

JOSEPH PAYE, Appellant, v. REPUBLIC
OF LIBERIA, Appellee.

APPEAL FROM THE CIRCUIT COURT, TENTH JUDICIAL CIRCUIT,
LOFA COUNTY.

Argued March 18, 1971. Decided May 27, 1971.

1. A *nolle prosequi* entered by the prosecution to a charge of manslaughter before a jury has been empanelled, will not give rise to the defense of double jeopardy when the defendant is subsequently tried for murder, arising out of the same circumstances leading to the prior charge of manslaughter.
2. A judgment rendered by the court based upon a jury's verdict, within ten days after the jury session of that court has terminated, is entirely valid and cannot be attacked on the ground of the court's lacking jurisdiction.
3. A defendant may be convicted on a lesser charge of homicide by the jury, when the essential elements constituting murder have not been established satisfactorily at the trial.
4. When the essential element of malice prepense has patently not been proved at a trial for murder, the appellate tribunal may set aside the jury's verdict finding murder, and modify the lower court's judgment to the extent necessary under the law applying; in the instant case, sentencing the defendant wrongly found guilty of murder, for the crime of manslaughter, instead.

The appellant was indicted for murder by the presentment of a grand jury on June 11, 1969. He had previously been charged with manslaughter for the same act. On June 13, 1969, the prosecution entered a *nolle prosequi* to the charge of manslaughter, resulting in the release of the defendant. Defendant had been employed as a car boy in 1966, but was not licensed to drive a motor vehicle, nor could he drive. He was invited by the driver of a truck owned by the same company, to take the wheel of the truck and thus learn to drive. He thereupon drove the truck while the driver was to operate the brakes. Subsequently, he appeared to lose control of the vehicle, and it ran off the road about 150 feet into the bush, where it stopped overturned. One person was killed as a result and several others injured, as a consequence of being struck at that time by the truck. The jury found the defendant guilty of murder and judgment was rendered by

the court thereon, from which an appeal was duly taken to the Supreme Court. The *judgment* was *modified*, in that the Supreme Court found that the vital element of malice prepense was patently lacking to support the finding of murder, compelling the Supreme Court to adjudge the defendant guilty only of manslaughter, thereby reducing his sentence to two and one-half years, inclusive of the two-year period he had already served after conviction of murder.

J. C. N. Howard for appellant. The *Solicitor General* for appellee.

MR. JUSTICE MITCHELL delivered the opinion of the Court.

This case comes on appeal before the Supreme Court of Liberia from the Tenth Judicial Circuit, Voinjama, Lofa County.

The record certified to this Court shows that Joseph Paye, defendant below, now appellant, was indicted on June 11, 1969:

“The grand jurors aforesaid upon their oaths aforesaid do present that Joseph Paye of B. F. Goodridge Company, Bomi Territory, defendant aforesaid, on the 24th day of February in the year of our Lord, one thousand nine hundred and sixty-six, on the public highway within the Kolahun District, Lofa County, Republic of Liberia, then and there not having the fear of God before his eyes but moved and seduced by the instigation of the devil, without any justification or excuse, with premeditation and deliberation, with malice aforethought, got into a vehicle made of iron, wood, steel and rubber owned by the B. F. Goodridge Company, knowing very well that he was not a driver and that he had no license for driving, unlawfully, wrongfully, deliberately, feloniously, without due care

did drive said vehicle owned by the B. F. Goodridge Company without exercising due care and precaution for the life and safety of the decedent on the rough and rugged road, thereby killing Dorlo, the decedent, and the crime of murder the defendant did do and commit, contrary to the form, force, and effect of the statute laws of Liberia in such cases made and provided."

This case was called for trial at Voinjama, Lofa County, on August 12, 1969, and the defendant pleaded not guilty.

According to our usual jury procedure under the Constitution, a jury was empanelled to try him. During the trial, the prosecution introduced two witnesses who were members of the National Police Force, who had gone to the scene of the accident and conducted an investigation, Captain James Sowah and Sergeant Jeremiah Karngba.

