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

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

Argued May 15, 1975. Decided June 26, 1975.

1. To justify the charge of assault and battery with intent to kill, it is necessary that the intent to kill be proved beyond a reasonable doubt.
2. All material facts essential to constitute the crime charged must be proved beyond a rational doubt or the accused will be entitled to a discharge.

During an altercation the private prosecutor herein was allegedly injured by an iron bar wielded by the appellant. The appellant was indicted for the crime of assault and battery with intent to kill. He was tried before a jury, found guilty and thereafter sentenced to six months' imprisonment.

The Court closely examined the evidence and found that the State had failed to prove the element of intent to kill, not even having proved that the instrument employed was a deadly weapon. Therefore, the judgment was *reversed* and the appellant ordered *discharged* without day.

Harper S. Bailey for appellant. *Jesse Banks, Jr.,* of the Ministry of Justice, for appellee.

MR. JUSTICE AZANGO delivered the opinion of the Court.

Appellant was indicted on September 6, 1973, by a grand jury, which charged him with assault and battery with intent to kill allegedly on July 26, 1973. Upon arraignment, appellant entered a plea of not guilty. Trial was held before a jury which found appellant guilty. Filing of a motion for a new trial having been waived,

appellant's counsel filed a motion in arrest of judgment. It was heard and final judgment rendered against appellant, who was sentenced to six months' imprisonment. Being dissatisfied with rulings of the trial judge, appellant has appealed to this Court for a review of the entire case, based upon a bill of exceptions containing five counts, two of which we regard as important for our consideration, and the determination of this case. They are succinctly as follows: (1) appellant's exceptions to court's several rulings, verdict of the empanelled jurors, and court's final judgment; and (2) court's overruling appellant's objections to admissibility into evidence of appellee's demonstrative and documentary specie of evidence, which were offered on Friday, November 30, 1973.

In order to arrive at a just determination of the issues tendered in the bill of exceptions, we shall consult the record certified to us.

According to the testimony of the private prosecutor, Harrison Garwo, a controversy arose between him and John Walker over a gourd of palm wine. Appellant was not concerned in the dispute, but he laid claim to the gourd of palm wine. His claim was ignored and he forcefully jerked the container holding the wine and broke it. Appellant slapped the private prosecutor and a fight ensued. Mr. Jannie intervened and quelled the fight. Apparently defendant was dissatisfied with the settlement of the issue and later on returned with a length of iron of unusual size, and hit the private prosecutor on the head while he was in the company of the Jannie family. As a consequence he fell down. Continuing his testimony, Mr. Garwo said:

> "Before I came to myself, the defendant had disappeared. Therefore I ran to the Police Headquarters for a police officer; and when we searched for him, we found him. After that, Mr. N. J. Logan came to me with the defendant himself and said that they

wanted to take me to the hospital. During this time Mr. Wafic Ricks got there and he took me to the hospital. I was there for four days. After the four days the defendant and his wife came to me and said to me that this is not court. We will take you home to beg you. I told her that if I was well then I will answer you. After one week and I got home, the defendant stood before the Magisterial Court with Counsellor Smith and said to me that since Grebo man killed a Bassa man I am going to kill you too. Hearing this that morning, I ran to the County Attorney's office and asked the County to permit me, since the defendant said he would kill me, to give me only two hours whether he will kill me or not. The County Attorney said since the case is in my hand you should stop. I said, O.K. County Attorney, I will look up to you. Two days after again, the defendant said, Garwo, if I miss you in town, then you know where I am coming from. I appeared before the County Attorney's office again and reported this; and he said, all what the defendant said to you, you sit down, I will have him arrested. This is all I know."

On direct examination, he identified the length of iron that was allegedly used by defendant.

While on cross-examination, when asked "How did he get to the hospital, being presumably unconscious?" he answered, "I was taken to the hospital by a National Police Officer named Chinaken Brown." Later, when further asked:

"Q. Were you taken from the scene of the incident by the Policeman just mentioned by you or how?

