# DAVID JOHNSON and PHILIP TOOM EY,

Appellants, e. REPUBLIC OF LIBERIA, Appellee.



MONTSETULADO COUNY.

Argued March 28, **1962.** Decided June 1, **1962.**

1. Although an appellate court will ordinarily refuse to review errors alleged to have been committed by the trial court where the bill of exceptions upon which the appeal is based omits mention of those errors, and although such ommis- sions are ordinarily deemed waivers of appeal as to such errors, nevertheless, in a criminal appeal on a capital offense, the Supreme Court will review the sufficiency of the evidence and the regularity of the trial as a whole before affirming or reversing a judgment of conviction thereupon.
2. A judgment of conviction in a criminal case must be supported by proof of all the necessary elements of the crime charged beyond a reasonable doubt.
3. The Supreme Court will take judicial notice of the fact that the taking of bodily temperature is not a means of determining whether a person has malaria.
4. In a trial on an indictment charging murder, proof that the defendants, em- ployees of a hospital, unauthorizedly administered a drug to a patient with whom they had previously had altercations, and who died about two days after the administration of the drug, is insufficient to support a j udgment of conviction, in the absense of any medical evidence as to the cause of death, or expert testimony as to the nature and effect of the drug.

On appeal from a judgment of conviction of murder,

*T. G yiblt Gollins for* appellants. *Solicitor General*

*J. Dossen Richards* for appellee.

MR. CHIEF JUSTICE WILSoN delivered the opinion of the Court.

This case originated in an indictment of the grand jury for the February, '9 6 i, term, of the Circuit Court of the First Judicial Circuit, Montserrado County. The

charges of murder were founded on a true bill growing

out of circumstances and acts connected with the de-

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Pendants’ engagement at the Government Hospital in Tchien, Eastern Province, Liberian H interland, where the defendants were employed as dresser and messenger, respectively, and where one Morris Nyansuah was also employed as clerk. The circumstances surrounding the death of said Morris Nyansuah may be briefly sum- marized as follows.

The absence of Nyansuah from duty on December z i,

\*9° was explained by him to be due to physical ex- haustion from his previous day’s work of thatching his house. He was persuaded to go to the hospital for a

medical checkup, the directress of the hospital suspecting that he was suffering from malaria.

When the decedent reached the hospital, the defendants were about to leave. Hearing of his illness, they per- suaded him to enter a room in which injections are administered, where they persuaded him to permit them to give him an injection which allegedly caused his un- timely death.

Prosecution witnesses testified that there had been altercations between the decedent and the defendants con- cerning hospital money and patients’ fees, he being re- sponsible for the satekeeping of funds of the hospital. Codefendant Toomey was alleged to have made threats to the effect that, in the future, he would let decedent know that he was a man.

Predicated on these alleged threats and other related circumstances, responsibility for the death of decedent was laid to the defendants ; and on trial by a petty jury, a verdict of Guilty of murder was returned against them. In confirmation of that verdict, final judgment was en- tered sentencing the defendants to be hanged on August

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From the several rulings and final judgment of the trial

court, the defendants, now appellants, excepted and have appealed to this Court for review of the errors they con- tend were committed during the trial.

The Solicitor General, appearing for the Republic, moved this Court to dismiss the bill of exceptions because of legal insufficiency and unsoundness in that, although defendants excepted to the verdict of the empanelled jury, their purpose being to reserve same for review by this Court, said exceptions appear nowhere in the bill of exceptions, and should not be argued by appellant, since such an omission amounts to a waiver. The Solicitor General also pointed out that, although appellants ex- cepted to the ruling of the trial court denying their motion for a new trial, this exception was likewise omitted from their bill of exceptions, which omission also amounts to a waiver.

I n support of the foregoing, the Solicitor General cited a long line of decisions wherein this Court has held that any exceptions taken to the ru lings of a court during trial must be considered as waived if not included in the bill of exceptions ; which principle would seem sufficient to warrant an order for the enforcement of the lower court’s judgment. The Solicitor General, however, did not insist on dismissal of the ap peal ; and this is quite understandable, since, as disclosed by the record, all the ju risdictional prerequisites to the per/ection of an appeal had been taken by appellants, the omissions f rom the bill of exceptions of the exceptions mentioned *su pt-a* not con- stituting jurisdictional defects. But, at this point, the Solicitor General argued that we should not open the record certified from the court below because there re- mained no issue for this Court to decide, ap pellants hav- ing conceded the correctness of the final judgment entered against them by fa iling to enter exceptions to the verdict of the jury and to the trial court’s denial of the motion for a new trial.

Whilst it is true that the omission of rulings made

during the trial of a case constitutes an incurable error, it would be impossible to ascertain the existence of such omissions in the records, and this Court would not be in

a position to pass upon them if the record were closed ; nor could this Court command the court below to resume jurisdiction and enforce its judgment, as prayed for by appellee, unless the appeal were dismissed, which appellee has not prayed for. We are therefore unable to accede to the contention of the Solicitor General that the record regularly before us on appeal should not be opened.

Inspection of the record does disclose the absence of exceptions taken to the verdict of the jury and to the ruling of the judge on the motion for new trial. Since a bill of exceptions stands as the complaint before an appellate court, these exceptions, though contained in the record, are not legally before us on appeal ; therefore the judg- ment of the trial court ought to remain undisturbed. Supporting the point of waiver of exceptions taken at the trial but not made a subject for review by the appellate court, we quote from syllabi of decisions of this Court: “Any exception taken during the trial, and not embodied in the bill of exceptions, will be considered

as having been waived.” Led/o'ui v. *R e p ublic,* z

# L.L.R. s 9 ( 9°s ) , Syllabus z.

“In appeals the bill of exceptions must set forth the

points upon which it is believed the court decided erroneously and contrary to law.” Anderton v. Etc- *tain,* i L.L.R. 44 ( i 868) , Syllabus i.

“Where the bill of exceptions and other parts of the record in an appeal fail to show that exceptions were taken in the lower court to some ruling of the lower judge, the appellate court will not take cognizance of such exception upon an appeal.” *Anderson* v. plc- Lain, supra, Syllabus 2.

However, since this case involves the lives of indi-

viduals, we consider it an inescapable duty of this Court, before affirming the judgment, to convince ourselves that the evidence produced at the trial did justify the verdict of guilt for wilful murder. It is therefore necessary to open the record in order to pass intelligently upon the

points raised by appellant. Without comment on any points not contained in the bill of exceptions, we will continue the review of the appeal as follows.

To support the judgment of the court below, based on the verdict of the empanelled **jury,** the evidence must be conclusive and void of any doubt, the sentence being one which involves the lives of the appellants. The record shows that circumstantial evidence was relied on to establish defendants’ guilt. Such evidence is contained in the testimony of witnesses in support of the charge laid in the indictment, which testimony tends to establish that the decedent was not actually sick, but suffering from physical exhaustion, when he was persuaded to go to the hospital for a medical checkup, the hospital directress suspecting that he was suffering from malaria. Further testimony was introduced to show that when the de- fendants discovered that the decedent was in the hospital they induced him to go into a room where injections were usually administered.

At this point, the element of malice aforethought was injected into the case through testimony to the effect that defendant Toomey had threatened to show decedent in the future that he was a man because decedent had refused to share with him money collected by him as clerk in the hospital from patients.

The record made at the trial of the case contains further testimony tending to show that, after appellants had induced decedent to enter the injection room, an injection was administered by appellant David Johnson, who was a messenger in the hospital, and who was not

authorized to administer injections to patients. Appel- lant Toomey, who was made an accessory before the fact, confessed to inserting the drug into the syringe and giving it to appellant Johnson to administer.

Both appellants, as witnesses in their own behalf, testi- fied that the decedent got relief from this injection ; yet they testified further that, about two days thereafter, the

decedent reported to the hospital directress that his con- dition had deteriorated as a result of the injection, and made the statement that, if he died, defendants would be responsible, as the injection had given him an abscess. In this respect, their story did not harmonize with that of prosecution witnesses who testified that, immediately after the injection was administered to decedent, he fell and excreted, and thereafter languished and died.

