MOMO KAMARA, *et al.*, Appellants, *v.* REPUBLIC OF LIBERIA, Appellee.

APPEAL FROM THE CIRCUIT COURT, FIFTH JUDICIAL CIRCUIT, GRAND CAPE MOUNT COUNTY.

Argued November 6, 1972. Decided November 24, 1972.*

1. No unfavorable inferences ought to be drawn when a defendant in a criminal case elects not to present evidence in rebuttal as he had announced he would.
2. A variance between an indictment and the proof offered at the trial must be material in order to affect the proceedings.
3. It is the sentiment of the Court that uncorroborated testimony be accepted with great caution.

Appellants were indicted for malicious mischief and found guilty by a jury. Final judgment was rendered, at which time they were fined by the trial court and ordered to make restitution to the complainant for damage to his property in the amount of $3,900.00. They appealed from the judgment and stressed the point that the restitution ordered was far in excess of any damages established by the evidence. The Supreme Court agreed with this contention after examining the evidence and *modified* the judgment by reducing the amount of restitution to $277.00.

Nete-Sie Brownell for appellants. The *Solicitor General* for appellee.

MR. JUSTICE LEWIS, sitting by assignment, delivered the opinion of the Court.

At the August 1968 Term of the Circuit Court, Fifth Judicial Circuit, Grand Cape Mount County, Momo Kamara, Town Chief of Vonzua, Bai Sama, Koli Kiadii,

* Justices Wardsworth and Horace sat for argument. Roderick N. Lewis participated as Justice *ad hoc*.

Tonie Kiadii, Varnii Varnii Moys Kindii, Boima Kini Kiadia, Momo Gola Kandii, Ndaba Kandii, and Kanduhai Kaidii were indicted for the crime of malicious mischief. At the November Term of the court, the trial of the case commenced. On being arraigned the indictment was read to the defendants to which they pleaded "not guilty," whereupon a jury was duly selected, sworn, and impaneled to try the case.

According to the record certified to us from the court below, it is apparent that a verdict of "guilty" was returned against the defendants by the jury on November 15, 1968, to which they excepted and announced filing a motion for a new trial within the statutory time. In conformity with this announcement, on November 18, 1968, defendants tendered their motion for a new trial, which was denied, to which ruling of the trial judge the defendants excepted. Finally, on November 20, 1968, the trial judge rendered final judgment, amercing defendants of $150.00 and ordering restitution in the sum of $3,900.00, to be paid to the private prosecutor, the total value of the crops and staple trees destroyed. Defendants excepted to the judgment and have come to this Court upon a regular appeal.

Before addressing our attention to appellants' bill of exceptions and brief, as well as appellee's amended brief, it would be helpful to see the definition of malicious mischief set forth in our Penal Law.

> "Malicious Mischief. A person is guilty of a misdemeanor who wrongfully, unlawfully and maliciously (a) Destroys, defaces or by any means whatsoever injures any house, outhouse, farm, farm building, plantation, church, chapel, or the appurtenances of any such buildings; or (b) Destroys, defaces or by any means whatsoever injures any public or private buildings, or the contents, furnishing or decorations thereof, or any public or private monument, telegraph or telephone wires or poles, or growing trees, whether such

tree be ornamental, staple plants and vegetables; or (c) Destroys, injures, takes and carries away the property of another without intent to convert said property to the taker's own use; or (d) Destroys, defaces or by any means whatsoever injures any personal property whatsoever owned by another; . . . or (g) Injures any work of art, or article in the course of manufacture, or any mine, bridge, ship, or any personal property not herein enumerated; and is punishable by a fine not exceeding two hundred dollars where the value of the property injured is more than one hundred dollars, or by a fine not exceeding one hundred dollars where the value of the property injured is one hundred dollars or less. He shall be required to make restitution to the owner of the injured property." 1956 Code 27:294.

We shall now direct our attention to the record. Apellants in their brief contend that the verdict of $3,900.00 for restitution to the owner, who is the private prosecutor in the case, is excessive because with the exception of the private prosecutor's testimony there is not a scintilla of evidence in regard to the actual value of the crops and staple trees destroyed by appellants. Not even the slightest evidence was introduced to show how many staple trees, such as rubber, coffee, and orange trees, were actually destroyed, since no one, not even the owner, went to the site and made a careful and accurate check as to the quantity of staple trees, as well as crops, destroyed by appellants. This salient point, raised in appellants' bill of exceptions, requires us to ascertain from the record whether or not their contention in this respect has legal merit.

