killed, and, therefore, he made an attempt to disarm the appellant. During the process, Major Sarplah testified, he held the gun but the appellant successfully retrieved it and during the tussle, the appellant told the Major: "You are a dead man." At this time, the appellant pointed the gun at the said arresting officer and pulled the trigger but it did not respond; he did it three times but to no avail. Finally, the appellant was over-powered and the gun was taken from him. He was then apprehended with the aid of the other soldiers and the policemen who were called out by the Major. *(See* statement of Witness Augustine Sarplah on Sheets 5 and 6 of the 17th day's session of court, Tuesday, September 2, 1980).

Thus, Mrs. Beatrice Walker-Tolbert came to the end of the ladder by the shots of her husband's pistol in the manner stated hereinabove on the morning of December 16, 1979. Other witnesses who testified for the prosecution included the pathologist who performed the autopsy. He concluded that Beatrice Walker-Tolbert's death was caused by massive internal bleeding resulting from injuries of fatal internal organs caused by a gunshot injury from a weapon of low mussel velocity. The prosecution rested evidence with reservation.

The appellant, who had subpoenaed his witnesses, expressly waived the production of evidence and submitted the case for argument. After argument and the court's instruction to

the jury, the empanelled jury retired to its room of deliberation and, after due deliberation, they returned a verdict of guilty of murder. The defendant, appellant herein, excepted to the verdict and to the trial court's final judgment confirming the verdict and the sentence of death by hanging and announced an appeal therefrom. Appellant has therefore brought this case up for our review on a six count bill of exceptions which reads as follows:

"1. On the 18th day's sitting, sheet 15 of the minutes of court, the court proceeded to question witness Borsay to the effect, and I quote: 'Mr. Witness, according to your answer to several questions, you have put on record that you were appointed by the County Attorney as Chairman and ordered to summon eleven other persons to form a coroner jury for the purpose of inspecting the body of the late Mrs. Beatrice Walker-Tolbert. Please tell this court what did you see and observe when you inspected the body of the late Mrs. Beatrice Walker-Tolbert?' To this question, the defendant objected on the ground that "the answer will be prejudicial to the interest of the defendant because the witness on the stand was introduced to testify as chairman of the coroner report, which report was rejected as admissible in evidence. Your Honour overruled the defendant's objection to which he excepted.

2. That also Your Honour overruled the motion of the defendant made on the 24th day's sitting, beginning from sheet six, last paragraph, requesting the court to refuse jurisdiction over the subject matter, discharge the defendant and disband the empanelled jury for lack of jurisdiction over the cause of action, since, in keeping with law, not even a judge has the right to pocket an indictment brought in court by the grand jury and then after a day or so, turn same over to the clerk of court, how much more the County Attorney holding fast to an indictment since the 22nd of February and only presenting it to the clerk of court on the 14th of August, 1980, without any record showing that on the 22nd day of February, 1980, the grand jury brought in open court an indictment as required by law, which Your Honour overruled, and to which defendant noted exceptions.

3. And also because in the motion filed, Your Honour refused to investigate the clerk's office as to the date of the indictment, said to have been found by the grand jury and receiving the same from the County Attorney for the first time on the 14th of August, 1980, especially so when the Supreme Court has said in several Opinions that when any act of corruption, fraud, etc. are reported to the trial judge during the trial of the case in which the clerk's office is tainted with corruption, fraud, and misconduct, as appeared on the indictment and the seal of court, the Supreme Court will remand the case, order investigation and grant a new trial. To which contention in the motion Your Honour ignored and overruled, and to which the defendant exce
pted (See judge's ruling and part of the court's record).

4. And also because Your Honour refused to sustain the contention of the defendant that under our law, a pathologist should in fact request disinterested parties to witness the autopsy, which was not done, and that according to the pathologist himself, he never appeared before the grand jury to testify; nor did he file a copy of his autopsy report with defendant, which Your Honour also overruled and to which defendant excepted.

5. And also because defendant objected to the verdict of the empanelled jury charging the defendant with murder and without signing their respective names; that is, those who cannot write by the indication of their x-cross, setting forth as required by law that the verdict was theirs without forgery, which Your Honour overruled and entered the verdict in the records of court, to which the defendant excepted.