"A. No. After this I was on the ground for two hours, and when I came to myself I went to look for the defendant in the dock and it was during this time I met the Police Officer named before on Brown's Street while bleeding and I ex-

plained to him the cause of my bleeding and this is how he took me to the hospital and that is the way I got to the hospital.

"Q. In your general statement on sheet two of the record and I quote: "Therefrom I ran to the Police Headquarters for a Police Officer and when we searched we found him," and now in your statement on sheet four of the record you said that you never went to the Police Station; but met one Police Officer by the name of Brown in the street who had the defendant arrested, after you told him of the incident. Please for the benefit of the court and jury and adjustability for the records, harmonize these two conflicting statements.

"A. After I got wounded my sister ran to the Headquarters, there she was when I came to myself. On my way following her too, I butt up with a Policeman on Brown's Street.

"Q. Mr. Witness, you said that the defendant took this iron bar marked by court W/1; did it inflict any corporeal wound on you?

"A. Yes.

"Q. Mr. Witness, who was on the scene when the defendant hit you with the iron bar?

"A. The only witness that was on the scene was Alhaji Jannie."

The private prosecutor stated that after the fight he lay on the ground for two hours, presumably unconscious, and that after regaining consciousness, he went to look for the defendant. It was during that time that he met Police Officer Chinaken Brown on Brown's Street. He was bleeding at the time and he explained to him the cause of the bleeding. Brown thereafter took him to the hospital. We wish to observe that the private prosecutor's presentation of facts is unbelievable; and his disrespect shown to truth when he claimed that he lay on

the ground for two hours while unconscious, though he did not have a chronometer at the time to reckon the time of day. We are also amazed that Police Officer Chinaken Brown was never produced at the trial to testify and corroborate the testimony of the private prosecutor in this respect; neither was any other witness called to verify this portion of his testimony.

The prosecution while arguing before us stated that it was not appellee's contention that there was not a fight between the private prosecutor and appellant; but that after their first violent encounter, when they had been parted and gone their separate ways, appellant renewed the hostility by hitting the private prosecutor on the head with an iron bar, thereby rendering him unconscious. The testimony was corroborated by the prosecution's witnesses, Rebecca Garwo and Alhaji Jannie.

Regrettably, we cannot accept the contention of appellee's counsel as far as it relates to appellant renewing the hostility by hitting the private prosecutor on the head with an iron bar, thereby rendering him unconscious, for the testimony of Rebecca Garwo remains inconclusive as to identification of the alleged iron bar which was used in beating the private prosecutor. Moreover, according to the private prosecutor's testimony, when asked, "Who was on the scene when the defendant hit you with the iron bar?" he answered: "The only witness that was on the scene was Alhaji Jannie." The testimony of Rebecca Garwo, therefore, creates doubt as to its credibility, since she was not an eyewitness.

Alhaji Jannie testified that one night while sitting on his piazza eating, he observed defendant and the private prosecutor engaged in a fight in the street. After intervention by someone, both were advised to go home, which they did. After this incident he too went home. Upon his return he saw appellant spring upon Harrison Garwo, the private prosecutor, and both fell to the ground. Continuing the testimony, he said:

"I held both of their hands, and I told them to leave it. Defendant and Harrison Garwo went to their respective houses. This is all I know in the matter."

There is no evidence showing that defendant was in possession of any deadly weapon. When asked to tell the court and jury if he knew what gave rise to the fight between the private prosecutor and defendant John Davis, he could not tell, because he "was eating."

Next to the last of the prosecution's witnesses was Rebecca Garwo. In her testimony she stated:

"You know, on the 26th day, this young man, the defendant and a man were coming with palm wine. Harrison Garwo asked the man whether or not he was selling the wine. The man said, no. Then I left and went in the kitchen. While I was coming back they were fighting. I got there to part them. After they were finished fighting, they went away. While we were sitting down talking, defendant came with an iron bar. By the time I could look, he started beating Garwo with the iron. Then Garwo ran to him and we ran behind Garwo to bring him back because the blood was too much. This is all I know."