We see that Sanece Kiazolu testified for the prosecution as the second witness after the private prosecutor had finished testifying. On being asked by the prosecution if he could recognize the samples resulting from the rooting up of the trees in question, he replied: "Yes, I

recognize them to be the samples of the trees that were rooted up." On being asked further if he could give the sum total of the crops destroyed, he said: "Yes, the sum total is $3,900.00." He was also asked on direct examination if the crops destroyed were enumerated to him, and if so, to give the quantity of each. In reply he said: "He named them to me. He told me that the oranges were 200 trees, the coffee 300 trees and the rubber 600 trees. He did not show me the number of cassavas, that is to say, the quantity of the cassava trees that were rooted up." We gather from the record that this witness in using the word "he" was referring to the owner of the trees and crops—who is Bai Tiama.

The private prosecutor testified that he planted 300 coffee trees, 200 orange trees, and 600 rubber trees, as well as some eddoes and cassavas; he also had two farms of pepper on which he planted cassavas. When he was asked to state the value of the property destroyed, he itemized: oranges, $300.00; coffee, $200.00; rubber, $2,400.00, making a total of $3,900.00.

What seems unbelievable is the enormous value placed on the loss without any evidence thereof being offered except for the testimony of the complainant. Mere allegations are not facts; hence, it was incumbent upon the owner to have his testimony corroborated. While it is true that evidence is the perfection of proof it is of vital importance to reflect upon the necessity of having the testimony of each witness so meticulously introduced as to exclude every reasonable doubt. Not only should uncorroborated testimony be accepted with great caution, but this warning should also resound in the ears of every witness.

When the owner, who is the complainant, was asked if he wanted the court and jury to understand that he "counted those staple trees, rubber, coffee and orange trees and also the rest of the crops insofar as they related

to the crops planted in the owner's farm immediately after they were destroyed by appellants in the presence of the two men who accompanied you to the farm," he replied: "No, I was vex."

How then did he arrive at the calculations as to the quantity of trees destroyed, except by hearsay evidence, which will be commented on later in this opinion? According to appellants' brief it is apparent that the private prosecutor at an investigation in reference to the present controversy, held by the paramount chief, Mambu, presented 92 coffee plants, 30 orange plants, and 15 pepper trees, together with one bitter-ball plant, as being the plants destroyed. As this witness explained, this was only a portion of what was destroyed. If the complainant had shown how this sampling enabled him to compute his loss, it could be considered evidence. As it is, it seems to be an admission.

Appellants have contended that there is a variance between the indictment and the proof with respect to the number of staple trees and crops destroyed. Yet, in argument before this bench they admitted pulling up and destroying certain crops and staple trees, the subject of these proceedings, which the private prosecutor had planted on a portion of land owned by the appellants in violation of an implied contract, which made it quite clear that the private prosecutor was to plant only annual crops on said parcel of land and not staple trees. But having acted to the contrary, which was according to them a violation of breach of contract, appellants elected to do what they did though they had their remedy at law had they been less hasty in taking the law in their own hands. Nevertheless, they contended that because of such variance they should be acquitted.

Where there is a material variance between the indictment and the proof, such variance is legally fatal. The question then arises, what is an indictment? An indict-

ment is "an accusation in writing found and presented by a grand jury legally convoked and sworn, to the court in which it is impaneled, charging that a person therein named has done some offense, punishable on indictment." BLACK'S LAW DICTIONARY. See also the Criminal Procedure Law, 1956 Code 8:140; and *Hill* v. *Republic,* 2 LLR 517, 521 (1925), where the Court stated that "a variance between the number stated in the indictment and that proved at the trial may be regarded as immaterial."

Appellee in its amended brief contended that the state has undoubtedly made out a *prima facie* case and the judgment should be affirmed, especially since the appellants waived the production of evidence even though they had announced they would produce evidence in rebuttal. It should be remembered, if an accused elects not to testify such election is his constitutional right. Nor, if he should waive the production of evidence, even though he had announced he would introduce evidence in rebuttal, would the burden of proof shift to him, especially when his tactics as herein are predicated upon the belief that the private prosecutor failed in making out a *prima facie* case.

We feel that it was incumbent upon the private prosecutor to have itemized and identified his crops allegedly destroyed by appellants, just as he did a portion of the staple trees, which would have enabled the court below as well as the appellate court to take into consideration their market value. It would, therefore, be improper for the private prosecutor to have courts do for him what he has failed to do for himself.

Since this Court is vested with authority to modify any judgment emanating from an inferior court which requires modification, the judgment in this case is hereby modified to read as follows: Appellants are fined the sum of one hundred and fifty dollars, collectively; that restitution be made to the owner for the damage done as itemized: