CASES ADJUDGED

IN THE

SUPREME COURT OF THE REPUBLIC OF LIBERIA

AT

NOVEMBER TERM, 1941.

JESSE H. BANKS, Appellant, *v.* REPUBLIC OF LIBERIA, Appellee.

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

Argued December 8, 9, 10, 1941. Decided December 30, 1941.

1. When a physician, having treated a juror once during the trial and having found the juror suffering from chronic malaria and lumbago, during a subsequent examination of the physician in court stated that said juror was capable of coolly deliberating, a motion for a new trial on the ground that said juror could not properly follow the testimony will be denied.
2. Assault by defendant, now appellant, upon the private prosecutor in retaliation for an earlier and discontinued assault by said prosecutor upon said defendant is not justifiable.

On appeal from a conviction for assault and battery, *judgment modified.*

S. David Coleman for appellant. *The Attorney General* and *A. J. Padmore,* Revenue Solicitor, for appellee.

MR. CHIEF JUSTICE GRIMES delivered the opinion of the Court.

Prior to the general election of 1939 there were, as usual, primaries held in all the voting precincts of the country, each bringing forward a man whom it was hoped

the respective county conventions would adopt as its candidate for the House of Representatives. It was in the township of Brewerville in Montserrado County on the twenty-eighth day of March, 1939, in one of these primaries, that the curtain rises on this interesting little legal drama, revealing to our sight two groups, each contending for the recommendation of its nominee. Bull, the private prosecutor, was as ardent a leading adherent of the group sponsoring Williams as Banks was of the one espousing the endorsement of Curtis.

The more immediate cause of the altercation which ultimately developed into this prosecution was a contention about the eligibility of certain unlettered citizens to vote at this stage of the campaign and each side, arguing strenuously for exclusion or non-exclusion of his following, began to use language which Bull and Banks reciprocally complained was offensive to their *amour propre.* In a short while an interchange of blows followed, whereupon other partisans intervened, separated the combatants, and restored such a semblance of peace and tranquility that the business of the meeting was allowed to proceed.

In a short while thereafter, one witness said between ten and fifteen minutes and another witness set the minimum limit at twenty minutes, the time had come to decide the issue by counting the votes, whereupon the chairman ordered all the partisans outside the hall. And it would appear, although the record on this point is not clear but it was suggested during the argument here and not denied, that the method of voting was to count each partisan's vote as he filed back into the hall.

All the witnesses, both for the prosecution and for the defense, agree that Bull came out quietly with a chair in his hand and, upon the invitation of the Rev. Dr. Thomas, seated himself in the vicinity of such decent and respectable citizens as were gathered around the doctor, and was there sitting quite composedly when the curtain rose on the next scene in the drama, which was as follows:

Out of the house came Banks, the appellant, in a menacing attitude, being held as if to restrain him by a small crowd remonstrating against his doing any act of violence. Approaching Bull, the private prosecutor, in this threatening manner, the said Bull arose from his seat only to receive from Banks, the appellant, a severe kick in the pit of his stomach.

This is an epitome of the facts which led to the indictment, trial, conviction, and sentencing of appellant, from which he has prosecuted an appeal to this Court upon a bill of exceptions containing twelve counts. But we propose in this opinion to deal only with the four points in the bill of exceptions which were principally emphasized by counsel when the matter was argued at this bar.

First of all, appellant vigorously protested against the admission in evidence, over his objection, of the certificate given by the physician who attended Bull, claiming that said certificate so given had not been obtained by order or request of any of the prosecuting officers, but was merely a private arrangement between the patient and his private physician. Appellant cited no law in support of his contention and we know of none. Furthermore, we do not believe that any provision can be found anywhere in our code of laws that would support our ruling out said certificate. We regard same as a mere record made of facts found by the doctor contemporaneously upon examination of the patient, which certificate should be admitted or rejected on condition it complied or failed to comply with the hearsay rule. In the case at bar Dr. Sajous, the physician who issued said certificate, was brought to the stand, testified, and was cross-examined thereon, and we are of the opinion that the hearsay rule was thereby satisfied, and that the certificate was properly admitted in evidence thereafter. 1 Greenleaf, Evidence §§ 120*a*, 120*c*, 439*b*, at 204–07, 209–13, 540–42 (16th ed. 1899).

