ADNAM HASSEN, Petitioner, *v.* HON. McDONALD J. KRAKUE, Assigned Circuit Judge, Fourth Judicial Circuit, August Term, 1971, Respondent.

PETITION FOR WRIT OF MANDAMUS.

Decided September 6, 1971.

1. No person may be discriminated against in the courts of Liberia, for all persons are equal before the laws of the nation.
2. When the law provides for the posting of noncash bonds, the tender of a valid bond may not be refused by a judge who demands a cash bond instead.
3. Mandamus will not issue where its execution will serve no useful purpose.

The petitioner had been indicted for the misdemeanor of assault and battery and after his arrest had tendered a valid bond to obtain his release pending trial. However, the circuit court judge refused to accept the bond, contending that because the defendant was a foreigner, he might abscond before trial. He demanded cash bail, instead. The defendant, after posting the cash, applied to chambers for a writ of mandamus to compel the return of the money on the ground that the respondent judge had exceeded his authority by refusal to accept a valid bond, and in the process had violated the rights of all persons in Liberia to be secure under their constitutional rights, regardless of national origin. The Chief Justice emphatically agreed with the petitioner's position. For the reason only that the cash was no longer recoverable, the Chief Justice was compelled to deny the petition, since issuance of mandamus would have been ineffectual under the circumstances and serve no useful purpose. *Petition denied.*

Allen Yancy and *O. Natty B. Davis* for petitioner. Respondent *pro se.*

PIERRE, C. J., presiding in chambers.

After indictment for the misdemeanor of assault and battery with intent to do grievous bodily harm, the petitioner was arrested in Harper, Cape Palmas, and was imprisoned. In fact, it is alleged that the writ and the commitment were simultaneously issued and served. The petition alleges that although the defendant tendered for approval a surety bond to which was attached a Bureau of Internal Revenues certificate showing him the owner of unencumbered real property amounting to $7,584.00, to enable him to be released from custody pending trial of the case, the respondent judge, McDonald Krakue, refused this bond and insisted that a cash bond in the sum of $288.00 be filed instead.

The petition further alleges that the judge gave as his reason for refusing the surety bond, the excuse that the defendant, who is a Lebanese, might abscond before trial. The judge, in answer to protestation from the defendant's counsel, claimed the right to use his discretion in choosing the type of bond which he would accept in such cases.

The petition still further contends that the law does not give a judge the authority to say what kind of bond a defendant in a criminal case should profer, "but on the other hand the law requires in a bailable criminal case, bail bond as in this case, cash bond, stocks or collaterals." Petitioner, therefore, prayed for mandamus to compel the judge to approve his surety bond, and return to him his $288.00 which the judge ordered him to give as cash bond.

The return filed by the respondent judge did not deny any of the allegations contained in the petition, but instead tried to justify his conduct.

The statute providing for bail in criminal cases requires that the amount of bail in any criminal action shall be equal to the amount of the maximum fine which may be imposed upon conviction of the offense charged, or,

the maximum number of months of imprisonment which may be imposed, multiplied by $12.00; and, if the offense charged is punishable by both fine and imprisonment, the amount of bail shall be equal to the total of such two amounts. 1956 Code, 6:89. In this case the crime is assault and battery with intent to do grievous bodily harm, and the penalty is two hundred dollars fine, or imprisonment not exceeding two years. 1956 Code, 27:243. It must be noted that the law does not allow that both fine and imprisonment should be imposed in this case, and as such it was within the discretion of the judge to use either the fine or the imprisonment as the basis for fixing the penalty of the bond. The judge did not err, therefore, when he required the bond of $288.00, which is 24 months multiplied by $12.00.

Assault and battery with intent to do grievous bodily harm is a misdemeanor, and, therefore, the defendant had a right to offer a bond for his release from custody following arrest. The law requires that any one of several kinds of security might be given, provided the judge is satisfied with the sufficiency or validity. The first form of bail required in criminal cases shall be a surety bond.

> "The bond executed by a defendant shall also be executed by one or more qualified sureties, or, in the alternative, shall be secured:
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> "(a) by tender of the amount required as bail in cash, checks, stocks or other negotiable securities capable of being readily converted into money; or
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> "(b) by offer of unencumbered real property held in fee by the defendant." 1956 Code, 8:89 (a, b).

Accordingly, only where no surety bond is offered can the judge be justified in insisting upon a cash bond. This statute does not give him the exercise of discretion to deny a surety bond with property valuation attached. The law does not permit a judge to raise issues in a case before him, which could adversely affect the interest of one

of the parties. In this case the sufficiency or validity of the bond was not raised by the plaintiffs to have warranted the judge's using his discretion in naming the kind of bond. According to the statute, demand for a cash bond is one of the alternatives which the judge could have resorted to had there been no surety bond presented. The statute is clear on the point, that all other forms of bail other than the surety bond are alternatives.

The statutes regarding qualification of sureties and their sufficiency are clear.

> "Legally qualified sureties. Sureties qualified by law shall each be freeholders or householders of the Republic of Liberia and shall have a combined worth equal to or exceeding the amount specified in the bond on which they are to be sureties exclusive of their exempt properties and over and above all their debts and liabilities." 1956 Code, 6:463.
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> "Testing sufficiency of surety. If any party is dissatisfied with the sufficiency of any surety, he may, upon three days' notice, require a surety to attend before the judge of the court in which the action is pending and may there examine him under oath about his sufficiency in such manner as the judge thinks proper. If the judge finds that the surety is insufficient, he shall require another surety in his stead." 1956 Code, 6:464.

These are the provisions of law by which a dissatisfied party may test the sufficiency of a surety bond. In the face of this protection afforded the adverse party, no judge can excuse himself for *sua sponte* refusing to approve a surety bond offered by an accused in a criminal case.