6. And finally because Your Honor's judgment was contrary to the laws giving jurisdiction to the court to try cases properly brought in court by the grand jury as the consent of parties does not vest jurisdiction in the court. Your Honour not having acquired jurisdiction as the law directs, the defendant finally excepted to your final judgment and prayed for an appeal before the Honorable the People's Supreme Tribunal, sitting in its March Term, A.D. 1981.

When the case was called for argument before this Court, appellant opened his argument and read from his brief the following:

"While it is true that this case cannot ignore the fact brought in evidence that the appellant did aim at and shoot his late wife, Beatrice Walker-Tolbert, three times with his .38 caliber revolver and killed her instantly, the defense counsel contends that the court had not acquired proper jurisdiction as the law requires (for jurisdiction is given by law and not by consent of the parties) over the subject matter up to the arraignment of the appellant."

When the learned counsel was asked by the Bench what he meant by this statement, he replied that he was not contending that appellant did not kill his wife, nor was he attacking the evidence adduced by the prosecution at the trial, but that he was only contending that there were irregularities which the trial judge refused to investigate, and that the court below had not acquired proper jurisdiction over the subject matter because of said irregularities. Asked further whether the trial court had no jurisdiction to try a murder case, the appellant's counsel replied that the circuit court does have jurisdiction to try murder cases, but that, in the instant case, the indictment under which the appellant was tried and convicted was never presented in open court by the grand jury at the February, A. D. 1981 Term of the court, as there is no record to show that said indictment was found by the grand jury; instead, appellant's counsel said, the indictment was pocketed by the county attorney and after some time he delivered it to the clerk of court on the 13th day of August, 1980. He argued that

even though the indictment is said to have been filed on the 22nd day of February, 1980, according to the notation made by the clerk, the same clerk also made notation on the back of said indictment, that it was received by him on the 13th of August, 1980, and a writ of arrest issued by him on the 14th day of August, 1980. When asked further by the Bench as to whether the appellant was arrested and served with copy of the indictment before trial, the learned counsel replied in the affirmative.

The following questions are listed in the appellant's brief and argued by the counsel, which he asked the court to consider:

a)had the lower court any jurisdiction over the subject matter at the call of the case?

b)how does a circuit court acquire jurisdiction in criminal matters?

c)can a pathologist's report be admitted into evidence when it does not fulfill the requirements of the statute?

d)can the lower court refuse to investigate suspicion and corruption complained of against the office of the clerk of court in a given trial?

e)can it be said that the appellant has had a statutory and impartial trial when the court had not acquired jurisdiction over the subject matter?

f)can a final judgment of a court which had not acquired jurisdiction over the case be enforced?

Except for the two points listed in (c) and (d) above, which question the admissibility into evidence of the autopsy report and the allege failure of the trial judge to investigate the alleged irregularities complained of against the clerk's office, all of the other points, that is, (a), (b), (e) and (f), hereinabove referred to, are questioning the jurisdiction of the court below over the subject matter. Hence, the contentions of the appellant may be summarized into three major issues for the determination of this case. They are:

1. Whether the trial court had jurisdiction over the subject matter as contended in counts two and six of appellant's bill of exceptions?

2. Whether the admissibility into evidence of the autopsy report was illegal and improper, as contended in count four of the bill of exceptions?

3. Whether the refusal of the trial court to investigate the alleged irregularities of the clerk's

office affects the jurisdiction of the trial court over the subject matter, as contended in count three of the six-count bill of exceptions?

Appellant's counsel not having argued counts one and five of the bill of exceptions, such exceptions must therefore be treated as having been waived. In the said counts, appellant contended that the lower court's question to one of the prosecution's witnesses, Borsay, the foreman of the coroner jury, was prejudicial to the interest of the appellant (See count one of the bill of exceptions), and that the verdict of the empanelled jury did not indicate the names of the jurors by his or her x-cross to their respective signatures by those who could not write their names, thereby showing that the verdict was not theirs. The said two counts of the bill of exceptions not having been traversed in appellant's brief and argued before us, they must be treated as having been waived. However, we would like to observe only in passing that appellant could not have successfully argued on appeal that some of the empanelled jurors could not read or write their names, especially so when he participated in the selection of the empanelled jury and raised no objection to any of them. A party may challenge a juror on the ground that he is disqualified under the Judiciary Law for reason of any interest or bias. Such a challenge may be made only before the jurors are sworn, except that the court may, for good cause permit it to be made after the jurors are sworn, but before any evidence is presented. Failure by a party to challenge the panel or to challenge a juror, shall be deemed a waiver of the right to object and shall foreclose the right to move for a new trial on such grounds or to raise the objection at any subsequent time. Criminal Procedure Law, Rev. Code 2: 19.3(3)(4).

