DEBORAH DENNIS, Appellant, *v.* REPUBLIC OF LIBERIA, Appellee.

APPEAL FROM THE CIRCUIT COURT OF THE FIRST JUDICIAL CIRCUIT, MONTSERRADO COUNTY.

Argued November 20, 1967. Decided January 22, 1968.

1. Error is committed by the trial court when, after ruling that proposed questions are irrelevant, it allows the questions, nonetheless, to be asked and requires the witness to answer.
2. The prosecution in a criminal case cannot introduce any evidence as to the character of the defendant, until the defense first puts defendant's character into issue by offering evidence of good character.
3. On cross-examination a witness may be asked any question tending to discredit his testimony.
4. A person who has been convicted and sentenced for the commission of an infamous crime, such as murder in the instant case, is legally incompetent to testify as a witness in the trial of another.
5. Failure to object to the proposed testimony of such an incompetent witness does not constitute a waiver of his disqualification by the party later seeking to exclude his testimony, since a full pardon for the crime of which he was convicted is the only means by which the disqualification of such a witness can be removed.
6. And where such an incompetent witness does testify, where his disqualification is not known at the time, his testimony should be excluded from the consideration of the jury when his incompetence later becomes known to the party seeking to disqualify his testimony.
7. When the conviction of an accessory before and after the fact is based only on the confession of a principal in the crime who is incompetent to testify, the judgment of the trial court affirming the findings of guilt will be reversed, especially where the confession introduced into evidence was only one of three differing confessions made, none of the others having been produced by the prosecution pursuant to the demand of the defense.

The defendant was indicted as an accessory before and after the fact, on the charge of feloniously procuring the commission of murder by another, who was separately tried as principal and convicted of the crime. The convicted principal was produced at defendant's trial as the chief witness for the prosecution. Defendant appealed from the judgment of the trial court affirming the findings of guilt after trial by jury. The *judgment* was *reversed* and *defendant* ordered *discharged* forthwith, without remand.

Richard Diggs for appellant. *Asst. Attorney General Roland Barnes* for appellee.

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

At the November 1966 Term of the Circuit Court of the First Judicial Circuit, the grand jury chosen and selected to inquire into things and matters that affect the life, limb, and public safety of the individual and the people of Montserrado County, made a presentment to court that Deborah Dennis, as accessory before and after the fact, did wickedly, willfully, wrongfully, deliberately, feloniously, and maliciously counsel, command, induce and procure codefendant Moore Dennis, as principal, to kill one Lucretia Herron, of the Settlement of Royesville, Montserrado County, Republic of Liberia.

Because her defense clashed with Moore Dennis', severance was prayed for by Deborah Dennis, which was granted, and on May 23, 1967, said case came on for trial, and a jury was empaneled to try her.

Discovered in the record is a bill of exceptions consisting of 16 counts; 1 to 6 of said counts refer to the court's rulings on objections to questions put to the prosecution's witnesses by appellant, and the sustaining of objections by the prosecution to her questions put to her witnesses.

Count one of said bill of exceptions charges reversible error when the trial judge, though agreeing to the irrelevancy and immateriality of the questions put to the prosecution's witness, permitted the questions to be answered. Insofar as the materiality or immateriality of a question is concerned, we reserve comments, but we must here deplore the court's irregularity in conceding the immateriality of a question, after the objections of a party, and permitting it to be answered. We do not hesitate to sustain count one of the bill of exceptions. (See Minutes

Sheet 5, 12th day's session, and objections to court's ruling.)

We must also sustain count three of said bill of exceptions. The trial court committed error when, contrary to the statutes and the rules of our courts and practice, he allowed to be introduced into evidence extraneous matter, a divorce proceeding not related at all to the case of murder, on which appellant was tried and convicted, and from which judgment of the lower court she has appealed to this Court.

