WALTER B. SERJLEH, Appellant *v.* REPUBLIC OF LIBERIA, Appellee.

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

Argued March 16, 1971. Decided May 28, 1971.

1. A motion for a continuance is directed to the sound discretion of the trial judge, and for the defense to wait, as in the present case, until the day befor trial to subpoena a witness who is then discovered to be outside the country, will not be a ground for the Supreme Court to characterize the refusal of the trial judge to issue letters rogatory on the day of trial and continue the case for such purpose, as an abuse of his discretionary power.
2. In a criminal case the prosecution may not introduce in evidence a statement made by an unavailable witness, which is based on his conjecture, through another witness merely identifying the statement as that of the unavailable witness, for such procedure violates the rule against hearsay and the consituational right of confrontation possessed by an accused.
3. The plea of insanity in a criminal case is a plea in bar and shifts the burden of proof thereafter to the prosecution to prove the sanity of the accused sufficiently to warrant conviction, which the prosecution, in the instant case, failed to do.
4. A plea of insanity in a criminal case will be established if the defense shows that the mental condition under which defendant labored at the time of the commission of the crime, herein murder, had so impaired his judgment that he cannot be said to have been possessed of a criminal intent.

The appellant was indicted for murder, tried, and convicted by a jury. At the trial the pivotal issue of mental capability arose, and evidence of mental derangement was presented, after defendant's examination by a court-appointed psychiatrist. In considering the appeal from the judgment of the court, the Supreme Court decided that in the interests of justice the lower court's judgment should not be allowed to stand and the case was to be retried for, aside from certain inadmissible evidence permitted by the lower court, the weight and gravity of the psychiatrist's findings struck the Court as deserving of greater consideration by a jury. *Judgment reversed, case remanded.*

O. Natty B. Davis for appellant. *Solicitor General George E. Henries* for appellee.

MR. JUSTICE SIMPSON delivered the opinion of the Court.

During the May Term, 1965, of the First Judicial Circuit Court, Crimnal Assizes, Montserrado County, the grand jury presented an indictment.

> "The aforesaid Walter B. Serjleh, defendant, previous to the findings of this indictment, on the 7th day of April, 1965, at the home of the late Apostle Samuel O. Adowole, situated on Center Street, in the Commonwealth District of the City of Monrovia, County and Republic aforesaid, he, the said Walter B. Serjleh, defendant, not having the fear of God before his eyes but being moved and seduced by the instigation of the devil, did then and there with force and arms, make an assault upon the body and person of Apostle Samuel O. Adowole, then and there being in the peace of God and this Republic, and with a certain deadly weapon, to wit, namely, a hatchet, made of iron and steel with a wooden handle, which deadly weapon the said Walter B. Serjleh, defendant, then and there had and held in his hands, without legal justification or excuse, did then and there, wickedly, unlawfully, willfully, deliberately, feloniously, premeditatively and with malice aforethought, strike, cut and wound the said Apostle Samuel O. Adowole and from which mortal wounds the said Apostle Samuel O. Adowole did languish and die shortly thereafter; thereby the said Walter B. Serjleh did then and there wickedly, unlawfully, willfully, deliberately, feloniously, premeditatively and with malice aforethought commit the crime of murder, contrary to the statute laws of the Republic of Liberia in such cases made and provided and against the peace and dignity of the State.

"And the grand jurors aforesaid, do upon their oaths aforesaid, present that the aforesaid Walter B. Serjleh, defendant, at the time and place aforesaid and in the manner and form aforesaid, did do and commit the crime of murder contrary to the form, force and effect of the statute laws in such cases made and provided and against the peace and dignity of the Republic of Liberia."

Predicated upon the above-cited indictment, the appellant was apprehended and taken into custody upon the charge of the heinous crime of murder. Upon the first endeavor to conduct a trial, a plea of insanity was raised, but the trial judge, irrespective of that fact, endeavored to continue without first submitting the accused to a psychiatric examination for the purpose of ascertaining his mental state which would determine his ability to formulate criminal intent.

Upon proper application to this Court, it was resolved that there be a psychiatric examination of the defendant and it was thereupon conducted by Dr. Ronald Winthrop, then medical officer in charge of the Catherine Mills Rehabilitation Center. His findings will be dealt with *in extenso* at some later point in this opinion.

After several postponements trial was held in the November Term, 1969, of the First Judicial Circuit Court, presided over by Judge John A. Dennis, at which the prosecution and defense both presented witnesses.

Witnesses for the prosecution included Colston Johnson, of the National Bureau of Investigation, who testified that on April 7, 1965, a report was made to the National Bureau of Investigation headquarters that Apostle Adowole had been murdered at his Center Street residence with an axe. Immediately thereafter, a team of investigators was rushed to the scene of the crime and upon their arrival thereat, they found the body of the deceased. A preliminary investigation was immediately started, at which time they were informed that Mr. Walter B.