Appellant also could not have successfully argued the point that the verdict of the empanelled jury was not unanimous on the ground that there was no indication that the x-cross were in fact the signatories of the views invited. If there was any suspicion on the part of appellant that the verdict was not the unanimous verdict of the empanelled jury, a request to poll the jury was the proper remedy; but there is no indication in the record that such request was ever made. Under the law, when a verdict is re-turned and before it is recorded, the jury shall be polled at the request of any party or upon the court's own motion. *Ibid.* 2: 20.11.

Also in passing, we must here mention that the purpose of a trial is to find the truth. The trial judge has the right to be properly and clearly informed of all the facts and circumstances of the case being tried to enable him to instruct the empanelled jury on the law and the evidence adduced at the trial. Therefore, the court below did not commit any prejudicial error in asking the foreman of the coroner jury to tell the court and jury all that they saw when they inspected the body of the decedent, as contended in count one of the bill of exceptions. Appellant therefore correctly waived argument on counts one and five of the bill

of exceptions.

We shall now address ourselves to the remaining counts of the bill of exceptions, that is, counts two (2), three (3), four (4) and six (6), argued before us by the appellant and which are embraced in the points listed in his brief for our consideration. Since indeed counts two and six are questioning the jurisdiction of the trial court over the subject matter, we shall proceed with count three (3) of the bill of exceptions and make the jurisdictional issue the last.

In count three of his bill of exceptions, appellant alleged and argued that the trial judge had refused to investigate the irregularities he had complained of in his motion. The alleged irregularities, as argued by the learned counsel, are:

(1) that the County Attorney had pocketed the indictment until August 13, 1980, on which date it was delivered to the clerk of court; (2) that the indictment carried on its face the filing date of February 22, 1980, yet the clerk noted that it was received by him on the 13th day of August, 1980, and that the trial judge refused to investigate the said irregularities.

In our opinion, the contention of appellee is unmeritorious because the notation of the clerk made on the indictment is not a part of it so as to affect its validity. The indictment along with the writ of arrest having been served on the appellant before trial, the failure of the trial judge to investigate any alleged irregularities of the clerk's office will not affect the jurisdiction of the court. The only endorsement required by law on an indictment to make it valid, after it has been drafted and signed by the County Attorney, is "true bill" and the signature of the foreman. *Ibid.* 2: 15.10. The filing date is necessary, but it is not a part of the endorsement required by statute that would affect the validity of the indictment. The absence of the clerk's certificate to the effect that he did not receive the indictment because it had been pocketed by the County Attorney was sufficient cause for the trial judge to have refused giving credence to the allegation. Count three of the bill of exceptions is therefore not sustained.

In count four of the bill of exceptions, appellant has alleged substantially and argued in his brief that the pathologist was permitted to testify for the prosecution even though he did not appear before the grand jury to give evidence and, further, that the autopsy report was admitted into evidence over his objection. The ground for the objection was that the autopsy was not witnessed by disinterested parties as required by law.

In order for one to be allowed to argue an issue on appeal before this Court, he must have firstly raised it at the trial to allow the trial judge to enter a ruling thereon and thereafter note

his exceptions thereto, thereby saving the point for appellate review. If a party fails to take advantage of this right, this Court will not allow such an issue to be raised before it for the first time.

Taking recourse to the trial records, we observe on sheet one of the 24th day's session of court, Wednesday, September 10, 1980, that counsel for appellant was in court and seconded the motion for adoption of the minutes of the previous day's session of court when the prosecution applied to court for the qualification of its expert witness, the pathologist, who performed the autopsy on the body of the late Beatrice Walker-Tolbert. The records do not show that an objection was interposed to the qualification of this witness. Thus, the witness was qualified by the clerk to take the witness stand. It is therefore our holding that if appellant felt that the said witness should not have testified for reason that he was not one of the witnesses who appeared before the grand jury, he should have objected to the witness taking the stand on such ground so as to have the trial judge rule thereon in order for appellant, to note exceptions for appellate review of the issue. Appellant not having done so, he cannot raise the issue here for the first time. Furthermore, in prosecution for murder, the trial court may properly permit the introduction of testimony of witnesses for the prosecution whose names did not appear on the list of witnesses sworn before the grand jury. *Jackparwolo* v. *Republic*, 14 LLR 359 (1961).