Appellant next contended that the trial judge, having been requested to reduce his charge to the jury to writing, committed a reversible error when he made oral com-

ments to the jury not contained in the written charge. When asked at the bar appellant was unable to state what the gist of those comments was. The question was raised in the sixth count of the motion filed to set aside the verdict and award a new trial. His Honor the Trial Judge in his ruling on said motion made the following asseveration:

> "With regard to count six the court emphatically denies making any oral charge to the jury in this case. Of course the court did not quote the passages of law which it referred to in its charge, and aside from reading them to the jury the court said nothing which is not mentioned in the charge."

The rule of law which empowers an appellate court to set aside a verdict and award a new trial because a trial judge made comments to a jury not contained therein, after having been seasonably requested to reduce his charge to writing, is intended to prevent said judge from making any remark to said jury which, having been merely orally uttered, is incapable of being preserved for the review of the appellate court. The trial judge's asseveration above quoted, coupled with the fact that he placed on record the name of each authority he cited together with the page and section thereof, permits us to refer to and to read those authorities for ourselves and to obtain thereby a complete word picture of what he charged, thereby obviating the necessity of the complaint which appellant on that score has made at this bar. See 38 Cyclopedia of Law and Procedure *Trial* pages 1767–1768 (1911) for a discussion of this point.

Another exception to which appellant seemed to have attached considerable importance was his claim that one of the jurors, one Joseph Dawson, was ill and could not properly follow the testimony in the case. This contention, the record shows, was first raised only after the jury had been disbanded and had gone to their respective homes; hence the said Dawson himself was not produced

to testify during the investigation held by the trial judge in order to discover the truth or falsity of the allegation. But the said judge did not neglect to have called and to have examined the physician who attended the juror. The physician testified that he had given one treatment during the term of court to one Joseph Dawson, a juryman, upon the request of the court and county attorney, and that said juror was suffering from chronic malaria and lumbago. He was then asked whether or not said illness could so affect the juror's mind as to prevent said juror from coolly deliberating. The physician's answer was "no." His emphatic negative answer to the question whether or not the nature of the disease so interfered with the mind of the patient as to prevent the patient's cool deliberation did, in our opinion, warrant the judge's denying the motion for a new trial on said ground.

And thus we come at last to the kernel of appellant's contention, the subject of complaint in the tenth count of the bill of exceptions based upon the fifth count of the motion for a new trial, which reads as follows:

> "And also because it was conclusively proven by evidence that the assault and the tearing of defendant's coat accompanied by a blow from the private prosecutor by his fist on the head of the defendant near the cheek, took place prior to the alleged kicking, and, in circumstances of the kind, the effort or attempt on part of the defendant to retaliate, was an act which the law fully justified."

Such a novel theory of the law as that therein propounded and reiterated several times during the oral argument of appellant calls for the most careful elucidation on our part in order that the correct view may be unequivocally expounded and settled, lest some court, practitioner, or other person be led into error in a matter of similar or even greater import.

First of all, we must premise that the law of homicide is so integrated into that of assault and battery with intent

to kill or to do grievous bodily harm, as to have provided as follows:

> "The mental element in this crime differs in no respect, it seems, from that requisite to the crime of murder—'malice,' in a word. To warrant a conviction the circumstance disclosed by the evidence must be such that, had death ensued from the result, the crime of murder would have been complete." 13 R.C.L. *Homicide* § 103, at 800 (1916).

Then the question is, had Bull died from that kick would it have been murder or manslaughter? That question involves questions of intent, of malice, and of hot blood, and involves more particularly whether or not there was any legal justification in appellant having at that time kicked the private prosecutor, as has been contended in the court below as well as at the bar of this Court.