Sowah's testimony-in-chief:

"It was February 24, 1966, when an accident occurred on the public highway between Kolahun and Foya Kamara. In this accident, Joseph Paye, the defendant, was driving a blue truck bearing license plate T-1248. While passing Korwohun, just approaching the intersection road leading to Kamarahun and Foya Kamara Road, and because of the speed, he lost the control of the steering wheel and jumped off the road and run into the bush. From the main road to the place where the truck turned over, is 150 feet and several people were wounded and on the spot Dorlo was killed, the truck was damaged and many other properties. The body of Dorlo was brought to Kolahun to be buried and the wounded people were taken to Kolahun Clinic."

On cross-examination:

"Q. You have placed on record that because of the speed the defendant jumped from the main road

into the bush; are you telling this court that you were travelling in the same vehicle?

"A. I was no time on the vehicle with him but through my preliminary investigation and having examined the truck also, I observed that the accident occurred because of the speed.

"Q. Since you were also not present when the accident occurred, how do you then come to know that decedent was a pedestrian and not a passenger in the truck and that because of the truck running into the bush, resulted in his death?

"A. Mr. Dorlo was an employee to work on this truck and he was inside when the accident took place. The body of the late Dorlo was transported by me to Kolahun.

"Q. Contending that you not being present when the accident occurred and not knowing the speed with which the defendant was driving, how come you to state definitely the exact hour this accident occurred in which as you say the death of one Dorlo ensued thereby?

"A. When we say we investigated an accident on the scene, we mean to tell you we investigated everything down to what caused the accident and what minute this accident took place, before submitting our report. Through my preliminary investigation, I came to know the date and the time.

"Q. The defendant in the dock is charged with the knowledge of malice aforethought; can you say to the best of your ability that you knew decedent and the defendant prior to the accident?

"A. All that I know is that Joseph Paye, the defendant, was driving recklessly, carelessly and he made the accident which caused Mr. Dorlo's death. I do not know Mr. Dorlo nor do I know

Mr. Joseph Paye to say whether there was malice or not, so I cannot tell.

“The Court: It is averred in the indictment that defendant was not a qualified driver when he operated the vehicle with which he made the accident and Dorlo died; can you explain this for our benefit?”

“A. During the investigation on the scene of the accident, it was observed that Joseph Paye was not a driver nor did he own a driving permit. He was employed to work on said truck as a truck boy.”

Karngba’s testimony-in-chief:

“It was on February 23, 1966, about the hour of 3:30 P.M., an accident occurred near Chief Kollie’s Town, Korwohun, between Foya Airfield and Kolahun, on the public highway, involving a blue truck bearing the license plate number T-1248, owned by the B. F. Goodridge Company, driven by the car boy, Joseph Paye, who was charged by the police traffic investigators, Captain James K. Sowah and Sergeant John D. Karngba, for the traffic offense of reckless driving resulting into property damage, injuries, death, and driving without license. During this accident, one Mr. Dorlo, a car boy, died in said accident and three other persons were also wounded. According to information gathered from the scene of the accident, defendant Joseph Paye was driving recklessly because he was not an experienced driver and also was a car boy. The said defendant was taken into police custody pending the trial of court.”

Among other things, he said that upon his arrival on the scene, Dorlo was dead. That the accident took place at 3:30 in the afternoon and that the investigating officers arrived at 4:00 P.M. of the same day. That defendant was driving recklessly, because if he had been conforming to

driving rules he would not have run from the road into the bush. Moreover, that he was not the driver for the vehicle nor did he have a license, and, lastly, that from the spot where the truck turned off from the main road to the point where it turned over, was one hundred fifty feet.

In substance, this was the testimony of the witnesses introduced by the prosecution. Before going further, we would like to make it clear that the defendant, having declared himself a pauper, the defense counsel at Lofa County was assigned by the court as his lawyer.

At this stage of the trial, after the prosecution had rested, defense counsel requested the qualification of the defendant and also asked for a subpoena to be issued for the general manager of the B. F. Goodridge Company and for Ben Harris, who was the actual driver for the truck number T-1248, to testify in behalf of defendant. Against objection from the prosecution the court ordered the issuance of the subpoenas, but unfortunately the defense was compelled to waive the testimony of the manager of B. F. Goodridge and Ben Harris, for the reasons set forth in a letter addressed to the court.

“Dear Judge Tulay:

“Your radiogram addressed to our client, the Manager, B. F. Goodridge, requesting his presence together with driver, Ben Harris, as witness for the defense in the case: *Republic of Liberia versus Joseph Paye*, charged with the commission of murder, has been presented to us for our legal advice.

“This is to advise that the manager of B. F. Goodridge is at the present out of the country and driver Ben Harris is no longer in the employ of the company, hence his whereabouts are unknown to the company; however, Mr. Alpha Kandakai, one of the officials of the company, who visited Lofa County at the time of the accident and who probably will have information

relative to the case, will represent the manager in keeping with your request. With kindest regards,

“Respectfully yours,
M. KRON YANGBE,
Counsellor at Law.”

Whereupon, the defendant took the stand. He stated that he was acquainted with decedent, Dorlo, who had died in the truck accident. That one Ben Harris was the driver for the truck carrying license plate number T-1248 and that the decedent, Dorlo, was one day on the truck with them, that is to say, the driver and himself. Ben Harris told the defendant to sit beside him on the front seat so that he could teach him to operate the vehicle. That defendant took the wheel while Ben Harris controlled the brakes. That he drove the truck and it got into a hole on the road and started bouncing. It finally ran into the bush and fell over and thereafter both he and Ben Harris were arrested and taken to Voinjama Central Prison after Dorlo died in the accident. Continuing, he said that five days after their imprisonment, Ben Harris was released on bail but he remained in prison for five months, when he was able to procure the legal service of attorney Clarke, who succeeded in having him released from prison on bail. That subsequently, he appeared before Judge Azango, who then presided over the court, and was told that he was free and could go anywhere, hence, he could not say and did not know why he had been brought back to jail and had remained in confinement for another two months.

Testifying further, in answer to a question he said that in 1966, when the accident took place, it was then and there on the very day that Dorlo died in the accident and his body was brought to Kolahun. He said further, in answer to another question, that at the time he was driving the truck as aforesaid he had no license but was learning to drive.

Before the defendant took the stand, after the prosecu-

tion had rested, oddly the defendant made a motion, entitled "Defendant Joseph Paye's motion against double jeopardy and court's jurisdiction over subject matter."

In his motion he pointed out that the defendant had been charged with manslaughter in 1969, and in June of that year, the prosecution entered a *nolle prosqui*. His subsequent indictment and trial for murder, therefore, he claimed, constituted double jeopardy. Other peripheral grounds were also set forth.

The trial court denied the motion.

The jury found the defendant guilty of murder. Defendant filed his motion for a new trial predicated upon the fact that the verdict was manifestly against the weight of the evidence. The motion was denied and the court proceeded to render a final judgment affirming the verdict. It is from this verdict and judgment the defendant excepted and brought his appeal on a bill of exceptions comprising several counts.

When this case was called for hearing, counsel for appellant and appellee ably represented their respective sides. The appellant maintained that Ben Harris should have been made a defendant in the case because he was the driver for the truck and controlled the brakes while appellant held the wheel. Besides, that it was Ben Harris who caused the appellant to take the wheel, which meant that appellant was acting at the time upon the instructions of his boss, Ben Harris. He also argued that there remained a doubt as to who was actually responsible for the accident, since Ben Harris operated the brakes and could have avoided the accident.

On the other hand, appellee's counsel in his argument concluded by showing that the appellant was the person actually responsible for the accident, since he knew that he was not a driver and had no license to drive, but regardless of human life he carelessly and recklessly drove the truck which resulted in the death of Dorlo.

We will now consider the bill of exceptions. We will

disregard the first four counts, for they are virtually irrelevant to the merits. The fifth count raises the denial by the court of the plea of double jeopardy raised by motion.

According to law, a *nolle prosequi* may be entered by the prosecuting attorney at any time before issue is joined in any criminal case and does not serve as a bar to a re-indictment or retrial of the same party for any cause growing out of the same act. Double jeopardy cannot be successfully pleaded unless a defendant had pleaded to a charge and a jury had been empanelled. Thereafter, upon an indictment subsequently found against him he may on his arraignment plead double jeopardy. This has not happened in this case for we have thoroughly examined the record before us and found that immediately upon the call of the case for manslaughter with which the defendant was charged in the indictment, the County Attorney proceeded to enter a *nolle prosequi*. Therefore, the County Attorney was permitted under the law to reindict the defendant on a charge growing out of the same act of the defendant. The charge is whether it was manslaughter or murder. *Republic of Liberia v. Dillon*, 15 LLR 19 (1962); *Williams v. Republic of Liberia*, 14 LLR 452 (1961); *Republic of Liberia v. Aggrery*, 13 LLR (1960); *Wood v. Republic of Liberia*, 1 LLR 445 (1905). Count five, therefore, is not sustained.

Count six excepted to the verdict of the jury as contrary to the weight of evidence and the law. The jury, of course, is the judge of facts, but an appellate court may review its findings on the basis alleged, which also contends the verdict returned should have, at most, been manslaughter and not murder.

Since the trial court ought to have considered the merits of this contention, that the verdict could not be legally sustained on the charge of murder, count six is sustained.

Count seven attacks the judgment of the court for affirming the verdict by a judgment rendered after the ad-

journalment of the jury session of the court. We are of the opinion that this count is unmeritorious and should not be sustained because all circuit judges on assignment are required to remain in term ten days after the adjournment of any jury session, within which time the law permits the rendition of judgments in matters tried as well as hearing motions for a new trial. Hence, the judgment rendered after the adjournment of the jury session was not contrary to law. This count, therefore, is not sustained.

From a close study of the record, it is patently clear that malice aforethought was not established.

“Any person who:

“(1) Without legal justification or excuse, unlawfully with malice aforethought, kills any human being; or

“(2) Is present unlawfully aiding and abetting another directly or indirectly in the felonious killing of any human being; or

“(3) With malice aforethought conspires with or counsels and advises another to kill a human being . . . is guilty of murder and punishable with death by hanging.” Penal Law, 1956 Code, 27:232(1),(2), (3).

Malice prepense not having been established, as aforesaid, the statute defining manslaughter becomes appropriate.

“Any person who:

“(1) Without legal justification or excuse unlawfully kills any human being, malice prepense not appearing from the circumstances; or

“(2) While engaged in any lawful pursuit without intent to hurt, negligently kills any human being; or

“(3) Being the aggressor in any sudden affray, unlawfully kills any human being . . . is guilty of a felony and punishable by imprisonment not exceeding five years.” Penal Law, 1956 Code, 27:233.

When after indictment for murder the essential re-

quirements are not proven at the trial, the defendant may be convicted for a lesser degree of homicide. In this case, the evidence for the prosecution proved that the defendant was not a driver and, hence, did not own a license to drive and that Dorlo came by his death through the reckless driving of the defendant, which caused the truck to run into the bush one hundred fifty feet from the main road and turn over. Defendant testified that he was driving the truck when the authorized driver was controlling the brakes. He also said that he was not a driver and had no driver's license. It is conclusive that malice prepense was not present; just reckless driving. Therefore, in our opinion the verdict of the jury should have been set aside and a new trial ordered because of the lack of sufficient evidence to convict for murder.

Under the circumstances, however, since the law authorizes this Court to give such judgment as ought to have been given, the judgment of the lower court is modified by sentencing the defendant for manslaughter instead of murder; because of the fact that the defendant has already served a period of more than two years in prison, he is hereby sentenced to imprisonment for a period of two years and six calendar months, inclusive of the period that he has already been in confinement.

Judgment modified; appellant re-sentenced.