Serjleh had been seen running downstairs from the scene and had also been seen running in the back of the Department of Justice. After a search for the accused he was apprehended on the Gardnersville Road and then taken in custody to the National Bureau of Investigation headquarters for questioning.

Testimony presented at the trial by the prosecution also established that the defendant had bought an axe from a merchant on Camp Johnson Road, after having first entered the store and asking the cost of the axe without having the necessary funds to effect the purchase. The testimony also showed that a subsequent time, not long after his first entry, he returned to the store with the required funds and concluded the purchase.

After the prosecution had rested, the defense for its first witness called to the stand Mr. Matthew S. Bridges, a resident of the City of Monrovia, who testified that after becoming ill, the defendant commenced attending the Prophet Church and thereafter when he would go to visit the defendant, the latter would commence using abusive language directed at him. This eventually became so pronounced that he decided to cease calling upon the accused. Further testifying, the witness said that once when the defendant had taken ill and he was requested to accompany him to the Government Hospital, Serjleh held that he could not go to the hospital but instead he would be carried to the Prophet Church on Center Street. Additionally, the same witness testified that two or three weeks later when he saw the defendant, he told him that he was surprised that Bridges' joined Jacob in sending him to the Government Hospital, because they had planned to kill him there.

Further evidence showed that Serjleh would complain about fire in his head, thereby leading his relatives and acquaintances into believing that he had malaria. Besides this, when carried to the Prophet Church he could only stare at a person with a fixed gaze. Even his

mother, sisters, and other relatives complained that he would abuse them and act unusually.

Later Dr. D. H. Ross, a medical practicioner who at that time, though not a trained psychiatrist, had interim responsibility for the Catherine Mills Rehabilitation Center, took the stand, initially for the purpose of identifying the signature of Dr. Winthrop. Having done this, a question was put to him regarding the contents of the report of Dr. Winthrop. In fine, Dr. Ross held that the report of Dr. Winthrop portrayed one's dealing with an individual who was then mentally deranged. He further went on to explain certain terms in the report, including the term "acute schizophrenic reaction paranoid type." Concluding, Dr. Ross stated that Dr. Winthrop was a qualified psychiatrist and that he had every reason to believe that his diagnosis was predicated upon information received from the subject and others whom he had interviewed.

After the testimony of Dr. Ross, other witnesses testified for the defense in the same vein of the testimony previously given by Matthew Bridges. When all evidence was finally presented, the jury was duly charged by the trial judge, whereupon they proceeded to their room of deliberation, subsequently returning therefrom with the verdict of guilty. Exceptions were taken to the verdict and thereafter a motion for a new trial was filed, resisted and denied. The denial was based principally upon the ground that the verdict was in fact not contrary to the weight of the evidence presented at the trial. After exceptions to the ruling on the motion, final judgment was entered in confirmation of the verdict of the jury and exceptions thereto taken by the accused, who then and there set his appeal in motion. The case has now reached this Court on appeal.

The bill of exceptions was prepared, approved and filed by appellant. It contained five counts, which we shall deal with in deciding this case. This includes count

three, although the trial judge failed to approve that count, since the best evidence of what transpired in the lower court is the record itself.

Count one of the bill of exceptions deals with the motion for continuance filed in the lower court just prior to the commencement of the trial, which had as its primary contention the fact that the sheriff in his return to the subpoena for Dr. Ronald Winthrop had stated that the doctor was outside the Republic. The defendant held that in the circumstances the court should avail him the opportunity of filing letters rogatory to obtain the testimony of the absent doctor. The subpoena for Dr. Winthrop was applied for and issued on November 25, 1969, and returned on November 26, which was the following day. The case had been assigned for hearing on November 26, by an assignment that issued on November 19, 1969, as mentioned. The application for the issuance of the subpoena was not made until one day prior to the trial and six days subsequent to the issuance of assignment for trial. Our Civil Procedure Law, 1956 Code, 6:762, recites that if the witness resides in a country where the execution of commissions is not allowed, the court or judge may send interrogatories with a rogatory addressed to the proper authority to take the deposition of the witness. In the circumstances, we see, firstly, that for letters rogatory to issue there must *a priori* be an averment to the effect that the execution of commissions is not allowed in the country in which the particular witness resides. Besides, in the case at bar, the pivotal issue revolves around whether or not the motion should have been allowed at the time it was made for the issuance of letters rogatory. This Court has on innumerable occasions held that a motion for continuance is directed to the sound discretion of the trial judge and a determination by him upon the motion will by us be overturned only in instances wherein clear abuse of the judge's discretionary powers is shown.