We note here that no laboratory test was reported, except for the taking of decedent’s temperature, although it was alleged that he was suffering from malaria. The taking of bodily temperature is not a means of determin- ing whether one has malaria ; yet a drug not identified on the record was administered to decedent by one who was not authorized to give injections to patients ; nor was it in the line of his duty to do small of which leaves one with the strong belief that the decedent’s fatality must have resulted from this drug; and if so, malice, as ex- pressed in the threats allegedly made against the decedent by defendant Toomey, could have motivated the adminis- tering of the drug.

Whilst this chain of evidence seems very strong, we hesitate to enter into any speculation concerning guilt of a capital offense unless and until all the elements of the crime, or criminal agency, have been sufficiently established.

The indictment charges, and we quote the relevant portion for the sake of this opinion:

“That on December 22, \*9\*••› £t t Tchien District, Eastern Province, Republic of Liberia, David John- son, defendant aforesaid, then and there not having

fear of God before his eyes, but moved and induced by the instigation of the Devil, without any legal justification or excuse, in, at and upon the body of Morris Nyansuah, unlawfully, wilfully, wrongfully, intentionally, deliberately, purposely, feloniously with premeditation and deliberation and with malice

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aforethought, did administer a drug (an injection) upon the body of the said Morris Nyansuah. The said defendant at the time was serving in the capacity of a messenger in the hospital at Tchien, he not being a licensed physician or registered pharmacist; and from said felonious, wilful, unlawful, wrongful, de- liberate, intentional, premeditated act with malice aforethought, and without any legal justification or excuse, he then and there administered said drug, and the said Morris Nyansuah did take seriously ill and

languished for a few days up to December 24, 19° . when at Ganta Hospital, Central Province, Liberian Hinterland, the said Morris Nyansuah did die.

Then and thereby the crime of murder said defendant 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.

“And the grand jurors aforesaid, upon their oath aforesaid, do further present that Philip Toomey, accessory before and after the fact, defendant afore- said, did on December 22, I 9\*o engage the services of the said David Johnson, principal defendant, for the purpose of committing murder at the said Tchien Hospital, Liberian H interland, and unlawf ully, wil- fully, wrongfully, intentionally, deliberately, pur- posely, feloniously, with premeditation, deliberation and malice aforethought, did procure the services of the said David Johnson to administer the drug upon the body of the said Morris Nyansuah, and from the drug thus administered the said Morris Nyansuah did take seriously ill and languish for a few days up to December 24, I 96o, when at the Ganta Hospital,

Central Province, Liberian Hinterland, the said

Morris Nyansuah did die. Then and thereby the crime of murder said defendant 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.” Upon such an indictment, proof that a drug was ad-

ministered by defendants, without establishment of the kind of drug and the Iatal effect it could have when administered, or if not ordinarily Iatal, under what cir- cumstances it could be fatal, is insufficient to establish the actual cause of death beyond reasonable doubt. We never theless do not feel that this doubt constitutes suffi- cient ground for acquittal of the d ef endants in this case, especially in view of the lack of any certificate or medical opinion of the resident physician at Tchien, or of the medical doctor at Ganta where the decedent was taken for treatment, certifying to the cause of death, the resident doctor at Tchien not being on the spot at the time.

Moreover, it was brought out at the trial that a blood smear was taken ; yet, without awaiting results of this test, the defendants administered the injection ; that thereafter the stool of decedent turned black; and that this was observed by the medical doctor at Ganta. An important item of evidence is therefore missing I rom the record of this case, namely, the testimony or medical certificate of the doctor at Ganta, as referred to in the following testi- mony of Arthur Brown, a witness for the prosecution : “That night, the urine and the stool were black.

So, being that the doctor was not there, we had to take him to the Ganta hospital ; that is on the 23rd of December. I chartered a car and took him, decedent, to Ganta. Before I carried him to Ganta, I called all of the people in the town with David Nearbo, a public relations officer. When the people came, he told the people that when he dies, then it is defendants, Philip Toomey and David Johnson that killed him, the decedent. And he further told the people that he is

unable to make any paper.”

