S. DAVID COLEMAN, Appellant, *v.* REPUBLIC OF LIBERIA, Appellee.

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

Argued April 8, 9, 14, 15, 1942. Decided May 8, 1942.

One charged with sedition has a constitutional right to demand as a prerequisite to being unconditionally imprisoned that a preliminary investigation be instituted to ascertain whether proof that he had committed a capital offense was evident or presumption thereof great in order that general bail be granted if the proof is not evident or the presumption not great.

Defendant, now appellant, was indicted for the crime of sedition. Since defendant was ill, he was allowed special bail until he was sufficiently recovered to undergo trial, at which time, the bail stipulated, he would be incarcerated pending trial. Defendant made an application for a speedy trial and general bail which was denied by the circuit judge. At the next term of court of the Circuit Court of the First Judicial Circuit defendant made a similar application on the same grounds to the circuit judge then sitting. Said application was denied on the ground that the judge could not review his predecessor's decision. On appeal from the denial of the second application, *judgment reversed.*

S. David Coleman for himself. *The Attorney General* for appellee.

CHIEF JUSTICE GRIMES delivered the opinion of the Court.

This appeal, if not altogether unique in the annals of our judicial history, presents at least certain anomalies, a few of which will be adverted to in the course of this opinion.

First of all, it has not been brought hither after a trial and judgment of the facts or upon any demurrer as is usually the case, but rather in order to have reviewed the decisions given and proceedings occurring after the arrest of, but prior to the arraignment of, the accused. It would appear from the records certified to us that the proceedings under review in this cause commenced as follows: At the November term, 1940, of the Circuit Court of the First Judicial Circuit appellant, S. David Coleman, was one of several defendants indicted for the crime of sedition. Process was ordered issued, but the defendant, having been reported ill at his home in Clay-ashland and the certificate filed by his attending physician in support thereof having been confirmed by another physician, Dr. Schnitzer, in the service of the Republic, was allowed special bail until such time as defendant should have recovered sufficiently to undergo the ordeal of a trial, at which time, the bail stipulated, he would surrender himself to the sheriff of the county for incarceration pending trial.

Six months later, at the May term of said court for 1941, there is on record an "application for a speedy trial" addressed to His Honor E. Himie Shannon, Circuit Judge then presiding in the First Judicial Circuit, the seventh count of which application we now proceed to quote:

> "7. Your applicant further respectfully submits that he is innocent of the charge as brought against him and that despite the special bail granted him in the instant of his illness he is entitled to a general bail under Constitution of Liberia which provides for same in all cases or instances where a defendant is held to answer for a capital offence when proof of defendant's guilt is not evident or presumption great. Your humble applicant therefore in this respect prays that this Honourable Court will institute such investigation of the

evidence or adopt such course as to satisfy the court in regard to defendant's guilt in the premises and thus order the granting of a general bail in addition to the special bail if necessary; in the meantime granting to your applicant fair, speedy and impartial trial of the case as will be in consonance with justice and good government."

The prosecution thereupon filed a resistance to the said application, objecting to the court's granting same, upon five grounds, the fourth and fifth being as follows:

"4. That at no time since the founding of the indictment against defendant Coleman has the prosecution refused to go forward with the trial of the case as will be seen by copy of the minutes of February 25, 1941 of the circuit court, first judicial circuit, attached and marked exhibit "B". And what the prosecution has refused to do is to connive at the ingenious contravention of the terms of the obligation filed by the defendant. See Minutes marked exhibit "B".

"5. That after the hearing of the application for speedy trial filed by the defendant in the court below, that court ruled inter alia 'that from the observation of his counsel it is apparent that the defendant is still unable to attend the trial of the case; that being a criminal case which will require the presence of the defendant throughout the trial, further the offence with which defendant is charged being a capital one, and bail not permitted except under special condition as the one now, to commence the trial of the case now would be useless; the application with much regret is denied and since the defendant is still ill he will be permitted to remain under special bail or until the stipulations therein be complied with; and it is so ordered,' at which time the law requires in such causes made and provided the Resident

Judge or any other Circuit Judge whether assigned or not may convoke a jury and proceed with the trial of the cause.

"(See Minutes February 25, 1941.)

"The defendant excepted to this ruling but did not appeal therefrom."

