SAMMY COLLINS, Appellant, *v.* REPUBLIC OF LIBERIA, Appellee.

APPEAL FROM THE CIRCUIT COURT, SEVENTH JUDICIAL CIRCUIT, GRAND GEDEH COUNTY.

Argued October 18, 1972. Decided November 24, 1972.

1. A trial judge need not instruct a jury in the exact language requested by a party as long as his charge is fair to that party.
2. An exception taken by a party to an alleged occurrence during trial will not be considered by the Supreme Court unless such occurrence appears in the trial record.
3. Malice in its legal sense means the intentional doing of a wrongful act to another without legal justification or excuse.
4. When the verdict in a case is contrary to the evidence presented, a trial court is empowered to set the verdict aside and award a new trial pursuant to motion.
5. A person charged with a crime is innocent until the contrary is proven and the prosecution must establish by its proof the guilt of the defendant beyond a reasonable doubt before he need offer his defense.

Appellant had been harvesting rice on his farm with the assistance of a friend and some women. At the end of the day, perhaps five o'clock, the appellant informed the others that they could go home to the village, but that he would first go hunting. The friend walked ahead of the women, but they could not testify to what happened. The appellant testified that he saw animal tracks and fired into the bush at what he took to be an antelope. Instead, he had killed his friend, he found. At the cry of the appellant many people came to the scene from the village nearby. The exact time of the shooting appeared unknown, but the distance where appellant stood when he fired to the place in the bush where decedent's body was found measured a little over 16 yards. The appellant was indicted for murder, tried, and convicted. An appeal was taken from the judgment of the trial court sentencing him to death. The Supreme Court reviewed the evidence presented at the trial and stated as its opinion

that the prosecution had not established the guilt of appellant beyond all reasonable doubt required. The judgment was, therefore, *reversed* and the appellant *discharged* without day.

Frank W. Smith for appellant. The *Solicitor General* for appellee.

MR. JUSTICE HORACE delivered the opinion of the Court.

The appellant in this case was indicted for murder on December 13, 1971, during the November Term of the Circuit Court for the Seventh Judicial Circuit, Grand Gedeh County. According to the indictment appellant is alleged to have shot and killed one Gar 'havy Boyd on December 3, 1971, in the bush near a village in Zwedru, Grand Gedeh County. At the ensuing February 1972 Term of said court, appellant was duly arraigned and after entering a plea of "not guilty," a jury was selected to try the case. The trial was held and after witnesses for both sides had testified and the hearing of argument pro et con, the trial charged the jury, and after deliberation the jury returned a verdict of guilt. A motion for a new trial was filed and resisted, and denied by the court which rendered final judgment on March 7, 1972, sentencing appellant to death by hanging. From this final judgment an appeal has been duly taken and is now before us on a bill of exceptions containing four counts.

Before going any further we would here remark that rarely has a case come before the Supreme Court which was so ineptly handled in the court below by both the prosecution and the defense. Beginning with the indictment, which was very loosely and inartistically drawn, the entire proceedings, including the presentation of evidence, were very poorly handled.

According to the record before us it appears that on the

evening of December 3, 1971, appellant, decedent, and some women who had been working all day harvesting appellant's rice, finished work and decided to go from the farm to the village where they were living. Appellant told decedent and the women to go to the village, but he was going to hunt awhile before going home. Appellant left them to go hunting and soon thereafter decedent and the women started toward the village with decedent preceding the women. After proceeding a little distance appellant observed marks on the ground which he concluded were the tracks of an animal. He began following the tracks and not long thereafter noticed some movement in a cluster of bush before him. According to him he stopped and looked more closely and saw an object which he took to be an antelope. Being convinced that it was an antelope he fired point blank at the object. He heard groaning after firing the gun and rushed to the spot where the object he had fired at should have been and to his utter dismay, as he told it, he discovered that the object he had shot was the young man whom he had told to go to the village with the women. He began crying and made an alarm and, since apparently the place was not very far from the village, the people rushed to the spot where they saw the body of the decedent who had been shot in the chest.

The record further reveals that the gun was taken from the head wife of appellant who must have got possession of it from her husband. The matter was reported to the police who allegedly sent investigators to the scene. Later, a coroner's inquest was held and thereafter the body was taken to the Martha Tubman Memorial Hospital in Zwedru for postmortem examination.