The prosecution attacked defendant's reputation, claiming that appellant had put into evidence her general reputation as evidence of her character. The record of the court discloses that this was not done by the appellant; rather, it was the prosecution which, on cross-examination raised the issue by questions of her about her qualities, to which she replied, asserting her good qualities. To verify this, we will set forth the questions and answers upon which the prosecution based its contention that appellant had put her reputation and character into evidence:

"Q. Mrs. Witness, carefully reading your testimony and taking into consideration the clever manner in which you answered the question put to you on cross-examination, I gather that you are trying to impress this court and jury that you are a lady and/or a human being who is not given to wicked practices. Am I correct in this suggestion of mine?

"A. Yes.

"Q. You want us to accept this answer as being true and correct. Isn't it also true and correct that because of certain wicked practices on your part, your former husband, John Matthies, was forced and compelled to divorce you?"

Over the defense objection that the witness was not the best evidence and that the question was incriminating, the

court ruled that said question be answered, to which appellant excepted.

"A. No. I was not cruel to him that it caused him to divorce me. (At this point the prosecution gave notice of rebuttal.)"

This is the only pertinent part of appellant's testimony, where the question of her general reputation was forcibly brought in on cross-examination by the prosecution, relating in substance to a divorce case, which bore no connection to the case of murder then on trial. Hence, it was error to rule that she had put in evidence her general reputation as proof of her general character.

We must, as has been contended by appellant, say that such an extraneous matter was brought into the case for the mere purpose of inflaming the minds of the jury, and possibly did. Hence, we sustain this court of appellant's bill of exceptions.

This principle has been consistently upheld by this Court in several of its opinions. In *Lewis* v. *Republic of Liberia,* 5 L.L.R. 358 (1937), it was held that the character of an accused can only be brought into evidence if he first makes it "an issue," when the prosecution may reply and introduce evidence of his bad character. It is also emphasized in this opinion that it is reversible error for the prosecution in a criminal case to resort to the accused's bad character as a basis of inference of guilt, the reason being that such evidence is too likely to move the jury to condemnation irrespective of the offense charged. But the accused himself may invoke his good character as tending to disprove his commission of the offense, no matter how strong the evidence against him.

Count five of the bill of exceptions complains against the trial judge for sustaining the objections of the prosecution to a question put to one of the prosecution's witnesses,

"Q. In your statement you said that you told Moore

> Dennis that this gun in question was not yours, but you did not name the owner. Do you mind telling the court and jury the owner?"

This question was objected to by the prosecution on the grounds of irrelevancy and immateriality. Appellant, however, contended that this witness having in his general statement made reference to a gun, omitting the name of the owner, subjected himself to such a question. *Cummings* v. *Republic of Liberia,* 4 L.L.R. 16 (1934). The trial judge, on the authority of the foregoing, committed an error; hence, count five of the bill of exceptions is hereby sustained.

One of the most controversial issues that was presented in this case, contained in count eight of the bill of exceptions, was the refusal on the part of the trial judge to instruct the jury, though requested so to do, not to convict appellant on the testimony of Moore Dennis, the convicted and sentenced principal in this murder case, since he was disqualified under the law, having been convicted and sentenced for the crime of murder, his conviction and sentence preceding his testimony at the trial of appellant as an accessory before and after the fact.

Appellee cited in support of its position, 58 AM. JUR., *Witnesses,* § 208:

> "When a witness is produced, it is a right and privilege, according to the adverse party, to object to his examination on the grounds of incompetency to testify. If a party knew before trial that a witness is incompetent on account of mental condition, objections must me made before he has given any testimony. If objections appear on the trial, it must be interposed as soon as it becomes apparent. So, too, an objection to the competency of a witness because of a religious belief should be made before he is sworn. There is a distinction between competency of evidence and the competence of a witness, and ordinarily an objection to the competency or relevancy of testimony or a ques-

tion is insufficient to reach the objection that the witness himself is incompetent. However, the contrary may be true where such an objection succeeds repeated objections made to the competency of a witness."

We have thereunder, the following:

"Although a witness has been sworn, an objection to his competency may be made."

Disqualification of a witness to testify in any case because of a conviction and sentence for the commission of an infamous crime, can only be removed, and his disqualification lifted, by pardon. Nor can it be reasonably or legally contended that failure on the part of a party to an action to object to the swearing in of such a witness, makes such a waiver sufficient in itself to remove or mitigate this disqualification.