The aforesaid judge, after hearing the arguments *pro et con,* denied the application of defendant, taking pains in his ruling thereon to make it clear that his decision was not based upon his personal convictions of the law controlling in said case, but upon his inability to review the decision of a colleague, His Honor Judge David, also a circuit judge who, at a previous session held in the February preceding, had denied a similar application of defendant, now appellant, which application was upon the same grounds upon which the application then pending was predicated. Defendant, now appellant, had excepted to this previous decision, but had not appealed from said decision and instead had filed this second application which Judge Shannon, as a judge of the same grade as Judge David, felt himself legally incapable of reviewing. It is from this decision of His Honor Judge Shannon, confirming that of His Honor Judge David, that the appeal was prosecuted to this Court upon a bill of exceptions containing five counts.

It is significant that although defendant, now appellant, limited his application to two points, *viz.:* (1) The granting of a speedy trial while under special bail, and (2) The institution of an investigation to ascertain whether or not the proof of his guilt were evident or the persumption thereof great in order that, if not, ordinary bail might be granted; it was the prosecution which, in the fifth count of its resistance filed at the May term of Court, quoted from the ruling of Judge David, stating that sedition is a capital offense. The prosecution also filed as an exhibition to the prosecution's second resistance in May, 1941, the minutes of February 25, 1941

containing this statement. Judge Shannon in his ruling of May 27, however, although denying the application, made the following observation:

> "Sedition as defined in the Criminal Code of 1914 and in subsequent statutory enactments, is not wholly a capital offence; but it only reaches this degree where 'death or other serious bodily injury is the result of the acts, or the safety of the nation is seriously imperiled.' "

Hence the point that sedition is in every instance a capital offense, raised by the prosecution and argued before two circuit judges both of whom expressed opinions thereon, brought into prominence a third issue not originally raised by the defendant, now appellant, but by the prosecution. In both the brief and the two amended briefs filed in this Court by the Honorable Attorney General appearing on behalf of the Republic he submitted and argued with great emphasis that "sedition is a capital offence, and under the laws of this Republic is not bailable." See count 1 of appellee's first brief, count 2 of appellee's amended brief of April 9, and count 2 of appellee's amended brief of April 11.

The question of whether or not the offense charged was a capital one, although not originally raised thus by the resistance of the prosecution, became one of paramount importance, and in order to be responsive to that argument we must first inquire about what a capital offense is. Bouvier defines a capital crime as "one for which the punishment of death is inflicted." 1 Bouvier, Law Dictionary *Capital Crime* 419 (Rawle's 3d rev. 1914). *Corpus Juris* enlarges upon this definition as follows:

> "An offense for which the highest penalty is death; one for which the penalty of death is inflicted; one which is punishable or liable to punishment with death; a crime which may be punished, in the discretion of the jury, with the penalty of death. The expression is descriptive of those felonies to which

the death penalty is affixed as a punishment under given circumstances to distinguish them from that class in which under no circumstances would death ever be inflicted as a penalty for the violation of the same." 9 Corpus Juris *Capital Crime, Felony, or Offense* 1279–80 (1916).

It is obvious then that appellant upon being charged with sedition did have a constitutional right to demand, as a prerequisite to being unconditionally imprisoned, that a preliminary investigation be instituted to ascertain whether proof that he had committed a capital offense were evident or the presumption thereof great, especially in view of the nature of the indictment presented by the grand jury against him. In *Ruling Case Law* we find that:

"Under a constitutional provision guaranteeing the right to bail except in capital cases 'when the proof is evident,' the word 'evident' means manifest, plain, clear, obvious, apparent, and notorious, and therefore unless it plainly, clearly and obviously appears by the proof that the accused is guilty of a capital crime, bail should be allowed. As has been very cogently pointed out, the terms 'proof is evident or presumption great' are as definite to the legal mind as any words of explanation could make them, and are intended to indicate the same degree of certainty whether the evidence is direct or circumstantial. These statements make clear the conclusion that a mere conflict in the testimony is insufficient of itself to warrant the allowance of bail, and the same is true of the fact that the evidence against the accused is circumstantial. On the other hand where it is uncertain whether the accused is innocent or guilty—in other words where, upon an examination of the testimony, the presumption of guilt is not strong, the court will exercise its discretionary powers and admit to bail; and it is particularly called upon to bail in all cases where the

presumptions are decidedly in favor of the innocence of the accused. . . ." 3 *Id. Bail and Recognizance* § 8, at 10–11 (1914).