Since the killing was admitted by appellant we do not deem it necessary to review the postmortem report which only stated the cause of death. The *corpus delicti* was beyond doubt established because, as stated before, appellant admitted the killing and the instrument employed

by him. The facts being what they were, the essential thing to be determined is whether the killing was murder as charged in the indictment or some other degree of homicide.

The bill of exceptions primarily alleges that the trial judge refused to charge the jury properly as to the verdicts it could return, that in addition the trial judge passed prejudicial remarks to the jury off the record, that the court was in error when it failed to grant a new trial and, in fact, the prosecution failed to prove any culpable homicide.

Count one of the bill of exceptions, when considered with count two, is an example of what has been earlier stated in this opinion about the inept handling of this case in the trial court. Count one begins with a recital about what appellant's counsel said in outlining the theory of his case before the jury, stating that he emphatically told the court and jury that the homicide was accidental and how the court was requested to explain to the jury the degrees of homicide, which the court refused to do, as a result of which, the count alleges, a verdict of guilt was returned by the jury. Count one states that appellant excepted to the court's charge to the jury in its entirety. Even casually reading this count shows it is not clear just what the exception is taken to, the outlining of the theory of the case, the refusal of the court to charge the jury as requested, or the charge itself.

Before commenting further on this point let us resort to the record to find out what the court really said to the jury on the question of degrees of homicide.

> "The prosecution as well as the defense have asked us to charge you on their entire law citations quoted in the case without any specific reference as to any particular phase of the evidence as relates to the law controlling. However we shall clarify your minds as to malice aforethought which was argued by the prosecution as it relates to the evidence, which our Supreme

Court says is inferred as an element of the crime of murder when deliberately done and further that in proving malice the evidence must show that the act was committed without just cause or excuse and the state need not prove ill will or misunderstanding. The defense counsel in their request laid emphasis on the degree of homicide which under our penal statute can either be excusable or justifiable, that is to say, the former is a slaying act which is beyond one's control and the latter a slaying done in defense which is justifiable."

So we can see that the contention of appellant that the trial court refused to charge the jury on the degrees of homicide is not altogether borne out by the record. It may be true that the court did not charge the jury on this point as well or fully as appellant would have desired, but it is generally held that a judge is not compelled to instruct a jury in exactly the language a party may request him to do. The prime requirement in this regard is to be fair.

The second count of the bill of exceptions states that the trial judge made certain prejudicial remarks off the record to the jury, to which both defense and the prosecution took exceptions, and that those remarks tended to intimidate the jury and restrict them in the exercise of their good judgment in determining a capital offense. We can resort to the record on the point: "The defense counsel excepted to the entire charge to the jury. The prosecution also excepts to the points specifically made by His Honor off the record that the jury must agree on either guilty or acquittal."

In arguing this point before us, appellant's counsel stressed that "a charge to the jury should be given literally as they are written, and it is usually held, under the statute, or rules of court, to be error to accompany the written instructions with additions which affect or change the law as stated in the written instructions." We agree

with this principle, but we do not find in the record any specific exception on the part of appellant to the alleged "off the record" remarks of the judge, but rather to the entire charge. It was the prosecution which excepted to some "off the record" remarks of the judge to the effect that the jury "must agree on either guilty or acquittal." Obviously the record is not complete in this respect and there is a strong suspicion that something went wrong, because even the prosecution became apprehensive about something the judge must have said. But we can only be guided by the record before us.

For the reasons hereinabove stated, we cannot sustain counts one and two of the bill of exceptions.

We now come to count three of the bill of exceptions, which deals with the denial of appellant's motion for a new trial. Appellant contended that the verdict to which he excepted was manifestly against the evidence and law. In order to pass on this issue intelligently we think it necessary to succinctly give the gist of the testimony of most of the witnesses.

The first and second witnesses respectively for the prosecution were the doctor who performed the post-mortem examination on the decedent's body and the laboratory technician who identified the doctor's signature on the postmortem report. Since, as stated before, the killing and the instrument employed therein were admitted to by appellant we do not see any necessity for reviewing the testimony of these two witnesses.