On direct examination she could not identify the iron bar which was allegedly used by the defendant in committing the crime.

Moreover, when asked on cross-examination, "Please say, after the private prosecutor, Harrison Garwo, was struck with the iron bar, as you have alleged, how long did he remain unconscious?" She replied, "I do not know."

The last of the prosecution's witnesses was Dr. M. F. Naithulleh. Having been informed of the charge against the appellant, the witness answered the following questions:

"Q. Are you employed, if so by whom and in what capacity?

"A. I am employed by the Ministry of Health and Welfare as Medical Director to Martha Tubman Memorial Hospital, Zwedru.

"Q. Please tell the court and jury if you have any time received a patient by the name of Harrison Garwo, around July this year, into your hospital for medical attention; and if so state in brief your findings.

"A. Yes. I examined a patient by the name of Mr. Harrison Garwo on the 27th day of July, 1973, for an alleged beating. On examination, I found the following injuries on his person. No. 1, an abrasion with a contusion of a half-inch in dimension over the right temple. No. 2, the contusion of about one inch diameter over the dorsum right palm. That's all.

"Q. Please tell the court and jury if you at any time after the examination of patient Garwo issued any certificate as a result of your findings.

"A. Yes. I have issued this certificate.

"Q. Do you confirm that the instrument you have just identified was made by you and the signature thereon is your genuine signature.

"A. Yes. The document was signed by me."

This is the evidence adduced by the prosecution that led to a verdict of guilt against the defendant by the jury, upon which a final judgment was rendered sentencing appellant to six months' imprisonment.

In the testimony of the Medical Director, he stated that he found upon examination of Harrison Garwo, injuries consisting of an abrasion of about 2-1/2" over the right temple with a contusion of about the same size; a contusion of about 1" in diameter over dorsum of the right palm. But it is unfortunate that the doctor was not sufficiently interrogated so as to learn from his testimony whether or not the wounds referred to, allegedly inflicted

by appellant, could have been caused by a blunt or sharp instrument or whether the instrument was a deadly weapon.

According to law an expert, for instance a surgeon or competent physician, may express an opinion as to the nature, cause, and the effect of wounds. He may testify as to the character of the instrument with which the wounds were inflicted, as for example, whether it was inflicted by a blunt or a cutting instrument, or by gunshot. He may testify moreover, as to whether a particular wound could have been produced by a particular instrument.

Since the medical director did not sufficiently testify, and not having been thoroughly interrogated, how was the essential element of intent in the instance case established and proven? In other words, the evidence of the doctor should have established the injury and the cause of its infliction.

Furthermore, it has been held that where an instrument is not per se a deadly one, a person experienced in the use of a similar implement may testify whether, under the circumstances described, it could have been used with deadly effect.

We are of the opinion that evidence should have been produced to prove the deadliness of the alleged iron bar, if it was used at all. This not having been done rendered the trial defective. On the other hand, when the defendant took the stand to testify on his own behalf, he stated that he bought a gourd of palm wine for 50 cents and gave it to his friend John Walker to carry to defendant's home. While on his way, private prosecutor Harrison Garwo seized the wine and asked John Walker if he was selling it. He replied in the negative, because it was owned by appellant John Davis who bought it.

At that stage Harrison Garwo demanded the wine from John Walker, but he refused and called defendant John Davis for assistance in his struggle. The defendant re-

quested the private prosecutor to leave the wine also because it was his. The private prosecutor rejected the request and called defendant a rascal, in the meantime kicking the gourd of wine, breaking the container. When asked why he acted in the manner he did, he slapped defendant. Then and there a fight ensued. They were both injured and taken to the hospital. Upon being treated and returned home, John Davis requested the Medical Director at the hospital to issue him a medical certificate, but was refused by the doctor on the ground that one had already been forwarded to the County Attorney for the private prosecutor, Harrison Garwo.

