ALLEN N. YANCY, JR., and ALFRED D. MOULTON, SR. Appellants, *v.* REPUBLIC OF LIBERIA, Appellee.

MOTION TO DISMISS APPEAL ON JUDGMENT OF CONVICTION OF MURDER.

Argued November 22, 1966. Decided December 16, 1966.

The absence of a supporting affidavit on a motion for new trial in a criminal prosecution is not sufficient ground for dismissal of the appeal. 1956 CODE 8:390.

On appeal from a judgment of conviction on a verdict of "guilty" of murder, a *motion* to dismiss the appeal was *denied.*

O. Natty B. Davis, J. Dossen Richards and *G. P. Conger Thompson* for appellants. *Attorney General James A. A. Pierre* for appellee.

MR. JUSTICE SIMPSON delivered the opinion of the Court.

After this case had been bulletined for hearing on its merits, a motion to dismiss was filed on the 15th day of November, 1966, by the Attorney General. The filing of the motion precluded us from embarking upon the hearing of the case and instead has now caused us to concentrate our efforts upon the determination as to whether or not this motion is sufficiently well taken in law to cause us to refrain from entertaining the main suit.

In virtue of the brevity of the motion, we have deemed it expedient to quote herein the two counts thereof *in toto.* The Attorney General alleged:

"1. That after verdict had been rendered against the defendants-appellants in the court below, they filed a

motion for new trial in which they raised issues of law and fact without supporting the issues of fact by affidavit, as will more fully appear from copy of a certificate issued out of the clerk's office, and under seal of court hereto attached marked Exhibit A and made to form a part of this motion.

"And this appellees are ready to prove.

"2. That in view of the fact that the said motion for new trial is not strengthened and supported by affidavit as the law requires, the motion is void and the appeal as taken is without the required request for new trial after the jury's verdict.

"And this the appellees are ready to prove."

To this motion as filed, the appellants entered a seven-count resistance, in Count 1 of which the said appellants contended that the motion is baseless and legally unfounded in law because the grounds therein contained do not, under the provisions of our statutes and the decisions of this Honorable Court, constitute grounds for the dismissal of an appeal.

Further countering the motion, appellants contended that Count 1 was unmeritorious because a motion for new trial had by them been filed and the same denied in the trial court and, additionally, the order of denial had been excepted to and constituted a count in the bill of exceptions transmitted to this Court for a review of the action upon its merits.

The appellants, in their further endeavor to avail themselves of adequate legal reasons to cause us not to sustain the motion, contended that the law requires that, as a condition precedent to the taking of an appeal from the verdict of a jury on any question of mere fact, a motion for new trial should be filed. Additionally they contended that so long as a motion for new trial was filed by the appellants in keeping with statute, they were within the pale of the law and the judge's denial of such a motion a fit subject for appellate review upon exceptions properly taken.

Lastly, appellants argued that it would be further unsound for this Court to pass upon the issue of the correctness of the trial court's determination of the motion at this juncture because to do so, of necessity, this Court would be compelled to open the records of the lower court and this was the very act that the prosecution was strenuously endeavoring to have this Court refrain from doing.

These are the issues that were raised by the parties in the motion and resistance thereto. The prosecution proceeded to give many legal citations, presumably in support of their position. The case of *Gardiner* v. *Republic*, 8 L.L.R. 406 (1944), was strenuously pressed by the Attorney General. In that case the Court held that a party who does not apply for a new trial after rendition of an unfavorable verdict has not exhausted his means of securing relief in the trial court and therefore cannot appeal to the Supreme Court.

In very cogently endeavoring to put forth the legal soundness of the prosecution's contention to this Court, the Attorney General then turned to the case of *Nyenee* v. *Republic*, 9 L.L.R. 189 (1946). In that case there were two grounds laid in the motion to dismiss. The first ground dealt with the failure on the part of the appellants to serve on the clerk of the trial court a written notice of their intention to take an appeal to the Supreme Court in keeping with the mandatory provision of statute. The second point was that the appellants had failed to file a motion for new trial after the verdict against them. In our view, this case represents the most cogent legal argument put forth by the prosecution in support of their contentions. We shall, later in this opinion, explore the *Nyenee* case.

After citing these and other decisions of this Court, the prosecution turned to the common law and in so doing cited 37 AM. JUR. 507 *Motions, Rules and Orders* § 14. This provision of law maintains that motions for a rule or order affecting substantial rights ought regularly to be accompanied by an affidavit verifying the facts on which

they are grounded, and when not so supported they will not in general be entertained by the court for affirmative action.

At this juncture, we should like to point out that, with the exception of the *Nyenee* case, *supra*, all of the citations of the prosecution were concerned with the issue of the necessity for a new trial and steps commensurate therewith for the bringing of an appeal before the Supreme Court. The motion as filed, however, was one to dismiss an appeal. In the premises, the primary issue before us for determination relates to whether or not the motion may be sustained though not on one of the grounds specified in Section 380 of our Criminal Procedure Law. In making this determination, we must bear in mind that the *Nyenee* case was also a criminal action and also dealt with the question of a motion for new trial in the lower court.