The third witness for the prosecution was David Sinatu who testified that at 9 o'clock on the night of December 2, 1971 (he must have meant December 3) appellant reported at Police Headquarters that he had gone hunting and killed a man; that on the following morning he was ordered to go to the scene of the shooting with appellant which he did, taking along a police officer; that upon arrival at the scene they took the measurement from where appellant was standing to the place where the dead

body was and it was 16 yards and a half-foot; that after taking the measurement he interrogated appellant about decedent and was told that off and on decedent had been living with him, sometimes leaving to seek a job; that on the day of the fatal shooting they went to the farm to "cut" rice, and at five o'clock he told decedent and three women to go to the village but he would go to hunt; that when they got near the hunting road he told decedent to go to the village and prepare water in the house; that soon thereafter he observed animal tracks on the ground and began to trace the tracks when he heard a sound and stopped, he observed the bush shaking and because he was tracking an animal he fired his gun at the bush, in which he had seen movement; when he rushed into the bush he found decedent dead. All this, according to the witness, was told him by appellant.

On cross-examination this witness stated that he found decedent's body in the bush and not on a road.

Other questions were also put to him on cross-examination.

"Q. Can you say defendant willfully, feloniously, with malice aforethought, shot and killed decedent?

"A. I cannot really say that he killed him because of malice aforethought because I never learn from anybody to say that they have misunderstanding before but the time mentioned he left the people on the farm and from where he was standing to the deceased alone show that he did mean to kill him.

"Q. Since you have concluded that because of the time mentioned and the distance between decedent and defendant malice was shown, please say what was the weather condition of that particular day at the time mentioned?

"A. I was not there and I cannot just tell."

On the basis of the last question quoted above, there

must have been some reason for referring to the weather. Peculiarly, this line was never again pursued during the trial.

The prosecution's fourth witness was Oldman Soohn who testified that one day his Town Chief told him there had been an accident and so he and others went to the scene and found someone had been killed; that they measured from the place where decedent was found to the place where the fatal bullets were discharged and it was 16 yards, and that they observed decedent lying on his back with bullets in his chest.

On cross-examination this witness also testified that decedent's body was in the bush and not on a road. When asked further how they came by the measurement of 16 yards, that is, did they use "one-hand long as a yard or two-hands long," he said they used "two-hands long," which is a fathom. When also asked whether the shooting was done with malice aforethought he replied he went there as a coroner and he did not know if there was malice.

The fifth witness for the prosecution was Peter Carr, who testified that the Government sent him to see where defendant was when he shot decedent, and he cut a rope and measured the distance and it was 16 yards; that he asked appellant about the shooting and appellant told him that he saw the head of something and he shot it and it was six o'clock; that when he was asked how is it that the one who took the gun from him, named Sammy, said it was five o'clock, appellant told him he was confused.

On cross-examination he confirmed that he found decedent's body in the bush and not on a road. When asked how measurement was made he replied they used rope measurement by yards and it came to 16 yards. He could not testify to any malice aforethought by appellant. An interesting question was put to him.

"In your interrogation of the defendant after the commission of the alleged crime as one of the law enforce-

ment agents did you advise him not to make any statement and that whatever statement he made would be used against him as evidence?"

This question was objected to by the prosecution on the grounds of not being the best evidence and assuming facts not proven. The objections were sustained by the court.

The sixth prosecution witness was Sammy Johnson, who testified that one evening when he was building a farm kitchen to store his rice he heard the report of a gun and soon thereafter he heard crying in the direction of appellant's village; that he and his wife went in the direction of the crying and upon arriving in the village appellant's sister informed him that her brother had killed somebody; that on his way to the scene of the incident he met appellant's head wife with a gun which he took from her and took the gun to George Wah Harris and they took it to Police Headquarters, where he made his report, after which the police sent investigators to the scene; that he accompanied them there and a measurement was taken from where defendant stood when he discharged the gun to where decedent was slain and it was 16 yards.

There was patent conflict between the testimony of this witness and David Sinatu about reporting the matter to the police. David Sinatu said appellant reported the matter himself about nine o'clock on the evening of the shooting and he was sent to the scene the next morning. Sammy Johnson said he and Harris reported the matter and thereafter he accompanied the police investigators to the scene. Obviously, something was wrong with the testimony of one of these witnesses, and it is dismaying that appellant's counsel did not exploit the motive behind such conflicting testimony.

The seventh and last witness for the prosecution was Peter Blayee, who testified to the measurement taken and said that the bush where decedent was shot was young bush.