Continuing to relate what the decedent is alleged to

have said, the witness testified as follows:

“He said that he wanted to make his statement in writing, but he was unable to do so. When we took the decedent to the Ganta hospital, the doctor asked us what had happened. We told him that the dece- dent had taken some injections from defendants Toomey and Johnson. The doctor told me that if the decedent had passed any stool I should bring it to him. The decedent passed stool the next day, and we took it to the doctor, and the doctor asked us what caused the stool to be black. I told him I did not know; and he further asked us whether he had been passing stool like that before. I told him no ; not before the injection was given to him. The doctor told me that he will not give the decedent any treat- ment, but he will operate on the spot where the injection was applied. After the operation, he told me he was sorry, but he could not give any further treatment. Two hours thereafter, he gave up. The next day, I carried the body back to Tchien. When I got to Tchien, I explained to the district commis- sioner, and the commissioner arrested the two de- fendants now before the court. After the commis- sioner inquired into the matter, he sent the matter down here.”

Since the expert testimony of the medical doctor at

Ganta, who personally treated decedent shortly before his death, was obviously essential to the establishment of the cause of death, we wonder why it was not produced to form a part of the evidence in this case. Because of the absence of this indispensable evidence, we consider it necessary to remand the case with instructions that such evidence be obtained together with all other information on this drug, and its description and effect on the human body when administered.

The judgment of the court below is therefore reversed, and a new trial is hereby ordered with definite instruc- tions that the testimony of the medical doctor at Ganta

who treated decedent before his death, as to the cause of decedent’s death and other related circumstances includ- ing the nature and effect of the drug used on decedent when injected into the human body, be obtained. And it is so ordered.

*R ezersed and rem andcd.*

MR. J USTICE PIERRE, dissenting.

Although I am in full agreement with my colleagues that the evidence taken at the trial in this case, as certified to us in the record sent up from the court of origin, fails to prove the appellants’ responsibility for the decedent’s death, I have refused to vote for the judgment which remands this case for another trial. In my opinion, there was no legal reason why this case could not have been conducted in such manner as to prove the real cause of decedent’s death at the proper time—especially when, at that time, the evidence was fresh, and circumstances and conditions were such as to negative the possibility of error or mistake as to who or what was responsible for the decedent’s death. It is my view that the State has failed to prove the charges laid in the indictment for murder, and Iailed to prove that the appellants were responsible for decedent’s death, if indeed, he was shown to have died of causes other than natural. I therefore have with- held my signature from the judgment.

It is my view that, in criminal cases, it is upon the State first to charge the crime committed ; then to prove the commission thereof and the circumstances surrounding the same ; and finally, to prove the defendant’s guilt beyond a reasonable doubt. The indictment in this case has alleged that: ( i ) an injection was administered on the body of the decedent by one of the defendants upon order of the others ; (2) one of the defendants employed the services of the other to administer the said injection for the purpose of committing the murder ; (3) as a result

of the administration of a certain drug by said injection, decedent did die ; and (4) said death amounted to murder for which the defendants are responsible. Each of these four points, in my opinion, should have been proved conclusively and beyond doubt ; or the prosecution should be adjudged to have f ailed to prove the indictment, in which event the accused should be acquitted.

The bill of exceptions upon which the case has been brought here contains only three counts, in which appel- lants’ counsel has contended, in substance that: (a) the prosecution failed to connect the death of the decedent with the injection administered by the appellants ; (b) it was not proved that the drug administered by the injec- tion was poisonous, or that it could have caused the dece- dent’s death ; and (c) the real cause of death was never proved. These are the main issues raised in the bill of exceptions. Since I feel that, in keeping with our prac- tice and a line of opinions of this Court, we should concern ourselves only with what is laid in the bill, I have confined this op inion to those issues only. In order to support the position which I have taken, I think it necessary to review the evidence upon which the majority opinion has grounded the Court’s decision.

The trial of David Johnson as principal, and Philip

Toomey as accessory, on the charge of murder, was had before the criminal court in Monrovia in the February,

19 I , term, with Judge Weeks presiding. A jury heard evidence, deliberated, and returned a verdict of Guilty. Upon this verdict, judgment was rendered, to which exceptions were entered, and from which appeal has been taken to this Court.