An exception taken during the progress of a trial is a protest against the ruling of the court upon a question of law. It is designed as a warning for the protection of the court so that it may reconsider its action and for the protection of the opposing counsel so that he may consent to a reversal of the ruling. 2 RCL, § 69, at 92. Where the bill of exceptions or assignment of errors in an appeal fails to show on its face that the exceptions taken and set forth in the bill of exceptions or assignment of errors conform to, and are supported by the records at the trial, the appellate court will not take cognizance of such exception upon an appeal. *Elliott* v. *Dent*, 3 LLR 111 (1929). Also on sheet six of the 24th day's sitting of court, Wednesday, September 10, 1980, when the prosecution rested oral evidence and offered into evidence several instruments, including the autopsy report, appellant interposed no objection to the admissibility into evidence of any of the instruments, and therefore they were admitted for the consideration of the empanelled jury. It is also our holding that appellant cannot now raise the point of the autopsy report that it was not attested to by a disinterested party. Count four of the bill of exceptions is, therefore, overruled.

In counts two and six of the bill of exceptions, appellant makes reference to his motion, spread on sheet six of the minutes of the trial court, Wednesday, September 10, 1980, 24th day's sitting, in which he questioned the jurisdiction of the court.

The said motion reads, as follows:

"At this stage, defendant respectfully moves this Honorable Court to refuse further jurisdiction of the trial case, discharge the defendant without day, and disband the jury for the following legal grounds, to wit:

1. That in keeping with court procedure, indictments are brought by the grand jury in open court, a record made thereof and handed to the judge presiding, who will, by the same token, make record and turn the indictment over to the clerk of court, who is the only custodian of all court records, giving him instruction to issue the necessary precepts and place same in the hands of the sheriff for service. Unlike in this case, during the sitting of the February Term of court, a purported indictment was said to have been presented in this court, with no records being made, but rather was kept by the county attorney of Bong County until August 13, 1980, when this session of court convened when the county attorney went into the office of the clerk of court and presented him the indictment, said to have been found in February, and requested him to issue precepts on the defendant now in the dock. This was done by the clerk of court and can be verified. This was arbitrary and contrary to the spirit and intent of the law of this land, for not even a judge has authority to pocket an indictment after it is presented. This being the case, this court cannot have jurisdiction over an indictment brought by the grand jury (*sic*).

2. And also the defendant moves this honourable court to discharge him without day and disband the jury because the law requires that when an autopsy is performed, the defendant must be given a copy of that autopsy report to give him an opportunity to raise an objection, which was not done in this instant case and it is a violation of his constitutional right. Neither did the coroner nor the pathologist appear before the grand jury to testify. Where there is doubt in the minds of the court and the jury, the defendant is entitled to an acquittal, but this is a legal issue left with the bench to decide. Therefore, and in view of this motion, the defendant most respectfully requests that the case be abated and Your Honour proceed to investigate the clerk's office to ascertain whether or not a true bill and/or indictment was presented him by the judge presiding, with the necessary instruction to have the defendant arrested. And respectfully submits" (*sic*).

This motion was resisted by the prosecution, heard and denied by the trial court. In its ruling, the trial court noted that it had jurisdiction over the subject matter of the trial because the records of court showed that the indictment charging the appellant with murder was returned by a grand jury and was filed within term time, that is, on February 22, 1980. The court also noted, among other things, that the alleged irregularities of the clerk should have been brought to the attention of the court before trial. We are in perfect agreement with the

holding of the tria1 judge, because an objection to an indictment must be made and heard before defendant is called upon to plead. *Potter* v. *Republic*, 1 LLR 67 (1874). Any defense or objection which is capable of determination without trial of the general issue may be raised before trial by motion to dismiss the indictment. Defenses and objections raised on defects in the institution of the prosecution or in the indictment, other than that fails to show jurisdiction in the court over the subject matter or to charge an offense, may be raised only by motion to dismiss before trial. Criminal Procedure Law, Rev. Code 2: 16.7(1)(2). The motion to dismiss shall be made before a plea is entered, but the court may permit it to be made within a reasonable time thereafter, and such motion shall be determined before trial, unless the court otherwise orders that it be deferred. *Ibid,* 2:16.7(3)(4).