On cross-examination he could not testify to malice

aforethought by appellant in the commission of the deed.

The first witness for the defense was appellant himself. He testified that although he lived in Zwedru he immigrated there from Fishtown, Cape Palmas, and that decedent was from the same place and their families lived near each other in Fishtown; that he had been living in Zwedru since the time D. Colden Wilson was District Commissioner and had been hunting since that time and, therefore, was used to handling guns and being observant before he shot any meat (animal); that decedent had lived with him three years and they had never had any dispute; that during this period decedent left on more than one occasion to seek a job but being unsuccessful he had returned; that on one occasion when decedent was going to seek a job he gave him ten dollars, and also asked him to take two bags of cement to Tchien; that early in December, 1971, he begged decedent to help him with his farm; that on the particular day of the incident he ordered his people to quit work at five o'clock and told them he was going ahead to hunt but after resting they should go to the village; that upon entering the hunting road he saw "meat track" and determined that it was an antelope's tracks which he followed and that afterward he saw an animal; he stopped to make sure and when he was sure he fired. After the gun went off he heard groaning and saw that he had killed a human being, his own brother, whom he had left on the farm. He then took hold of the body hoping to bring him to the hospital, thinking that he was not dead but, unfortunately, he was dead. When asked on direct examination how he generally took precaution against hunting accidents and the shedding of human blood, he replied that before he shoots he always looks.

On cross-examination he testified that the place where decedent was shot was a young field about six years old. On cross-examination the prosecution sought to establish that the shooting took place a few yards from the village

under a walnut tree, which appellant denied. The prosecution gave notice of rebuttal, but the record does not show any rebuttal to appellant's answer. Prosecution on cross-examination also sought to establish the existence of ill will between appellant and decedent prior to the killing, which appellant denied.

The next two witnesses for the defense, Mary Collins, appellant's wife, and Lue Wissner testified that appellant left the women and decedent on the farm when he went to hunt, telling decedent to accompany the women to the village. They also testified that decedent walked ahead of them on their way to the village but when they arrived they did not see him. Not long afterwards they heard the report of a gun and then appellant crying; that the women ran and saw appellant and he told them that it was decedent whom he had left at the farm that was shot.

The cross-examination of these witnesses was cursory and therefore we need not comment thereon.

We have reviewed the evidence in some detail in order to determine whether it is the sort of evidence upon which one can be convicted of murder. From the testimony of the appellant it is apparent that he is one of those persons with the superstitious belief that a person can turn to an animal and vice versa, but we are not concerned with his superstitious belief. Our concern is with the facts. In considering the facts there are certain things that stand out in focus while others are left unexplained. One fact that is clear is that the appellant was the only eyewitness to the killing and even the prosecution witnesses based most of their testimony on what he told them. Another fact which cannot be ignored is that all the witnesses, except the doctor and the laboratory technician, who testified to the distance between where appellant was standing when he fired his gun and the place where decedent's body was lying, could have only obtained the information as to such measurement from the appellant himself.

When it comes to such measurement there is some

divergence of testimony, for one witness said that it was taken by fathoms and the others said by yards. As to the testimony establishing 16 yards as the measured distance, we have not been able to obtain from the record whether these witnesses were all present when the measurement was taken or whether they took it individually. In any case this kind of testimony seems too doubtful to be taken seriously. But more than this it has not been shown that the nature of the bush in question was such that a distance of 16 yards was too short to determine that one could not mistake one object for another.

One of the things left unexplained is how decedent who was left on the farm with the women got into the bush in the same area where he must have seen appellant go hunting. Another thing left unexplained is what happened to the rope with which the measurement was taken. Why was it not introduced in evidence, since it appears to us that the stress laid on the distance between where appellant was standing when he fired the fatal shot and where decedent's body was found, was intended to establish implied malice. Still another unexplained circumstance is why the prosecution did not rebut, in keeping with its announcement, the statement of appellant that the shooting was not done under a walnut tree near the village. This line of cross-examination could only have been to establish implied malice and then the appellant's answer was not rebutted as announced, it certainly weakened the prosecution's case in respect to establishing malice.