The attention of counsel for the appellant during his argument at this bar was directed to section 134 of Wharton on *Criminal Law* which he read for the benefit of the Court, omitting the Latin quotation therein found; but he was thereupon ordered to reread same and to translate for the Court's benefit said quotation in which is contained the kernel of the law of self-defense, which is particularly appropriate to the facts in this case. The quotation reads as follows:

> "When the danger is over, the right of self-defense ceases. It follows that when a thing which is the object of attack is finally taken from him, the loser cannot ordinarily use violence to recover it. For this purpose he must resort to process of law. The technical right extends to the defense of a thing before it is taken; not to its recovery after it is taken. *Quamvis vim vi repellere omnes leges et omnia iura permittunt, —tamen id debet fieri cum moderamine inculpatae tutelae, non ad sumendam vindictam, sed ad propulsandam iniuriam.* . . . But an assault on his person

> he cannot punish when the danger is over. His right is defense, not retribution." 1 *Id.* at 177 (11th ed. 1912).

Now let us stop and analyze said principle. The original meaning of the word *moderamine* in the above quotation is "with a rudder" and, taken in its context, means that when one undertakes to repel force by force he should have his passions under a control similar to that with which a rudder controls a vessel. The expression *inculpatae tutelae* indicates that the privilege of self-defense is for the protection of one who himself is blameless, and is analogous to the principle of "retreat to the wall . . . retreat to the ditch," quoted and discussed in 13 Ruling Case Law 824–25 (1916).

More important still is the fact, as was pointed out to appellant's counsel at this bar, that the verdict phrases which follow are in the gerundive, and the gerund always implies continuity of action; hence *non ad sumendam vindictam* negates entirely the contention of appellant that said appellant, nourishing a grievance rankling in his breast, would have the right to take revenge; instead it imposes upon him, as the expression *sed ad propulsandam iniuriam* implies, the duty and responsibility of so controlling himself by keeping his hands upon the reins of his passions as to use force only proportionate to the attack, and for only so long a period as the injury is threatened or impending.

We note that the discontinuance of the combat, which we at the beginning of this opinion tried to emphasize by distinguishing between the drop of the curtain at the end of the first scene and its rise at the beginning of the second, was also fatal to the contention of appellant, and this brings to our mind another relevant and important principle necessary to be emphasized in this case.

> "In some cases the accused has sought to free himself under the plea of self-defense, upon the ground that the quarrel preceding the one in which the homi-

cide occurred was superinduced by the deceased. In such cases, however, the plea of self-defense will be of no avail where the first quarrel has ended, and there has been a cessation of the conflict, or the deceased has withdrawn therefrom, and the subsequent difficulty is provoked or brought about by the accused himself, as he is the aggressor in bringing on or renewing the affray, even though in so renewing the difficulty he has no intention of killing or of doing serious bodily harm. But the rule would be the reverse if there was no cessation from the time the deceased struck the first blow or commenced the difficulty." 13 R.C.L. *Homicide* § 136, at 832 (1916).

It will be seen from the foregoing that the contentions of appellant's counsel, hereinbefore quoted from the fifth count of his motion for a new trial, are totally in conflict with the principles of law hereinbefore cited. Such erroneous views of the law may lead to grave consequences unless properly and speedily corrected. Moreover, we would feel rather remiss in the performance of the sacred duties devolving upon us were we to neglect to express in the strongest manner our disapproval of a growing tendency to import into meetings called for the discussion of business appertaining to a township's selection of a candidate or for other purposes, rowdyism, force, or blackguard behavior rather than calm, logical reasoning and at least decent and polite behavior on the part of all concerned.

It is true that when appellant's counsel began to gather from questions propounded from the Bench during the argument that his plea of justification was not being favorably received by us, he abandoned his stubborn defense on the ground of justification and began pleading for mercy, apprehending that we were contemplating such an increase in the sentence awarded by the court below as to make his punishment more commensurate with the gravity of the crime proven. But while considering favor-

ably his latter plea, the plea for mercy, it is our opinion that, in view of all the circumstances proven at the trial, the best we can do is increase the punishment by an addition of only twenty-five percent of the fine, and/or the period of imprisonment, and in all other respects affirm the judgment of the court below; and it is hereby so ordered.

Judgment modified.