Section 380 of our Criminal Procedure Law provides that:

> "An appeal from a court of record may, upon motion properly taken, be dismissed for any of the following reasons only:
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> "(a) failure to file an approved bill of exceptions within the time specified in section 373;
>
> "(b) failure to file an approved appeal bond or material defect in such bond;
>
> "(c) failure to have notice of appeal served on appellee; or
>
> "(d) nonappearance of the appellant on appeal.
>
> "An insufficient bond may be made sufficient at any time during the period before the trial court loses jurisdiction of the action. Thereafter if the appellant discovers an insufficiency in his appeal bond, he may petition the appellate court for permission to make it sufficient." 1956 CODE 8:380.

This statute, and especially the last word of the first paragraph: "only," clearly shows that it was the intention of the Legislature to specifically enumerate, to the exclusion of any other grounds, the grounds upon which this

Court may dismiss an appeal. Legislative history shows that prior to the amendment of the Criminal Code wherein these specific enumerations were effected, dismissals of appeals were frequent and for many reasons. Since passage of the above-quoted statute, this Court has made several pronouncements on the question of dismissal of appeals. In *George* v. *Republic* 14 L.L.R. 158 (1960), Mr. Justice Pierre, speaking for the Court, quoted the statute at 14 L.L.R. 159 and said:

> "Under the above-quoted statutory provisions, the four grounds specified are the only grounds upon which an appeal can legally be dismissed in the Supreme Court.
>
> "This Court has no authority to extrapolate the intent of the Legislature beyond the specific wording of a statute. This limitation is all the more mandatory where the statute in question specifies the only manner in which an act is to be performed. Our law does not give us authority either to add to or take from what the Legislature has commanded unless the said command breaches provisions of the Constitution; and in such case the consitutional issue must be raised squarely."

During the same term of this Court, the decisions in *Cess-Pelham* v. *Republic*, 14 L.L.R. 161 (1960), *Sillah* v. *Republic*, 14 L.L.R. 192 (1960), and *Massaquoi* v. *Republic,* 14 L.L.R. 212 (1960), constituted further holdings to the effect that the policy of strict adherence to the statutory requirements for the dismissal of appeals must at all times be maintained by this Court. Additionally, in the case of *Bryant* v. *African Produce Company*, 7 L.L.R. 37 (1939), this Court held that an application to dismiss an appeal pending before the Supreme Court must allege neglect to take some steps necessary to bring the case within the Court's jurisdiction and that, if no such grounds are shown, the appeal will not be dismissed but will be heard.

McCaffrey in his treatise on statutory construction has this to say:

> "It is a general rule of statutory construction that *expressio unius est exclusio alterius.* That is to say, the specific mention of one person or thing implies the exclusion of other persons or things (*Wallace* v. *Swinton,* 64 N.Y. 188). This maxim has its basis in the rules of logic and the natural workings of the human mind. It has been used in the construction of practically all types of statutes. Though this rule of construction must be applied with great caution, there are still many cases in which it aids the court in searching out the legislative intent. It is particularly applicable in the interpretation of statutes which are within the application of the rule of strict construction. Where an enactment is carefully drafted in the light of existing rules of construction, the inference that matters not expressly mentioned were intended to be excluded is entitled to greater weight (*Behan* v. *People,* 17 N.Y. 516). The following observation of the Court in *Ford* v. *United States,* 273 U.S. 593, is a guide to the use of the maxim: 'This maxim properly applies only when in the natural association of ideas in the mind of the reader that which is expressed is so set over by way of strong contrast to that which is omitted that the contrast enforces the affirmative inference that that which is omitted must be intended to have opposite and contrary treatment.' If it is clear that the legislature did not intend that its express mention of one person or thing should be taken as an exclusion of all others, then the rule must yield." MCCAFFREY, STATUTORY CONSTRUCTION 50–51 (1953).

Having now reviewed our statute, several opinions of this Court, and the common law we still have before us the *Nyenee* case, *supra,* in which this Court at 9 L.L.R. 192, quoted the "OLD BLUE BOOK" as follows:

> " 'These [sic] shall be no appeal from any verdict

> of a jury, in any question of mere fact, except to the court in which the case was tried, for the purpose of setting aside the verdict in the manner herein before provided for.' STAT. OF LIBERIA (OLD BLUE BOOK) ch. XX, § 2, at 78. 2 Hub. 1578."

In respect of this pronouncement of the Court in that case, we have but to say that the Court's statutory reliance was upon legislation that is now extinct since the passage of our Code of Laws in 1956. During that year the Criminal Code that was then made a part of our Code of Laws specifically enumerated the legal deficiencies of which judicial cognizance could be taken for the dismissal of an appeal. In view of this fact, it becomes unnecessary for us to overrule the *Nyenee* decision, for it was a correct interpretation only of the law that prevailed at the time of its pronouncement.

Lastly, we would like to note that the request being made of us in the application to have the appeal dismissed creates a rather anomalous situation in that, paradoxically, we have been requested not to review the proceedings of the court below, but at the same time we are told that the only way it is possible for us not to review the lower court's proceedings is to review a certain portion thereof as same relates to the trial judge's ruling on the motion for new trial which constituted a count laid in the bill of exceptions. In passing, we must here say that we cannot both do and not do a thing at the same time, especially when by doing the thing sought, we will be in violation of an express statutory provision which requires our mandatory compliance therewith.

In view of the above, it is the considered opinion of this Court that the motion as filed is not well taken in law and to sustain it would be violative of statute extant; and in the premises, the motion is hereby denied. And it is hereby so ordered.

Motion denied.