I t would appear that one Morris Nyansuah was em- ployed as a clerk at the Government Hospital in Tchien. The appellants were also employed in the same hospital as messenger and d resser, respectively. The record re- veals that, on December 2 i, I 9\*O, the decedent reported being tired from having done some repairs to the roof of his house the day before, and stayed at home, and did not

attend his duties at the hospital. The directress, suspect- ing malaria to be the cause of the tiredness, persuaded the decedent to go to the hospital for a checkup. At the hospital, the directress instructed the laboratory tech- nician to take a blood test. After this was done, appellant Toomey ordered, and appellant Johnson took the decedent into another room, and gave him an injection.

There is conflicting testimony at this point ; but the State’s witnesses testified that, immediately after the in- jection was administered, the patient cried out, fell to the floor, and excreted in his clothes. They also testified that the decedent’s urine and stool were discovered to have turned black. No doctor being in the vicinity, the patient was taken to the Ganta Hospital the next day; and the doctor there examined him. What the doctor found is not disclosed in the testimony of any ot the State’s wit- nesses ; but one of them said that the doctor stated that he would operate on the spot where the injection had been administered. I shall say more about this later in this opinion. The decedent lingered for a day after the in- jection, and for another day in the Ganta Hospital, and then died. This is the main testimony ot one Arthur B rown, as transcribed in the record for April i8, '9°-

Also brought out in further examination ot this witness

was an incident two months before the injection, involving Toomey, one of the appellants. It is alleged that this incident grew out ot a dispute between Toomey and the decedent over who should retain custody ot the hospital’s tunds. The dispute seems to have grown into a quarrel which resulted in Toomey telling the decedent: "You, Morris, you do not respect anybody; but one of these days I will show you that I am a man.” It has been claimed that the quarrel, together with this remark, are evidences ot malice; and the fact that the dispute over custody ot the money was settled in the decedent's Iavor seems to have strengthened the presumption of malice on Toomey’s part against the decedent.

The first witness seems to have been more vocal than

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any other on what happened at the Ganta Hospital when the decedent was taken there after the injection. Here, now, is a part of the examination on that phase of the story: “Q. I suggest that you got or saw to it that a certifi- cate as to the cause of death was given by the

medical doctor, who you say last treated the dece- dent at Ganta.

# “A.

”Q.

Ooctor Walter told me that he could not give a medical certificate because he was not able, or better still, could not issue a medical certificate, and for said reason, he did not give any medical certificate.

I suggest, also, that because of the relationship existing between you and the decedent, and the interest which you so manifested in the decedent at the time of the alleged taking of the injection, that you investigated and found the injection that was given him ; and if so, kindly tell us the name of that injection.

“A. I do not know what kind of injection.”

This was not the only prosecution witness who did not know what drug was administered ; not one testified to what was really injected. Frances Oorbor and O avid Guam said that they were told by appellant Toomey that acid had been injected. Only these two witnesses testified to having been told what was administered. Appellant Toomey testified that he had ordered, and appellant Johnson. had administered, a drug called Badonial, and that this drug was used in cases of malaria to reduce temperature. All doubt as to what was really injected could have been easily removed if some effort had been made to establish this Iact with certainty, either by post mortem examination or by medical testimony. I have wondered why no doctor was called to corroborate the testimony of appellant Toomey as to the medical use of the drug called Badonial, which he claimed he ordered to be injected and particularly as to whether this drug is

used to reduce temperature in cases of malaria. But there is another question which has arisen in my mind. Could a patient live for two days after acid was injected into him 7 Medical testimony might have cleared up these questions.

Frances Dorbor was the State’s next witness. She testi- fied almost exactly to the same facts as had the first witness, but she went on to tell what was said to her when she went to the hospital to visit the decedent after hearing of the circumstances surrounding the administration of the in- jection. She testified that the decedent told her: "The injection was given me by David Johnson ; I fell down and excreted in my clothes.” She further testified that, when the decedent told her this, she went to the directress of the hospital and asked about the kind of injection which had been used, but the directress did not know what it was. She then discovered that the decedent could not walk. She had Arthur Brown carry him on his back from the hospital ; and she testified that he could not sleep that night.

Going back to the testimony of the first witness, there appears a significant statement which, although not cor- roborated by any other witness, might have been checked with a view to strengthening the case for the prosecution. The judge put the following questions to the witness: “Q. You have said that you chartered a car to carry decedent to Ganta for medical attention. To

what hospital did you carry decedent, and who was the medical officer in charge 7

# Dr. Walter.

*°a.*

“A.

After the decedent died, did the doctor tell you or explain the cause of death ; and if so, what did he says

The doctor said that he could not have attended the man because it was late; and for said reason, the man who gave him the injection would be responsible for his death. There was nobody,

such as a qualified medical officer, to have taken autopsy to find out the cause of death.”

This seems peculiar because, even though the doctor is alleged to have placed the responsibility for the patient’s death upon the person who administered the injection, yet, according to this witness, the same doctor refused to give a certificate as to the cause of death. It seems even more peculiar that there was no medical officer qualified to perform an autopsy, although Dr. Walter, to whom the patient was taken, was qualified sufficiently to examine and treat the decedent, and is conceded to have given the decedent his last medical care. Can it be that some doctors are qualified to perform autopsies, and others are not 7 These are some of the very strange and conflicting aspects of the evidence in this case which have raised doubts in my mind as to where responsibility for the death should rightly be placed. Only one other witness, David Guam, testified for the prosecution ; and he brought no new facts into the case.

Here I would like to call attention to the fact that the indictment mentions a medical certificate which must have been regarded as constituting part of the State's evidence. I am of the opinion that, in a case of this kind, such a certificate is necessary to prove the cause of death. Unfortunately, however, no such certificate was ever offered in evidence ; and it has been testified that the doctor at the Ganta hospital, who examined and treated the decedent, refused to issue a certificate. We know that no post mortem examination was performed ; the State’s own witnesses testified to that effect. Thus, our certain knowledge extends only to the fact that the dece- dent died, without any certainty as to what caused his death. We pass now to the defendants-appellants and their witnesses.

Succinctly stated, the story told by the two defendants is that, on December z '. 9 . th e decedent showed signs of illness, and when questioned, said he was suffering from

heart trouble and malaria. Defendants testified that the decedent did not return to work at the Tchien Hospital for a number of days, and that, his absence being noticed by the directress, she went to find him at his home ; asked him why he had absented himself from duty; was told by the decedent that he was sick; and asked why he had not sought medical treatment at the hospital. She then took him back with her and ordered his blood tested. After the test, the technician gave the decedent a paper which he took to appellant Toomey, who was in charge of the hospital in the absence of the doctor. It was discovered the decedent’s temperature showed a reading of rod.4 degrees, and dresser Toomey ordered i c.c. of a drug called Badonial injected as treatment. Toomey is re- ported to have given the ampoule containing c.c. of the drug to messenger David Johnson, who was instructed to administer I c.c. of it. Appellant Johnson testified that he took the decedent into another room and injected the drug known as Badonial from the ampoule which had been given him by dresser Toomey.

Just here I would like to note that, when the injection

was administered, according to appellant Johnson’s testi- mony, only he and the patient were in the room, and the door was closed. Since this testimony was uncontra- dicted, we must assume that there were no witnesses to the administration of the injection who could have testified to what took place immediately thereafter. But in this connection, Johnson’s statement makes no mention of the decedent having cried out, or having Iallen to the floor, or having excreted in his clothing. If the two witnesses who testified to such Iacts were not in the room, how could they have witnessed what took place behind a closed door 7

According= to Johnson, he heard no more of the dece- dent until December 23rd when he and dresser Toomey were called to the decedent’s home, where he was lying outside of the house seriously ill. Both Johnson and

Toomey testified that, in their presence, the decedent told the directress that he had an abscess. One David Nearbo then offered to take the decedent to the hospital in Ganta for treatment, but requested that the decedent make a written statement that, if he died in Ganta Hospital, his death would have been caused by the injection which dresser Toomey had ordered and which messenger David Johnson had administered.

