JOHN BING, Appellant, *v.* REPUBLIC OF LIBERIA, Appellee.

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

Argued October 12, 16, 17, 1967. Decided January 19, 1968.

1. It is expressly provided in the Constitution and by statute that a defendant in a criminal case may not be compelled to testify against himself.
2. The Criminal Procedure Law does not permit any inference to be drawn from the failure of a defendant in a criminal case to testify in his own behalf.
3. Highly inflammatory statements made by a trial judge in the course of a criminal case, will be deemed to have prejudiced the jury against the defendant.
4. Though it is evident that the prosecution has failed to prove its case as required by law, when it appears that missing evidence and testimony can be supplied at a subsequent trial, a remand will be ordered, so that substantial justice may be done.

At the trial of the defendant for murder, highly prejudicial observations were made to the jury about the defendant by the trial judge, and the prosecution failed to produce the key witness who had apprehended the defendant. On appeal from the judgment of the court affirming the jury's findings of guilt, the *judgment* was *reversed* and the case remanded.

G. P. Conger-Thompson for appellant. *Asst. Attorney General George Henries* for appellee.

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

One John Bing of the County of Sinoe, was indicted by the grand jury of Sinoe County, when the Circuit Court of the Third Judicial Circuit was sitting in its November 1963 Term. At the May 1965 Term of said court, presided over by Circuit Judge Lewis K. Free, the

jury returned to court a verdict of guilt against the defendant, now appellant.

Motions for a new trial and arrest of judgment were filed, and by the court denied, whereupon final judgment was rendered by the court against said defendant, to which exceptions were noted, and an appeal prayed for to this Court, and granted.

Stressed at the trial of this case by the prosecution, and insisted upon before this Court, was the failure of appellant to testify in his own behalf, nor to produce any witnesses to disprove the charge on which he stood indicted.

For reasons which we will later state in this opinion, we will forego the review of this and other points of law recited in most of the counts in the bill of exceptions, which grew out of objections to questions and answers, and the rulings thereon made by the court, and pass to the evidence on which the jury predicated its verdict of guilt.

Briefly stating the charge, defendant was held for the murder of decedent by means of a deadly weapon, a knife, with which he is alleged to have fatally stabbed decedent when in Wro Toe, in the Kabade Chiefdom, Juarzon District, Sinoe County.

To support the charge the prosecution produced several witnesses, most of whom endeavored to establish the *corpus delicti,* or body of the crime, by stating that they saw the mortal remains of the decedent lying on the ground, and, from inspection of the body, observed that fatal wounds had been inflicted.

There is no showing in the record that a coroner's inquest was held over the body of decedent, nor any medical certificate to determine the means by which decedent came to his death.

We deduce, however, from the arguments made before this Court, that because of the remoteness of this area in the interior where the decedent was found dead, these facilities were not available. This, of course, is a mere assumption which is not supported by the record.

Leading in the array of witnesses produced by the prosecution, and testifying, was one Isaac Davies, who established his acquaintance with decedent and appellant, the former of whom, he said, was dead.

He said, in substance, that on this fatal day, defendant and decedent were at the farm, and he observed a woman approaching them, who told him and others that appellant had killed decedent. He and others rushed to the scene and discovered the body of decedent lying on the ground. They took the body to town, and he ended with the statement, "This is all I know."

Under further direct examination, he named one Mary Yennoh as the woman referred to above, who, at the time of the trial of the case, had died. He stated in answer to a question on direct examination that decedent was killed with a knife. A knife was presented to him, the witness, who identified it as being the knife with which decedent was murdered. He gave the name of one David Williams, who was present when the woman, Mary Yennoh, told him of the killing of the decedent by appellant.

On cross-examination the following questions were asked by defendant's counsel of the witness:

"Q. Mr. Witness, you have made this court and jury to understand that the only facts you have within your knowledge concerning the defendant in the dock killing decedent is what one woman, Mary Yennoh by name, told you, and nothing that you said you saw with your own eyes; not so?

"A. Yes, I was not on the scene when the incident took place.

"Q. May we suggest that you saw defendant in town, that is to say, where the alleged incident took place?

"A. No, upon arriving on the scene defendant had disappeared.

"Q. Mr. Witness, since you have stated for the record that you did not see the defendant in town

that day, how can you identify that this is the knife that defendant killed decedent with?

"A. The soldier that went in search of the defendant arrested and brought him. When the woman came and brought the report, she told us that the defendant used a knife in killing decedent; and actually, when the defendant was arrested by the soldier who went in search of him, the said knife was discovered in the hands of the defendant; this is how I know that the defendant used a knife in killing decedent."