Appellant contended in his motion and has argued before us that he was not furnished a copy of the autopsy report. An autopsy report may be classified as a bill of particulars; but, unless it becomes necessary, a bill of particulars is not a mandatory legal requirement in the prosecution of a criminal defendant. Where the charges of an indictment are so general that they do not advise the accused of the specific acts of which he is accused, and the court feels that the bill should be furnished him so that he may properly prepare his defense, even though the indictment informs the accused of the crime sufficiently to enable him to prepare his defense, a bill of particulars need not be required. In the absence of a statutory requirement, it is unnecessary to file with the indictment a bill of particulars containing the names of witnesses or evidence on which it is expected to secure the conviction of the accused. 42 C.J.S., *Indictment and Information*, § 156. Unless a bill of particulars is demanded by an accused, it need not be required, but where demanded, the application therefore must be timely made. The motion, ordinarily, must be made before plea to the merits or before trial. *Ibid,* § 156. According to our statute, a motion for bill of particulars may be made only within ten days after arraignment or at such other time after arraignment as may be ordered by the court. Such motion shall specify the particulars sought by the defendant. Criminal Procedure Law, Rev. Code 2:14.5.

Recourse to the trial records does not show that appellant ever made an application for a copy of the autopsy report. Given the above citations, it is our opinion that the failure to furnish a bill of particulars not applied for is no ground to dismiss an indictment or to discharge an accused. It is therefore our further holding that the trial judge correctly denied the motion.

As we have already mentioned elsewhere in this opinion, appellant should have shown, by a clerk's certificate or the records of the February, A. D. 1980 Term of the trial court, during which the indictment was found in order to support his allegation that the indictment was pocketed by the county attorney and was never presented in open court by the grand jury.

The clerk of court is the custodian of records of court and a certificate from him on any matter pertaining to the records of court in our jurisdiction, is a material evidence to support a contention, and so is the returns of the sheriff inscribed at the back of a court's precept. It is therefore our holding that appellant should have substantiated the allegation contained in his motion by a certificate from the clerk of the court below to the effect that during the February, A. D. 1980 Term of the trial court, no such indictment was returned by the grand jury and presented in open court. In the absence of this showing, the trial judge committed no error when he denied the motion.

Counsel for appellant has also argued that the trial court had no jurisdiction over the subject matter of the trial, yet he had admitted that the circuit courts do have jurisdiction to try the crime of murder. We cannot, therefore, understand the consistency of appellant's argument. In our jurisdiction, except for petit offenses in which the circuit courts only exercise appellate jurisdiction, the circuit courts are the trial courts to try every offense as prescribed and set forth in our Penal Law, including the atrocious crime of murder; and, therefore, the contention that the circuit court lacked jurisdiction to try the murder charge preferred against the appellant is unmeritorious.

Appellant Levi Tolbert and his late wife were all residents of the City of Gbarnga, Bong County, where the crime was committed; and, therefore, appellant could not have raised the question of territorial jurisdiction. If we may presume that the appellant meant jurisdiction over the person of the appellant, which is not his contention, it has been established and confirmed by counsel for appellant, that a writ of arrest, together with a copy of the indictment were served on the appellant, thereby bringing him under the jurisdiction of the court by means of the court's precepts. Therefore, appellant could not have raised the question of personal jurisdiction.

Where a defendant in a murder trial had been properly brought under the jurisdiction of the court by means of process and has been furnished with copy of the charge against him before the case is ready for trial, alleged irregularities of the clerk of court in the filing of the indictment in his office after it had been found and presented by the grand jury, will not affect the jurisdiction of the court, and any such irregularities may be considered waived, if not questioned before trial. It is, therefore, our holding that the trial judge correctly denied the motion to dismiss. Counts two and six of the appellant’s bill of exceptions are therefore not sustained.

According to the statute under which the appellant was charged, a person is guilty of murder, who purposely or knowingly causes the death of another human being. Penal Law, Rev. Code 26:14.1. The mental element of this crime is "malice aforethought", which, in

common use, means a settled anger against a person and a desire to avenge. In the definition of the crime of murder, malice aforethought also means a forwardness of mind; a wicked, depraved, malignant spirit; a heart regardless of social duty and fatally bent on mischief.