Was there such an abuse in this case? According to Rule 17 of the Circuit Court rules:

> "Witnesses for either side must be duly summoned and evidence thereof must in every case be shown by the sheriff's return before the case is ready for hearing (except in criminal cases when and where a bystander might have knowledge of the matter at issue and be required to testify) ; and no postponement of the hearing will be allowed, unless it can be shown to the satisfaction of the court that due diligence had been employed to secure attendance of the witness or witnesses."

In the present case, it is difficult to equate due diligence with the action of appellant in the procurement of the subpoena, for he sat by and waited until approximately 24 hours prior to the commencement of the trial before setting into operation the machinery of the court for the procurement of the testimony of the material witness. This lethargy on the part of defendant does not gain favor with this Court and the Court cannot say that the denial of the motion constituted an abuse of discretion in the circumstances recounted.

Count two of the bill of exceptions centered around the admissibility of certain documentary evidence offered by the prosecution and admitted by the court over the vehement exceptions of the defendant. A statement was offered in evidence made by Daniel B. Karnley, who had made representations regarding facts not in his certain knowledge, for he had not seen the actual act in the process of being performed but had instead conjectured that it had been done and its doing attributed to defendant. Appellant strenuously argued that by admitting this document he had been deprived of his ancient constitutional right of confrontation upon being accused. He held that one accused of such a heinous crime should be granted the right to confront his accusers and cross-examine them

on all points touching their testimony. In opposing this contention the prosecution held that the document had been properly admitted into evidence, since the defendant at the trial court had been afforded an opportunity of confronting the witness, identifying the document as Karnley's. In support of this position we were referred to *Washington* v. *Lloyd,* 1 LLR 83 (1875). In that case in a civil suit of ejectment it was held that where an opposing party had been afforded an opportunity of confronting the identifying witness permitted to testify to the contents of a document, the requirements of law were thereby met.

There was an additional referral to *Berrian* v. *Republic of Liberia,* 2 LLR 258 (1916), when the Court held that representations of a sick person of the nature and defects of a malady under which he is laboring are received as original evidence whether they are made to the medical attendant or to any other person. Treating firstly the *Berrian* case, it is easily seen that it is not applicable to the issue at bar, since that case dealt with the representations of a sick person as to the nature and effect of a malady under which he was laboring. In the case at bar, though Karnley was at the time of the trial absent, his statement offered and admitted should have dealt with an ailment under which the defendant was laboring but, instead, dealt with acts accusing him of murder when the accuser was not present for cross-examination nor even present at the actual moment the murder was allegedly perpetrated.

Turning now to the case allowing testimony from an identifying witness in respect to the contents of the document identified and its holding that the presence of the identifying witness to be examined by the adverse party is a sufficient fulfillment of the requirements of the law, we must state that the rule is applicable in certain instances wherein the particular suit is of a civil nature. In all criminal causes, an accused is entitled under the basic

law of the land to be confronted by those accusing him. Therefore, the *Washington* case is inapplicable here, as is *Freeman et al.* v. *Freeman et ano,* 8 LLR 187 (1944). In the latter case we were dealing again with a civil cause and, besides, the one called upon to testify was another expert witness who testified to what was apparently the same thing that the expert witness, whose signature he identified, would have testified to were he called.

The last important citation made by the State on this score is 20 AM. JUR., *Evidence,* §§ 922–924. Upon a perusal of these sections we find that they deal with the authentication and genuineness of a document and do not relate to its admissibility as an exception to the general hearsay rule; therefore, they have no applicability hereto.

Count three of the bill of exceptions, though unapproved by the trial judge, dealt with the alleged failure of the trial judge upon charging the jury to explain and elucidate upon the medical terms employed by the psychiatrist in his report. A study of the judge's charge to the jury shows that he endeavored to the extent of his capabilities to explain to the jury what the medical terms meant. However, we must here observe that his explanation must be considereed insufficient, for several of the terms used by the psychiatrist were by him left unexplained.

The next two counts dealt with the fact that in appellant's estimation the verdict of the trial jury was contrary to the weight of the evidence and the law, because in his report the psychiatrist plainly stated in unambiguous terms that appellant at the time of the commission of the offense was suffering from a severe mental disorder. This evidence, it is contended, was of a very high grade and could not in appellant's opinion be overlooked without grave injustice to appellant. The next count further averred that the motion for a new trial filed after the bringing in of the verdict, again established that the verdict of the jury was manifestly contrary to the weight of

the evidence, for there was no evidence produced by appellee to refute the conclusion of the doctor on the question of appellant's sanity.