The decedent was taken to the Ganta Hospital where he died a few days later. When his body was brought back, the district commissioner arrested the appellants and put them in jail. The commissioner is then supposed to have written to the doctor in Ganta ; and I shall say more about this later. It would appear that, after the com- missioner received a reply to his letter from the doctor, the central office of the National Public Health Service in Monrovia became interested in the matter, and sent up for the two appellants as its employees. The record does not show whether they came down released or were still in custody and brought down by officers. However, Miss Adelaide Morris interviewed them upon their ar- rival ; and she must have been satisfied with what she found, since she ordered them back to their posts at the hospital in Tchien. It was then that David Nearbo, as mentioned before, came down and reported the death to the county attorney who secured an indictment for murder. It was reported that, during the investigation con- ducted by Miss Morris in Monrovia, she mentioned that the decedent had previously been treated in Monrovia for a heart complaint, and that people suffering from heart trouble die suddenly. The decedent’s alleged pre- vious treatments for this complaint were not touched upon in the State’s evidence; but I feel strongly that the reference to such previous treatments should have been refuted if it were not true ; or at least, it should have been checked to establish with certainty whether or not dece- dent was indeed a previous cardiac patient. ***Miss*** Morris

could have been called to testify and explain the statement she is supposed to have made, wherein she is supposed to have asserted knowledge of the decedent’s previous car- diac trouble. However, none of these steps were taken ; and so we have several lay witnesses testifying to the decedent’s being a heart patient, without any expert testi- mony which could have established the truth or Ialsity of the report. Who is now competent to say whether the report was true or false 7

I am of the firm opinion, and in this I agree with the majority of my colleagues, that it was criminal negligence on the part of the hospital authorities to entrust a mes- senger with the administration of medicines which, be- cause of his lack of proper technical training, could cause the death of patients he handled. It came out in the testimony of a defense witness that this was contrary to hospital rules ; and to support this point, here is the testimony of George Mensah, administrative assistant in the central office of the National Public Health Service, and acting chief of hospital administration:

“According to our policy, no messenger or anyone else who has not attended the school of nursing, and who has not passed his or her State board examina- tion, can give injections of any type. If a doctor becomes interested in any of the employees at his station, it is his duty to send that person down to Monrovia in order to attend the school of nursing.”

If it had been proved that a patient had died of a drug injected by an unauthorized employee of the hospital, proof of the act of such an employee in injecting the patient would have constituted strong evidence of re- sponsibility for any death caused by such an injection. And if a layman, untrained in use of medicines, and ignorant of what effect a particular drug could have on a human being, injected a drug which caused death— no matter how harmless the drug—he was no 1ess **gui1ty** because the drug had been known to be harmless in other

cases, and not dangerous under normal conditions. But, first, it would have to be established by expert testimony that the death had indeed been the result of the adminis- tration of the drug. This was not established in this case ; and so I remain uncertain as to what really caused the decedent’s death.

If we are controlled by the allegations laid in the in- dictment that the death of the decedent was caused by the injection, the judgment of conviction should not be affirmed unless the record of testimony on the trial con- tained proof that the injection was really the cause of the decedent’s death. For, even if we concede the truth of the testimony of the defendants that they administered a drug called Badonial to the decedent, we would still have to determine whether this drug caused the decedent’s death. No layman could have testified to this ; and no expert was called at the trial. How, then, could the cause of the decedent’s death have been proved beyond a reasonable doubt 7

Clarification of such questions in this case would have been simple if a certificate of death had been issued, or a post mortem examination had been performed. There are quite a few more unanswered questions, such as, for instance, why the doctor who examined and treated the decedent before his death was not called to testify at the trial. And why was no other doctor called to testify on the many medical points brought out in the evidence 7 The indictment shows on its face that a medical certificate was among the documents to be introduced at the trial ; yet no such certificate was put in evidence. What hap- pened to this document 7 The unanswered questions which abound in this case leave me to wonder whether proof of the guilt of the accused went beyond mere speculation.