The next and last two questions that were propounded to the witness on cross-examination and to which he made replies were, *inter alia:* (1) that he could not say that defendant killed decedent as previously stated; and (2) that he did not go along with the soldier who went into the bush to apprehend the suspected murderer, to be able to identify with certainty the knife with which decedent was murdered, since it appeared that the soldier who was sent to apprehend the suspected murderer of decedent did so on the day of the alleged murder. It does not appear that any effort was made either by the prosecution nor the defense, to determine whether or not, though the killing had been committed the same day, there were any blood-stains on the knife, which could possibly have aided in identifying this knife with which decedent was allegedly murdered. The record reveals that at the time the soldier was sent to try and apprehend the person who may have murdered decedent, there were no instructions given to him as to whom to apprehend, and, as appears in the record, defendant, at the time he was arrested by the soldier in the bush and brought before the Commissioner and subsequently taken to the seat of the County, Greenville, Sinoe County, made no confession as to his having murdered decedent. Nor is there any indication in the record that the soldier who went in search of the supposed murderer and apprehended defendant, who had in his

possession a knife, testified to the circumstances under which he made his arrest and the attitude of the defendant when arrested, nor to any statements that were made by the defendant at the time of his apprehension and seizure concerning the knife in his possession.

What makes this appear to be necessary, is the fact that it is customary for people living in the interior areas to carry with them weapons, such as cutlasses and knives, for their own protection. Hence, the circumstance of the manner in which the arrest was performed seems to be a missing link in the trial of this case and has an adverse effect on the prosecution, which never produced the soldier at the trial. Nor is it known that he was not available.

The trial judge, Hon. Lewis K. Free, made certain declarations in his rulings and judgments that were manifestly prejudicial to the defendant in this case when he, among other things, said that the appellant, when pressed with questions by the District Commissioner, refused to deny or confess but remained "dormantly silent and contemptuously mute." He said also that "the appellant's attitude and his criminal reticence to withhold the secret of his criminal offense placed against him for a period of now two or three years, and complacency being in custody without a word of denial or confession, the court says that the circumstantial evidence in this case is indistinguishable from positive evidence, and it reasonably follows that the defendant committed the crime."

These poorly phrased declarations which are also void of any legal depth, portrayed the attitude of the trial judge throughout the trial of this case, as can be seen from the record.

The judge, now retired, made another statement in his charge to the jury, which besides being legally fallacious, shows little understanding, when he said:

> "The defendant is responsible for the accusation placed against him; that it is expected of the defendant to

defend himself by testifying in his own behalf, which is to deny the allegation made against him, and where he fails to do such, then the jurors have no doubt, neither can the law interpret it to be clearly a reasonable doubt."

For a trial judge to make such a declaration to a jury upon the conclusion of the presentment of evidence in a criminal case is grossly misleading and prejudicial. The jury so instructed convicted the defendant merely, it would seem, because the defendant did not take the stand as a witness in his own behalf, though the law has expressly declared that not taking the stand cannot be an inference of guilt. The Criminal Procedure Law, 1956 Code 8:274, provides:

"Defendants as witness.—The defendant may testify as a witness in his own behalf, in accordance with the rules governing other witnesses; provided, however, that he cannot be compelled to testify and he cannot be compelled to answer questions which may incriminate him. No inference shall arise from failure of the defendant to testify."

This is the statutory complement of the Constitution, which provides in Article 1, Section 7th:

"No person shall be held to answer for a capital or infamous crime, except in cases of impeachment, cases arising in the army and navy and petty offenses, unless upon presentment by a grand jury; and every person criminally charged shall have a right to be seasonably furnished with a copy of the charge, to be confronted with witnesses against him, to have compulsory process for obtaining witnesses in his favor; and to have a speedy, public and impartial trial by a jury of the vicinity. He shall not be compelled to furnish or give evidence against himself; and no person shall, for the same offense be twice put in jeopardy of life or limb."

While we feel that the prosecution has failed to estab-

lish the guilt of the defendant by the witnesses produced at the trial, we must confess that there is nothing in the record to prove that the testimony of the soldier could not have been obtained. For this reason, it is our opinion that this case should be remanded so that all of the facts and circumstances available can now be produced at the time of the trial, and that substantial justice may be done, with priority given to the trial of this case when the Court meets in its February 1968 Term. And it is so ordered.

Reversed and remanded.