In this case, appellant, on the morning of December 16, 1979, told his wife, Beatrice Walker-Tolbert, that he will kill her. The decedent's sister, Miss Walker, heard the expression and told appellant Tolbert to kill her first before killing her sister, the decedent. Appellant told Mr. Tommy Tucker, one of the witnesses in this case, who had overheard the conversation between the appellant and Miss Walker, and who had gone into the decedent's bar, that his (appellant's) wife, Beatrice, was bluffing him, and that he will kill her, burn the bar, and kill himself. Despite all the efforts of Mr. Tucker to persuade appellant Tolbert to change his mind from killing his wife, by pointing out to him that as the President's brother and a Baptist deacon he could not afford to kill his wife, the appellant, with a wicked and depraved mind, and with his heart fatally bent on mischief to take the life of his wife, looked up and down at her and told her in these words: "Since I cannot enjoy you, no one else will enjoy you." His wife responded by saying to him: "Levi, you are taking advantage of me because I do not have a brother, but if you kill me tonight I will pray for those who do not have a boy child to born a boy child". Despite these pathetic expressions, Mr. Tolbert followed his wife into the bar under the pretext of going to talk with her, and the next thing that was heard was the sound of a gun which caused the late Beatrice Walker-Tolbert to drop to the floor in the hallway, and to lay on her belly in cold blood. This terrible incident made no impact on the mind of the appellant. Indeed, without realizing the graveness and consequences of the crime committed by him, appellant remained in the shop and was playing a record of his choice entitled "Beautiful Lady", when he was arrested at the break of day.

From the evidence adduced at the trial of this case, which we have endeavored to summarize hereinabove, no relief that expressed malice was sufficiently established against the appellant. His act was not only unlawful, but wicked, intentional, deliberate, malicious, and done with premeditation to kill his wife. In keeping with his argument and the opening statement of his brief, counsel for appellant is not questioning the evidence adduced at the trial; nor is the regularity of the trial questioned. In *Gouykro* v. *Republic,* 11 LLR 102 (1952), this Court held that where the trial is regular and the proof clear, the judgment of the lower court must be sustained. In *Sartu* v. *Republic,* 11 LLR 400 (1954), this Court also held that where the testimony shows that a homicide was premeditated, a conviction of murder will be sustained.

It should be noted that despite the fact that the evidence of the prosecution points to the guilt of the appellant, he neglected and failed to produce evidence in support of his plea of not guilty. As shown by the minutes of the 24th day's session of court, Wednesday,

September 10, 1980, the appellant requested postponement of the trial in order to prepare his defense, which request was granted; but when the trial resumed on the 15th day of September, 1980, appellant expressly waived the production of evidence and submitted the case to argument. It is the privilege of every person in any criminal action in which he is an accused not to be called as a witness and not to testify, and no presumption of guilt shall arise with respect to the exercise of this privilege. He may, however, subject to the limitations, testify in his own behalf in accordance with the rules governing other witnesses. Criminal Procedure Law, Rev. Code 2:2.5. Nevertheless, it is to be noted that when the accused in a criminal prosecution fails to explain incriminating facts and circum-stances in evidence on the trial that lay peculiarly within his knowledge, he takes the chance of any reasonable inference of guilt which the jury might properly draw from the whole evidence. Once the prosecution establishes its case, the accused remains quiet at his peril. Furthermore, although the protection afforded an accused against any unfavorable presumption or inference being drawn because of his failure to testify remains with him until he takes the stand as a witness, is sworn to tell the truth and thereafter testifies in his own behalf, when he voluntarily testifies, he is subject to the same rules as other witnesses, and his failure to deny a material fact within his knowledge, previously testified to against him, warrants the inference that it was true. 29 AM. JUR. 2d., *Evidence,* §189

The trial court having acquired jurisdiction over the person of the defendant, now appellant before this Court, and conducted the trial upon a valid indictment, and the trial having been regular, it is the holding of this Court, based upon the legal citations given *supra*, that the judgment of the trial court should not be disturbed. The said judgment confirming the verdict of the empanelled jury and sentencing the defendant/appellant to death by hanging is therefore hereby *confirmed* and *affirmed*.