This conclusion finds more binding force in the instant case, with special reference to the prosecution's witness, Moore Dennis, the convicted and sentenced principal in this murder case, who, at a term of the Circuit Court immediately preceding the one in which appellant was tried, convicted and sentenced for the commission of said crime of murder, whose record of conviction and sentence was recorded and filed in the same Circuit Court previous to the trial of appellant in this case.

It strikes us to be highly irregular for the prosecution or the defense to offer as a witness a person who has been convicted and sentenced for the commission of an infamous crime, knowing such a person to be legally incompetent to testify as a witness.

It could be different if the incompetency of a witness is unknown, but even in such a circumstance, where his disqualification is subsequently revealed, and before the jury retires to deliberate on a verdict, the court refuses, even though requested to do so, to charge the jury to exclude such testimony in considering the evidence produced at the trial, it is reversible error.

Crimes for which a person convicted and sentenced render such a person incompetent as a witness, are enumerated in our Penal Law, 1956 Code 7:43:

> "Infamous crimes; consequences and sentences.—Murder, treason, sedition, conspiracy against the State or its official Head, rape, slave trading, pawning, burglary, embezzlement, kidnapping, larceny, robbery, receiving stolen goods, perjury, bribery, forgery, and arson are infamous crimes. Any person convicted and sentenced for an infamous crime shall be disfranchised; he shall be disqualified from voting and from serving as a public officer, as a witness in any action, or as a juror."

We turn now to the common law cited by the prosecution, but, in support of our opinion, cite 58 AM. JUR., *Witnesses,* § 143:

> "In the absence of a controlling statute on the subject, to exclude a witness as incompetent to testify by reason of a previous conviction of crime, the record of his conviction or an exemplified copy thereof must be produced, and until it is properly accounted for, no other evidence is admissible to establish the disqualification."

Following thereafter, we find:

> "There are several reasons for this rule, the principal one being that the record is the best evidence of the conviction, and hence, under the best-evidence rule, should be produced or its absence accounted for.
>
> "An authentic record showing the conviction of a person of the same name as a witness may be introduced without further proof that the person convicted was the same one who testified as a witness. The record produced must show not only the conviction but also that it was followed by a judgment; for as already suggested it is the judgment which disqualifies the witness. Mere difficulty in obtaining the record does not justify a resort to other evidence although when the

record is virtually inaccessible as when it is in a foreign country, the conviction may be shown by parol."

The point of waiver, by failure to object to the qualification, as a witness, of Moore Dennis who had been convicted and sentenced for the commission of the said crime of murder, was stressed, but we find ourselves not in agreement with this contention, since a waiver cannot remove a disqualification that has been imposed by law. Objections to the qualification of such a witness can be made after he has been sworn.

As previously stated in this opinion, disqualification of a person so convicted and sentenced can only be removed by pardon. 58 AM. JUR., *Witnesses,* § 144 is relevant:

> "Under the rule that a witness is disqualified by conviction of crime, there is a unanimity in decisions that the fact of a pardon removes the disqualification and may be proved to effect the removal even though the pardon was granted after the term of imprisonment had been served out in full. The witness may then testify to any facts within his knowledge, even those he learned during the period between his conviction and pardon."

And I add, with emphasis, that: "Notwithstanding the pardon the proof of conviction may be made a discrediting factor."

Further, in Section 145:

> "To remove the disqualification of a convict as a witness, the pardon must be full and complete . . . competency is not restored by a partial pardon or a conditional pardon which is liable to be revoked for a condition broken."

The law which prevents a person convicted and sentenced for the commission of crime from testifying as a witness is so replete it does not seem necessary for us to belabor the point further.

We turn to the evidence which was produced at the

trial on which the verdict of the jury affirmed by the judgment of the Court is based.

It was on the night of July 31,1966, in the Settlement of Royesville, that one Lucretia Herron came to her untimely death at the hands of Moore Dennis, the principal in this murder, in which appellant was also charged as an accessory before and after the fact, as the one who induced, counseled and advised the killing of decedent by the said Moore Dennis by means of a shotgun which was discharged at her and fatally wounded her.