During argument, the Solicitor General argued that the law presumes malice when in the course of an unlawful undertaking someone is deliberately injured. He relied heavily on *Koh-Geddue* v. *Republic* and *Krahn-Gbo* v. *Republic,* 8 LLR 141 (1943), as well as other reported cases. In both of these cases the appellants had deliberately engaged in unlawful acts, in the first case by striking an iron-pointed walking stick into a wounded

man's scrotum, and in the second, by shooting a man the second time while the victim was pleading for his life.

In *Taylor* v. *Republic,* 14 LLR 524 (1961), this Court held that malice aforethought as an element of the crime of murder may be inferred from a deliberate act and need not be grounded on actual ill will or malevolence. In *Kelleng* v. *Republic,* 4 LLR 33 (1934), this Court also held that malice in its legal sense, means the intentional doing of a wrongful act toward another without legal justification or excuse, or in other words, the willful violation of a known right. To our mind the essential words to establish malice are "unlawful," "wrongful," and "deliberate." Where are these elements evident in the present case? By the questionable 16 yards' distance between the appellant and the decedent? We think not, for not only was there not sufficient evidence to establish malice but we do not feel that even negligence was proved.

To our mind the evidence did not support the verdict in this case and, therefore, the trial judge should have awarded a new trial. For some unknown reason our judges are reluctant to award new trials, predicating their reluctance on the fact that the credibility of evidence being the province of the jury they would be invading the province of the jury. The Supreme Court has addressed itself to this point in *Teh* v. *Republic,* 10 LLR 234, 240 (1949), Mr. Justice Shannon speaking for the Court:

> "Whilst it is true that the admissibility of evidence rests with the court and its credibility and effect with the jury, yet this provision of the law is not to be interpreted to mean that the court is without right to set aside a verdict and award a new trial where in its opinion said verdict is expressly contrary to the evidence in the case and against the legal instructions of the court. In this case, the trial judge, upon request of the defense, instructed the jury upon the law of

alibi with its application to the facts in the case; but, despite said instructions, the jury brought in a verdict of conviction. Notwithstanding the judge felt himself without right to set said verdict aside and award a new trial because, as gathered from the wording of his ruling on the motion for new trial, in doing so he would be encroaching or infringing upon the right of the jury to pass upon the credibility and effect of evidence. To accept this theory would utterly obviate provisions in law for new trials, where an application is made therefor on the grounds that the verdict is either contrary to the evidence in the case or against the legal instructions of the court or both."

Count three of the bill of exceptions is, therefore, sustained.

Count four of the bill of exceptions is another example of a statement so jumpled that it hard to deal with, for it contains the contentions: (1) that the prosecution having failed to prove any degree of homicide, appellant should be discharged; (2) that the verdict was contrary to the evidence, and (3) that the final judgment based upon such a verdict has no legal foundation. We take this count to be an exception to the final judgment because the records do show that appellant took exception to the final judgment and announced an appeal.

Because of what has been said above in sustaining count three, count four of the bill of exceptions, excepting to the final judgment, is hereby sustained.

We have carefully reviewed all the evidence in this case and listened attentively to arguments advanced by both sides. We have not been convinced by either the evidence or the argument that the state has proved a case against appellant beyond all reasonable doubt. In *Dunn* v. *Republic,* 1 LLR 401 (1903), the Court held that in criminal cases, the prosecution must prove guilt beyond all rational doubt. In *Hance* v. *Republic,* 3 LLR 161 (1930), it has been held that it is a well-settled principle

in criminal law that everyone is presumed to be innocent until the contrary is proven, and where the plea of defendant is one of not guilty, the prosecution must prove the defendant guilty of the charge beyond a reasonable doubt before the latter can be called upon for his defense. This principle is confirmed in many other opinions of this Court, particularly in *Tendi* v. *Republic,* 12 LLR 109 (1954), where it was held that where a verdict of guilty of murder is contrary to evidence, a judgment of conviction thereon will be reversed; and in *Thompson* v. *Republic,* 14 LLR 133 (1960), it also was held that a defendant in a criminal action is presumed to be innocent until the contrary is proved; and in case of a reasonable doubt as to whether defendant's guilt is established, he is entitled to acquittal.

In view of what has been herein stated upon the evidence adduced at the trial and the law controlling, we are of the opinion that the judgment of the lower court should be reversed and the appellant who was the defendant in the court below, discharged without day. And it is so ordered.

Reversed; appellant discharged.