In a series of notes in the annotation to the case In re *Thomas,* 20 Okla. 167, 93 Pac. 980, 39 L.R.A. (n.s.) 752 (1908), the question of bail in cases in which a person is charged with a capital crime is very exhaustively examined. We find the following pertinent comments therein:

"A constitutional provision that 'all persons shall be bailable by sufficient sureties, unless for capital offenses when the proof of guilt is evident or the presumptions great,' guarantees the right to bail before trial in capital cases, unless the proof . . . is evident or the presumption thereof is great. State ex. rel. West v. Collins, 10 N.D. 464, 88 N.W. 88, 12 Am. Crim. Rep. 41.

. . . . . .

"A constitutional provision that 'excessive bail shall not be required; and all persons shall, before conviction, be bailable by sufficient sureties, except for capital offences when the proof is evident or presumption great' (Bill of Rights, § 8), makes the granting of bail mandatory in all cases not excluded by the exception, but does not prohibit it in cases falling within the exception. . . . [Ex parte *Bridewell,* 57 Miss. 39.]

"A constitutional provision that 'all persons shall be bailable by sufficient sureties, unless for capital offenses when the proof is evident or the presumption great,' does not forbid bail in a capital case where the proof of guilt is evident or the presumption thereof is great. The Constitution is silent as to granting or withholding bail in a capital case where the proof of guilt is evident or the presumption thereof is great. On the one hand, the Constitution itself does not give the right to bail in the class of cases last mentioned;

and on the other hand, the Constitution does not inhibit the legislature from doing so. State v. Collins, 10 N.D. 464, 88 N.W. 88, 12 Am. Crim. Rep. 41.

"Although the facts presented to the court on the application for bail as a matter of right may not be sufficient to entitle the accused thereto, this does not mean that he may not present facts which might move the court to admit him to bail as a matter of discretion. *Ibid.*

. . . . .

"In People v. Porter, 8 Barb. 168 (note by reporter), the prisoner voluntarily appeared on the coming in of the indictment, and by his counsel offered to give bail for his appearance at the next oyer and terminer to be held in said county in June thereafter. The grounds, as disclosed in several affidavits, were a defense on the merits; the absence of material evidence; the feeble state of the prisoner's health, which would not endure a protracted imprisonment; and he proposed also to disclose the nature of his defense. The district attorney consented that the court might admit him to bail, if they had the power to bail after indictment for murder. He consented, also, that the court might look into the evidence taken before the grand jury, and the affidavits furnished by the prisoner disclosing his defense. The court, after examining the several documents submitted to them, decided that they had the power to admit to bail, and accordingly let the prisoner to bail in the sum of $5,000, to appear at the next oyer and terminer." Annot. 39 L.R.A. (n.s.) 752, at 756–58, 769–70 (1912).

This would seem to negate the contention of the Honorable Attorney General that an inquiry into whether the proof of the offense charged is evident or the presumption is great cannot be instituted unless the accused is in

actual custody for, in the last case cited above, it would appear that the inquiry proceeded even before the service of process. That case, moreover, was one which, as in the case at bar, was commenced by the presentment of a grand jury and the application for bail did not arise out of a finding by a committing magistrate, and one cannot read the extensive notes above referred to without coming to the conclusion that courts having trial jurisdiction of crimes of the grade of felony are more reluctant to grant bail after presentment by a grand jury than upon a preliminary examination. Nevertheless there are several cases cited in which after indictment the accused has been permitted to "go behind the indictment" and submit affidavits or other testimony to show that the proof was not evident or the presumption great. From the numerous cases cited in the above annotation we have selected a few which are now hereinafter quoted:

> "In Re Losasso, 15 Colo. 163, 10 L.R.A. 847, 24 Pac. 1080, it is said: 'Most, if not all, of the state Constitutions, now contain provisions substantially similar to section 19 of our Bill of Rights, which reads as follows: "That all persons shall be bailable by sufficient sureties, except for capital offenses, when the proof is evident, or the presumption great." It will be observed that this constitutional provision is entirely silent as to the *status* of the prosecution. It does not say that *upon indictment* for a felony or for a particular kind of felony, the beneficent privilege conferred is withdrawn. On the contrary, its terms are broad enough to include persons accused of any crime whatever, *after as well as before indictment.* The only exception expressly made has reference to capital offenses, but this exception is wholly inoperative if the proof of guilt be not evident, and the presumption great. Had the framers of the constitution intended to provide that the indictment should be conclusive in capital cases, they would, in all probability, have

said so. A simple declaration to this effect would have avoided all doubt and embarrassment.'