We wonder why the doctor refused to issue a medical certificate for appellant, when it was requested of him? Was he prejudiced? However, we shall treat this later.

On cross-examination, the following questions were put to appellant, which he answered.

"Q. Is it not a fact that after you had assaulted and battered Harrison Garwo you were arrested and carried to the Police Station?

"A. Yes. When we fought I walked by myself and went to the Police.

"Q. Tell the court and jury what happened to you at the Police Station.

"A. When Garwo and myself fought, he took some kind of iron and ran behind me, that he wanted to hit me with the iron and myself, I ran from him. It was there and then I went to the Police Station. On my way going he, Garwo, took a car and reached there to the Police Station before I could reach there. The desk Sergeant told me that they had already sent for me. I said, well, this Garwo wants to make trouble with me. So for this reason I myself was on the way coming. The Police told me that Garwo brought this iron and said that you beat him with the iron. I said no. Garwo and my-

> self fought but he took this iron, he wants to hit with it, that's why I am here to tell you that he had already wounded me. The Police said, OK, first thing you must go to the hospital. The doctor put me on bed. The next morning Harrison came in the hospital and said to the doctor that he was looking for me in town here; but he didn't know that I was in the hospital; otherwise he was going to kill me with it the same night. He told the doctor, I am going to get ready to come; so that's what happened."

From this evidence, which was never rebutted by the prosecution, it appears that it was the private prosecutor who was the aggressor and inflicted wounds upon defendant, that being aware that he had committed a crime and apprehensive that punishment would be exacted, he became the first complainant to the police in an attempt to portray himself as innocent. It can also be seen that the entire incident occurred as a result of the heat of sudden passion and provocation.

In an attempt to establish corroboration of his testimony earlier given at the trial, defendant introduced as a witness John Walker, who confirmed and corroborated appellant's testimony. He concluded by stating:

> "Right away talking from one thing to the other one time he (Garwo) slapped John (defendant) two times and he fell down. When John got up, one time he blew him (Garwo). I divided them and I went to my place. This is all I know."

When asked as to whether or not the defendant returned to renew the fight with Harrison Garwo, as was earlier testified to by a prosecution witness, he could not say, for according to Walker, after taking defendant home to his wife, Walker went home.

Here again the testimony of John Walker tended to show that the crime of assault and battery common or

assault and battery to do grievous bodily harm were not committed, since no weapon was used.

However, from all circumstances it does appear from the testimony offered by both the prosecution and the defense, that there was no positive and clear evidence that a deadly weapon was used to commit the crime alleged in the indictment. The evidence of the private prosecutor Garwo as to the use of the iron bar was inconclusively corroborated by Rebecca Garwo, since she could not identify the alleged weapon. Moreover, the testimony shows that after the fight ensued and the private prosecutor was on his way to the Police Station to report the incident, he picked up a piece of iron and that was what he exhibited to the police authorities as being the instrument used during the fight. Besides the lone testimony of the private prosecutor, there is not a scintilla of corroboration that the iron bar introduced at the trial was used during the fight.

In view of these facts and circumstances, we now wonder: (1) as to whether or not all the essential elements in the charge of assault and battery with intent to kill have fully been established and proven; (2) whether or not a judicial conviction has been obtained, considering the inconsistent and conflicting statements made by the prosecution's witnesses; (3) were the admission into evidence of the iron bar, the instrument allegedly used and the medical certificate issued by Dr. N. F. Naithullen sufficiently identified and confirmed under the law?; (4) has there been complete corroboration of the testimony of the prosecution's witnesses?