The approval of bond in a criminal case should not be refused by a judge unless defect or insufficiency of the bond is raised by a party in litigation. It is not discretionary with a judge to approve a bond when required by law, and presented by a party in litigation. Any such

sua sponte refusal is an abuse of discretion. It is grossly irregular and improper for the judge to raise the question of defects when the law has afforded the opposing party adequate legal protection by the right to move for verification of bail and/or examination of sureties. In this case, no such motion was filed, yet the judge of his own accord undertook to refuse a valid surety bond with property valuation in the sum of $7,584.00.

It has been difficult for me to understand why the judge should have had fears that the defendant might have absconded after arrest, if released on the bond presented. It is known to our practice that where a criminal case is called, and the sureties cannot produce their principal for trial, the State moves to foreclose the bond. I cannot see how this could have concerned the judge when the plaintiff had not raised any issue with respect to the bond. If the sureties who had put up their real property were prepared to take the risk of default, why should the judge have any fears?

Normally, mandamus will not lie to review a judge's exercise of discretion, but in cases of arbitrary illegal decisions, and wanton abuse of discretion, mandamus has been employed to correct the grievance. In *King* v. *Howard,* 9 LLR 135, 144, 5 (1946), the Supreme Court being completely satisfied with the position taken by Mr. Justice Shannon in chambers, incorporated his ruling and made it a part of the opinion from which I quote.

> "There are, however, limitations and exceptions to this general rule . . . (and mandamus may be employed to prevent) an abuse of . . . discretion or with a view of correcting 'an arbitrary action which does not amount to the exercise of discretion.' (38 C.J. § 85, at 609 (1925), quoted in *extenso infra.*)
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> " 'If there is an arbitrary abuse of discretion, the courts recognize that this is an exception to the general rule, and mandamus may issue if there is no other adequate remedy, though the result is that the

court is called upon to review the exercise of a discretionary power. As has been said in this connection it is not accurate to say that the writ will not issue to control discretion, for it is well settled that it may issue to correct an abuse of discretion, if the case is otherwise proper. A public officer or inferior tribunal may be guilty of so gross an abuse of discretion, or such an evasion of positive duty, as to amount to a virtual refusal to perform the duty enjoined, or to act at all, in contemplation of law; and in such a case a mandamus would afford a remedy where there was no other adequate remedy provided by law. So where there has been a total refusal to act in a matter which may involve to some extent the exercise of discretion the court, when necessary to a proper and timely performance of the duty, may give specific direction as to a matter which otherwise may have been within the discretion of the officer.' 18 R.C.L. *Mandamus,* § 39, at 126 (1917).

" 'While as already shown the discretion of the court will not ordinarily be controlled by mandamus, it is not universally true that the writ will not issue to control such discretion or to require a judicial tribunal to act in a particular way. Where the discretion of a court can be legally exercised in only one way, mandamus will lie to compel the court so to exercise it; and in some cases mandamus has been employed to correct the errors of inferior tribunals and to prevent a failure of justice or irreparable injury where there is a clear right, and there is an absence of any other adequate remedy, as for instance, where no appeal lies, or where the remedy by appeal is inadequate. It may also be employed to prevent an abuse of discretion, or to correct an arbitrary action which does not amount to the exercise of discretion.' 38 CJ, § 85, at 608.

" 'In some cases, however, mandamus may be em-

ployed to correct the errors of inferior tribunals and to prevent a failure of justice or irreparable injury where there is a clear right, and there is an absence of any other adequate remedy; and it may also be employed to prevent an abuse of discretion, or an act outside of the exercise of discretion, or to correct an arbitrary action which does not amount to the exercise of discretion.' 26 CYC, *Mandamus,* 189 (1907)."

The judge has contended that his reason for demanding a cash bond instead of the valid surety bond presented to him, was because the defendant is a foreigner, and he feared the man might abscond. This is an open admission of partial treatment against a certain class of litigants. Speaking for the Supreme Court, I'd like it to be known that the courts of Liberia recognize no foreign litigants, as against citizens who come before the courts. All litigants are equal before the laws of our Country, and any judge who breaches this basic requirement of fair treatment under our law, is unfit to continue to serve in the judiciary.

Section 20th of Article I of the Constitution guarantees to all persons arrested for crime the right to bail by sufficient sureties. The application of this provision is not restricted to Liberians as against foreign persons; our courts treat all persons alike. It was gross error, therefore, for the judge to have used such a partial and unfair reason to deny the petitioner a constitutional right to which he was entitled.

One of the principles in mandamus, stated by writers, is that the writ will not issue to command the respondent to perform any act not within his legal powers to perform.

"Inability to comply with Mandamus. Mandamus is predicated upon the existance of a legal duty imposed by law upon the respondent, and the duty sought to be enforced must be one which the respondent can perform. The writ will not be granted to compel the

performance of an act where such performance is impossible, is beyond the physical, mental or financial power of the respondent, or would exceed respondent's legal authority. This is true notwithstanding the respondent officer may have put it out of his power to perform the duty requested and may be liable in damages on that account, as where the inability to comply results from a diversion of funds in the hands of the officer."

Though the respondent judge has arbitrarily and illegally demanded $288.00 as cash bond, he already has had the money deposited in the Bureau of Revenues, and it is beyond his physical or legal powers to return the amount. Therefore, any order for the issuance of the writ of mandamus would be ineffectual.

In view of the foregoing, the Clerk of Court is ordered to send a mandate to the Fourth Judicial Circuit, commanding the judge next assigned there in November Term to hear and determine this case of assault and battery. Costs are disallowed.

Though in agreement with the petitioner's position, for the reason that service of the writ would prove ineffectual the petition is denied.