The only witnesses who were produced by the prosecution are those who appeared on the scene after the shooting, and they testified as to what was told to them. One Captain Calluma, of the Liberian National Police Force, who, at the time, was in the Settlement of Royesville, but not at the scene of the murder, was the lead witness. All that he testified to was the confession made to him at police headquarters, in Monrovia, and at other places, by Moore Dennis.

The record reveals that Moore Dennis, according to the police who interrogated him, made three statements, each varying. In one of his statements he informed the police that he was not advised by anyone to murder decedent; at another time he said that he did not know the gun was loaded; and the third time, after having been kept in custody and under continued questioning for a week, said that it was appellant who advised him to do the killing, that it was she who loaded the gun, though he had previously said that he did not know the gun was loaded.

He als stated as the reason why he was advised or counseled by appellant to kill decedent, that decedent was suspected by appellant of being sexually involved with her husband.

All efforts, as the record shows, to prove this improper relationship and thereby connect it as a circumstance which caused appellant to counsel and advise the killing by Moore Dennis, failed, so that all of the testimony of

prosecution's witnesses, namely: Captain Calluma, Major Charles Tubman, Emmanuel Eba, Anthony Herron, and Rose Woodroff, tended to show that their knowledge of what led to the murder of decedent was based on what was told to them, and this hearsay evidence was acknowledged as having been given to the police by the principal accomplice in the alleged murder, Moore Dennis, and none other.

To sustain the conviction of the defendant, and the judgment of the lower court affirming it, we would have to rely exclusively on the testimony of Moore Dennis, the principal, if he can be accepted by us as competent, in the face of the complete denial on the part of the appellant of having counseled or advised the killing, who testified in her own behalf, undergoing rigorous cross-examination by the prosecution.

A signed statement of Moore Dennis was introduced into evidence. Because other contradictory statements had been made by him to the police, the defense requested their production, but to no avail, for only the statement obtained after a week's detention and questioning had been reduced to writing. If the other statements were available this Court would possibly be in a position to determine whether or not the last of the three confessions was sufficient by itself to convict appellant, the other contradictory confessions notwithstanding, since none of the witnesses of the State was in the position to prove the correctness or incorrectness of any of the three confessions. The only statement that bears directly on the crime is that of Moore Dennis, the principal in this murder case.

We have already held that Moore Dennis, convicted and sentenced for the crime of murder, was under no circumstance competent to testify in this case, and the failure of the defense to object to his competence to testify did not, in any respect, remove his disqualification.

Further buttressing this position, we cite more authority:

"A person shall be deemed an incompetent witness through infamy only if he has been convicted of an infamous crime and has not been restored to the rights and privileges of citizenship. The incompetency of a witness on these grounds must be established by the record of his conviction and by testimony of his identity." Civil Procedure Law, 1956 Code, tit. 6, § 753.

"The public has an interest in the life and liberty of one charged with crime; neither can be lawfully taken except in the mode prescribed by law. That which the law makes essential in proceedings involving deprivation of life or liberty, cannot be dispensed with or affected by the consent of the accused much less by his mere failure when on trial to object to unauthorized methods. For this reason, it has been held that as to felonies, in most jurisdictions, the right to a jury trial, and in some jurisdiction the right to plead and the right to be present on pronouncement of sentence involving corporal punishment cannot be waived." 56 AM. JUR., *Waiver,* § 9.

The fact, therefore, that this incompetent testimony of Moore Dennis constituted a part of the testimony on which the jury deliberated and convicted appellant, and was most directly related to the crime itself of all the testimony, the verdict of the jury cannot stand, nor the judgment confirming it.

The admissible evidence offered at the trial was clearly insufficient to prove the charge and sustain the verdict of the jury and the judgment of the court affirming it.

This appellate court is of course, empowered to reverse the judgment of a lower court in jury cases. 1956 Code 8:390(C); *Gouykro* v. *Republic of Liberia,* 11 L.L.R. 102 (1952); *Porte* v. *Porte,* 9 L.L.R. 279 (1947).

Consequently, the judgment of the lower court is hereby reversed and the appellant ordered discharged without delay. And it is so ordered.

Reversed and defendant discharged forthwith.