Our answers to the foregoing must be in the negative. This Court consistently has held in its opinions that:

> "in prosecutions for criminal offenses, especially those of the grade of the one now under review [assault and battery with intent to kill], the criminal act and the criminal intent must simultaneously coexist; for should

there have been a criminal act without a criminal intent, or vice versa, the crime charged is not proven. And particularly in the case of assault and battery with intent to kill. . . . The intent is the essence of the offense. Unless the offense would have been murder, . . . had death ensued from the stroke, the defendant must be acquitted of this particular charge. And, as a general rule, in all cases of assaults with intent, the intent forming the gist of the offense must be specifically averred and satisfactorily proved." *Smith* v. *Republic,* 7 LLR 205, 209, 210 (1941).

"To justify the charge of 'assault with intent to kill' the state must prove that the assault was made with such intent and not accidentally; and with malice and not a result of sudden heat of passion caused by sufficient provocation so that had death ensued it would have been murder in the first degree. Assault with intent to kill being charged, it is necessary that the intent to kill be alleged and proved beyond a reasonable doubt." *Id.,* 210.

Every ingredient of murder, except death, must be present in assault with intent to murder, and where, if death had resulted, the offense would have been manslaughter, and not murder, the charge is not sustained.

Here again we should be reminded that this Court constantly and uniformally has held that:

"A juridical conviction connotes . . . (2) that only legal evidence should be placed before the jury which is asked to convict; (3) that the evidence thus sifted should satisfactorily establish the guilt of the accused beyond a reasonable doubt." *Lewis* v. *Republic,* 5 LLR 358 (1937).

This Court has also held that to convict in a criminal case not only should there be preponderance of evidence but the evidence "should also be so conclusive as to exclude every reasonable doubt as to the guilt of the [accused], and when the evidence fails in this respect the

case breaks down and there can be no conviction." *Logan* v. *Republic,* 2 LLR 472, 475 (1924).

The indictment in the instant case specifically states the offense charged.

> "On the 26th day of July, 1973, John Davis, the defendant herein, without the fear of God, man and the laws before his eyes, intentionally, wilfully, unlawfully and feloniously with a deadly weapon otherwise known as an iron bar and with force and violence assaulted and battered private prosecutor Harrison Garwo with intent to murder, which said iron bar seriously wounded and injured private prosecutor Harrison Garwo over his right temple and over the dorsum of his right palm, thereby the crime of assault and battery with intent to kill, the defendant did do and commit."

It is unfortunate that no attempt was made by the prosecution to prove the intent of the defendant in committing the alleged crime. Neither is there any evidence to show that the instrument allegedly used was a deadly weapon per se and was intended and used by defendant to commit the crime alleged. To the contrary, an attempt was made to prove the crimes of assault and battery common, or assault and battery with intent to do grievous bodily harm, which are incompatible with the crime charged. In this context, we admit that evidence may be given in corroboration of other acts when connected with the act charged in the indictment. But evidence of acts constituting in themselves a substantive offense cannot be given unless they directly tend to prove the charge averred. The rule against the admission of evidence of a collateral offense excludes evidence of another act which constitutes an independent crime for which the defendant is indicted.

This Court has been so zealous in the safeguard of the rights, liberties, and privileges of litigants, especially of those criminally charged, that it has often been unwilling

to confirm convictions unless upon conclusive proof of the prisoner's guilt. *Sawyerr* v. *Republic,* 8 LLR 311 (1944). And "in all trials upon indictments the State, to convict, must prove the guilt of the accused with such legal certainty as will exclude every reasonable hypothesis of his innocence; the material facts essential to constitute the crime charged, must be proved beyond a rational doubt or the accused will be entitled to a discharge." *Id.,* 332.

Having scrutinized the evidence in this case, and the law applicable to the charge, we are of the considered opinion that there was a complete absence of legal evidence to warrant the conviction in the court below, finalized by its judgment. Said judgment is, therefore, reversed and appellant ordered discharged without day from further answering the charge of assault and battery with intent to kill.

The Clerk of this Court is hereby ordered to send a mandate to the court below informing it of this judgment. It is so ordered.

Reversed; appellant discharged without day.