And it is hereby so ordered.

Our distinguished colleague, Mr. Justice Mabande, is of the opinion that the judgment should have been reversed and the case remanded for retrial because the trial judge did not investigate the alleged irregularities of the clerk's office as contained in the appellant's motion to abate the proceedings; and that we should discharge the defendant/appellant and investigate the irregularities. He has therefore delivered a dissenting opinion.

Judgement affirmed.

MR. JUSTICE MABANDE**,** *dissenting*

After a plea of not guilty, Appellant Levi Tolbert was tried and convicted of the crime of the murder of his wife, Beatrice Walker-Tolbert.

Appellant Levi Tolbert, appealing from the judgment sentencing him to death, stated that he

was not tried in accordance with the same trial procedures accorded other persons accused and charged by the government for criminal offenses; that no indictment was returned in open court against him; and that the verdict of guilty of murder brought against him was spurious, in that it was knowingly forged by a single juror in the names of the other eleven jurors. He concluded that if the verdict had not been forged as reported to the trial judge, he may have been acquitted.

During the consideration of the appeal, appellant's counsel challenged the indictment and trial as being grossly irregular and illegal. The records reveal that during the trial, defendant filed a motion requesting the trial court to refuse jurisdiction and discharge him. The trial court summarized the motion, the relevant portions of which are that:

(1) no indictment was ever returned in open court and filed upon orders of the judge by the clerk of court as required by law; and

(2) that the court should institute an investigation to determine whether or not an indictment was returned.

To this motion, the prosecution filed a three-count resistance, the relevant portions of which are as follows:

(1) That courts do not do for parties that which they should do for themselves; hence, the investigation of the alleged non-existence of the indictment during the trial was to have the court help the defense in obtaining evidence in support of his motion;

(2) that since the parties joined issue, a motion to dismiss during trial should be considered as having been waived by the defendant; and (3) that a claim that an indictment was never returned in open court is not legally sufficient to support a motion to dismiss and refuse jurisdiction.

The court ruled that the fact that the indictment was now in the file of the court was sufficient evidence that it was returned in open court and that as a court is required to take judicial notice of its own records, it could not institute an investigation to ascertain the genuineness of said records. The court further ruled and I quote:

"If it is true that the honorable county attorney retained the indictment in his possession and it was never ordered filed by His Honour Galimah Baysah, Sr., then this is also grossly reprehensible."

The mere appearance of a document in a case file does not make it a part of the records in the case. It is only the minutes of court that do. Thus, this ruling of the trial judge was an outrageous misconception of the law. The court, however, denied defendant's motion, to which he excepted.
Our current Criminal Procedure Law has this to say on the issue:

"*Defenses and objections which must be raised.* Defenses and objections based on defects in the institution of the prosecution or in the indictment other than that it fails to show jurisdiction in the court over the subject matter or to charge an offence, may be raised only by motion before trial to dismiss. The motion shall include all such defenses and objections then available to the defendant. Failure to present any such defense or objection as here provided constitutes a waiver thereof; but the court for cause shown may grant relief from the waiver. Lack of jurisdiction to try the offense or the failure of the indictment or information to charge an offense shall be noticed by the court at any stage of the proceeding. Criminal Procedure Law, Rev. Code 2:16.7.2

Under our statute, all defenses and objections based on defects in the institution of the prosecution are permissible and where the defendants fail to raise such objection, he is deemed to have waived his rights. The law, however, in its liberal preservation of the benefits of a fair and just trial to an accused, gives the trial court the discretionary right to grant and relieve an accused from the waiver when he shows cause. In the case of Levi Tolbert, he did not have counsel until the very commencement of the trial. The court granted him permission to raise his defense by allowing his counsel to make the motion. Having made the motion, it was illegal for the same court to fail to hear the defenses when it ruled his defenses as having been untimely filed. Such a ruling is contrary to the statute and criminal justice.

Even where a defendant has confessed to the crime, if, at the trial, he pleads not guilty, such a plea is an attack on the manner of his arrest, the evidence, as well as his indictment which the prosecution is under duty to carefully and convincingly prove beyond all reasonable doubt.