Both of the appellants testified that, after the dece- dent’s death, the district commissioner wrote to the doctor in Ganta to ascertain whether death had been the result

of the injection, and that in reply, the doctor sent to the commissioner a letter in which the doctor stated that the decedent had died of cardiac trouble. Notwithstanding this, no effort seems to have been made to have the district commissioner testify on this point. I t would have been much better for the prosecution’s case if the commissioner had testified that no such letter had been received by him. The f act that no attempt was made to rebut this testimony leads me to infer that it could be true. Here is a portion of appellant Johnson’s testimony on the point:

“The commissioner said: ‘Let me write ... the doctor who did the operation to find out what hap- pened ; and the reply I will get from there, I will know what to do.’ When the reply came, the com- missioner called the people in council and said: ‘Anyone who can read among you people, let them come and read this letter f rom the hospital in Ganta.’ The letter was read, and it revealed that the decedent was suffering f rom heart trouble, and that it was not the injection that killed him.”

Not only was this never contradicted by the prosecution,

but again we are faced with the consequences of the prose- cution's f ailure either to call the doctor to testify, or to call the commissioner to testify as to whether such a letter had indeed been written to him by the doctor, and whether he had read such a letter in council.

Earlier in this opinion, I mentioned that the State’s first witness testified that, when the decedent was taken to Ganta and examined by the doctor, an operation seemed necessary ; and f rom the said testimony, it appears that such an operation was indeed performed. Here is the relevant portion of the testimony on this point:

“The doctor told me that he will not give the dece- dent any treatment, but he will operate on the spot where the injection was applied. After the opera- tion, he told me he was sorry, but he could not give any further treatment.”

I might mention that this witness was the only one of those who testified who is alleged to have accompanied the decedent to the hospital in Ganta ; so it is not strange that none of the other witnesses referred to this operation. What the operation was for, or whether such an operation was indeed performed, must remain among the unsolved problems ; but I still maintain that everything connected with this alleged operation could have been clarified if the attending physician had been called, or if a med ical certificate had been secured. The present situation is, therefore, that one witness who accompanied the patient to Ganta testified that an operation was performed on the patient before his death ; and we do not know for what purpose this operation was performed ; nor can we con- clude that a physical condition, which might have pre- viously existed and made such an operation necessary, was not responsible for the decedent’s death.

Count z of the indictment charges that appellant Toomey employed appellant Johnson to administer the injection for the purpose of committing the murder. Notwithstanding this very positive accusation, no effort was made to prove it. During the trial, the defense at- tempted to elicit testimony on this point, and the following question was put to a witness:

“Q. The State, in its indictment, alleged that de- fendant Toomey engaged the services of one David Johnson to administer a drug on decedent Morris Nyansuah, and as a result of said adminis- tration the decedent died. You have been brought here to prove this allegation. Can you swear that this allegation is true?”

The above question was objected to, and the objection was sustained. That was the only reference made to that part of the indictment during the entire trial. Thus, although the indictment charged it, an attempt to prove it was objected to by the prosecution, and the objection was sustained by the court. Why was this part of the indictment not allowed to be proved ?

As this Court concluded in Fnacy v. R *e/u6fic,* 4 L.L.R.

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“Hence this Supreme Court cannot be expected to affirm a judgment of conviction against any person charged, unless the evidence adduced is sufficient to satisfy our minds and consciences that the accused is correctly charged, and the evidence satisf actorily proves him guilty of the offense as charged.”

I am of the opinion that, in such cases, our minds and consciences should also be satisfied that another trial would be productive of better results based upon evidence of a better grade than in the former trial. kn view of this record of the trial, which I have endeavored to analyze, I am not satisfied that the evidence is either sufficient or of a quality adequate to prove the guilt of the accused beyond a reasonable doubt; nor can I bring my- self to agree with my colleagues that, at another trial, after so long a lapse of time, there will be a possibility of establishing the proximate cause of the decedent's death. A post mortem examination cannot be performed now, almost two years after decedent’s burial. Moreover, since any medical certificate issued now would be based more on conjecture than on any positive evidence of the conditions which existed at the time, to order one issued now, or to require medical testimony given now on the

patient’s condition in 19\* . wOl2ld seem to be flirting a little too much with guesswork. Thus, positive proof as to the real cause of death would **still** be wanting in another

trial.

In my opinion, no one should be convicted on such scanty evidence or by a chain of proof lacking so many vital links. I would hold, under the circumstances, that the verdict of the jury was not responsive to the testimony of the witnesses ; that the charge of murder has not been proved ; and that, therefore, the judgment should be reversed and the appellants discharged without delay.