In arguing before this bar, counsel for appellant relied heavily on *Ledlow* v. *Republic of Liberia,* 1 LLR 376 (1901). Speaking generally, in the *Ledlow* case, this Court held that the plea of sanity is a good plea in bar and when entered by the prisoner it becomes imperative upon the State to prove the sanity of the prisoner to warrant conviction. What is this plea of insanity all about? The law states unequivocally that criminal intent must coalesce with the overt act before criminal responsibility is chargeable against a particular individual. The accused must be possessed of the necessary *mens rea* to be criminally responsible for his acts. Where an individual upon a trial in a criminal cause pleads that he was *non compos mentis* at the time of commission of the act of which he is accused, the burden shifts from the accused to the accuser, meaning thereby the State, to prove the sanity of the accused at the time the act was committed for the proper establishment of criminal responsibility.

Let us see now what happened in the present case and project these facts against the law controlling in this jurisdiction, for the determination of whether or not the verdict of the jury was in accord with the evidence, and, additionally, whether or not, in the face of this determination, a new trial should have been awarded.

Having earlier in this opinion referred to the testimony of several witnesses, including Dr. D. N. Ross, we shall here quote from the concluding portion of the report of Dr. Ronald Winthrop, the examining psychiatrist, dated April 4, 1966.

> "Examination of Mr. Serjleh himself revealed a very pronounced disorder of thinking, affect and behavior. His contact with his environment was severely impaired. He was disoriented of date, month and season but correctly oriented for place and person.

Thinking was characterized by severe blocking, fragmentation, delusions and hallucinations. The content of speech was disorganized and revealed marked paranoid content. Delusions were of two types: (a) Hypochondriacal delusion with concretization, such as the belief that his internal organs solidified into a single mass, and the blood is draining out of his brain and flowing out of his mouth and nose; (b) People are trying to kill him, chasing after him in inhuman disguises, appearing suddenly before him staring and with menacing gestures. Nightmares and diurnal visual hallucinations similar to paranoid content are noted. Affect is one of very pronounced anxiety to the point of panic."

In summarizing, Dr. Winthrop had the following concluding remarks to make about the subject whom he had examined.

"In summary, the findings on the basis of the mental examination of Mr. Serjleh himself, and from reports of informants, were entirely consistent with a diagnosis of severe mental disorder; the precise psychiatric diagnosis being acute schizophrenic reaction paranoid type."

With this information in the background let us now turn to what the Supreme Court has said in the *Ledlow* case, at pp. 380, 381.

"Insanity, therefore, is a good and lawful plea in cases for murder, and if clearly and substantially proven will operate as a bar to a prosecution for murder, by showing that the law regards such homicide as excusable. But great care should be exercised in acquitting a prisoner on this plea. It would be as difficult as it would be unsafe, to lay down a rule that would apply to the infinite variety of forms in which insanity or derangement may show itself. Each case must therefore depend very much upon the circumstances, facts and development which attend it.

In the case of the United States against McGlue (1 Curtis U.S.C.C. Rep.) the learned Judge Curtis remarked that there are undoubtedly persons of great general ability, filling important stations in life, who upon some one subject are insane; and there are others whose minds are such that the conclusion of their reason and the result of their judgment are very far from being right. But, says he, it is not the business of the law to inquire into these peculiarities, but solely whether the accused was capable of having and did have a *criminal intent.* If he had, it punishes him, if not, it holds him unpunishable. And it supplies the test by which the jury is to ascertain whether the accused be so far insane as to be irresponsible.

This Court is of the opinion that there was strong and sufficient evidence produced at the trial, as already referred to by us, to show that the accused, at the time the crime was committed, was laboring under the delusion that people wanted to kill him and that his life was in imminent danger, and this fact, taken in connection with the circumstances under which the homicide was committed, renders the offense excusable in law. The court below therefore erred in not awarding the new trial and in pronouncing sentence upon one whom it had been clearly shown was not sound in mind and memory. This Court does not hesitate to declare its unwillingness to confirm a judgment of death where it appears that the homicide is excusable. It is better, observes Sir Matthew Hale, that ten guilty persons go unpunished than that one innocent person should be punished; but how much more proper, is it not, that courts should in all cases acquit when the innocence of the accused is made apparent to it."

From the foregoing and the facts presented at the trial, it is clearly evident that the report of the psychiatrist was not given proper weight by the jury in arriving at its ver-

dict. Besides, as stated in the *Ledlow* case, where the plea of insanity is raised, the burden of proof shifts and it then becomes the responsibility of the State to prove the sanity of the accused, and in this the State has failed.

In the premises, the Court is left with no alternative other than to remand this case for a new trial not inconsistent with the findings herein made.

Reversed and remanded.