In *Massaquoi* v. *Lowndes*, 4 LLR 260, 261 (1936), this Court held that in all criminal cases "a plea of not guilty puts in issue every fact which the prosecution is bound to prove." A criminal trial, unlike a civil suit, places great responsibility on the State to see to it that all procedural safeguards and liberties which may constitute a fair and just trial are strictly observed. I am convinced that where a murder charge is levied against a defendant, a claim that no indictment was returned imposes responsibility on the court, as well as the prosecution, to investigate and ascertain from the records of the trial court whether or not all

of the procedures required for the formal charging of the defendant were met. The trial of a defendant on an indictment which he charges to be spurious is not a fair and just trial unless the assertion is judiciously investigated and determined to be unfounded. Without proof beyond all reasonable doubt that such an indictment was formally returned against a defendant, a hearing and evidence produced by the prosecution in support of said indictment lack all legal support of a trial as required by due process of law.

In *Ledlow v. Republic,* 2 LLR 529, 531 (1975), it was held that:

"In all criminal cases, especially capital cases, the prisoner should be afforded every opportunity to establish his innocence; and when he is deprived of any right or privilege guaranteed to him by the Constitution or laws, by the subterfuge of his opponent or the action of the court, he cannot be said to have had a fair and impartial trial."

Upon the return of the verdict by the twelve trial jurors, the defendant filed an objection challenging the genuineness of the verdict. The objection read, thus:

DEFENSE: "To which verdict of the empanelled jury the defendant excepts on the ground that the verdict is written in one penmanship and does not indicate the ex-cross of any juror who cannot write for him or herself. Neither is there an indication of fingerprint opposite each name as required by law and submits.

THE COURT: the exceptions noted."The court did nothing further but ordered that the verdict be received and recorded. The jury was promptly discharged.
The purpose of polling the jury, especially where it appears from the records or on the objection of a party that there is doubt as to the unanimity of the jurors, is to determine with absolute certainty before it is too late whether the verdict reflects the conscience of each juror who tried the case. Our criminal procedure law has this to say on this subject.

"POLL OF JURY. When a verdict is returned and before it is recorded, the jury shall be polled at the request of any party or upon the court's own motion. If upon the poll, there is not unanimous concurrence, the jury shall be discharged and new trial awarded." (Emphasis mine). Criminal Procedure Law, Rev. Code, 2: 20.11.7

The verdict in a criminal trial should be the unanimous conclusion of all of the trial jurors. When an attack on a verdict seeks to discredit its genuineness, such as the signatures of the jurors, it is an objection that the said verdict is not the verdict of the trial jury. An appeal against a verdict and a judgment based upon it puts into issue the entire trial procedures adopted by the court. It is the verdict that determines the evidential aspects of the trial since

the jury, on the proper instruction of the court, applies the laws to the facts; hence, an attack on the jury before it is disbanded should be investigated by the trial judge in order to determine whether the law and evidence have been fairly maintained by the procedures adopted by the court. Upon an attack that the verdict is not that of the jury, the law requires either the party to request the court, or the court, *sua sponte, to* poll the jury before the jury is discharged, in order to insure the credibility of the jury and the court. It is not every signed verdict that is, upon polling the jury, found to be unanimous.

When a nation boasts of the civilization and the democratic institutions of its government, it is the records or the evidence of the liberties accorded and adjudicated by its people in the trial of those who are charged with the violations of the criminal law of the state that proves its pronouncements. To convict an accused, it is not enough that the evidence produced by the witnesses alone convinces the court, but also the manner in which the evidence is obtained. The procedures adopted at the trial must also be in accordance with the law. The trial court defaulted to do this in the case of Appellant Levi Tolbert. These trial defaults evidently proved that the court was purposely bent on concealing material facts that challenged the evidence, the trial procedure, as well as the law applied. When such outrageous malpractices are adopted by a court in a criminal proceeding and the defendant is sentenced to death, an appellate court should not support such open tyrannical judicial maneuvers.

No matter what crime one may be accused of, no matter how overwhelmingly evident the probable cause may be, and no matter what quality of evidence the prosecution may have against the accused, he is always entitled to a fair and impartial trial consistent with the guarantees of the equal protection of the law.

The trial records in this case clearly show that Appellant Levi Tolbert did not have a fair and impartial trial as required by law. It is abhorrent to criminal justice and our laws to affirm his conviction. I have for these reasons voted for a remand, with a mandate to the trial court to fairly and impartially retry this case, strictly in compliance with our laws. I therefore dissent.