"In the same case it is said: 'The English cases, and the American cases adopting the English rule, all concede the right to be heard upon an application for bail after commitment by a coroner's inquest or an examining magistrate. The character and scope of the inquiry are in many instances circumscribed, yet the right to be heard is nevertheless unquestioned. But, under our practice, it would ordinarily accord more nearly with justice to hold the finding of a coroner's inquest or a committing magistrate conclusive as to the clearness of guilt, than the report of a grand jury. In the former cases the accused may appear in person and by counsel. He may be heard in argument, may produce evidence, and make his own statement. But the proceedings of a grand jury are inviolably secret and wholly *ex parte,* evidence for the state being alone received. The accused is not present, and in many instances is ignorant of the fact that charges against him are being considered. He cannot be represented by counsel, or be heard upon the legality or bearing of the evidence adduced. The officer employed by the state to prosecute exercises a large influence in the selection of witnesses to testify; gives the only legal advice, unless the court be called upon; and usually directs to a considerable extent the entire proceeding. The rule that the proof of guilt thus offered and weighed should be *pro forma* treated as "evident," and that the presumption thus arising should in the same matter be pronounced "great," is largely a legal fiction. It finds little support in reason.'

. . . . .

"Indictments are found upon *ex parte* testimony, and hence often upon an incorrect understanding of the case; and further, upon an indictment for murder

in the first degree, the accused may be convicted of murder in the first or in the second degree, or of manslaughter. An indictment for murder in the first degree is therefore in reality an indictment for some one of three offenses, upon either of which the defendant may, according to the evidence, be convicted. Prosecuting attorneys are consequently tempted, as a matter of policy, to draw their indictments cov[er]ing the highest offense,—thus including the inferior,—rather than for either of the lower, which does not include the superior. The indictment, therefore, should not be taken as conclusive of the grade of offense, in determining the question of bail. Lumm v. State, 3 Ind. 293.

"In State v. Crocker, 5 Wyo. 385, 40 Pac. 681, 9 Am. Crim. Rep. 468, in holding that an indictment is not conclusive evidence that the proof of a guilt is evident or the presumption great, in an application for bail in a capital case, the court said: 'The grand jury does not determine and are not clothed with the power to decide, the question of bail in any case. The court or judge is to exercise that power in all cases; necessarily, then, the authority which fixes the bail and who is to settle that matter must determine the right to bail. That authority, then, must decide, and in that authority alone resides the duty and right to decide as to whether or not the proof is evident or the presumption great. Is this to be determined for the court in all capital cases by a grand jury, generally unskilled in the law, incapable of judging as to the materiality or admissibility of testimony? We cannot so conclude. No doubt the finding of an indictment is prima facie evidence that the proof is evident and that the presumption is great, and if not so, the legislature may well so provide, thus throwing the burden of proof upon the defendant to establish the contrary. . . .'

"Certain exceptions to the common-law rule in relation to bail in capital cases are recognized. Among these exceptions may be mentioned serious illness of the prisoner; delay by the state in bringing him to trial; consent of the prosecuting attorney to the taking of bail; the existence of public excitement at the time of the finding of the indictment, likely to prejudice the grand jury; the confession of another that he did the killing, and the like. These exceptions are, in the main, prompted by considerations of actual or probable hardship. Courts sometimes exercise a sound judicial discretion, and admit to bail in such cases, even when the proof appears to be evident or presumption great. But it occasionally happens that, by means of malicious or of prejudiced or perjured testimony, or upon wholly insufficient proofs, indictments are procured charging the crime of murder, and a long period must elapse before a trial can be had. The same promptings of humanity, reinforced by strong considerations of justice, would also sanction the hearing of proofs on the question of bail, where such matters, or some of them, are allowed as a ground of the application. Re Losasso, supra.

"In Com. v. Lemley, 2 Pittsb. 362, the court said: 'Suppose after indictment found for a capital offence, circumstances render it perfectly apparent that the prisoner is innocent: take a case which has actually occurred; the man supposed to be murdered, has only absconded and afterwards returns, in full life and stands before the judges as a witness upon the hearing, would it not be barborous [*sic*] to keep the prisoner in jail until the trial, simply because an indictment has been found?'" *Id.* at 765–66.

This Court recognizes that a charge of sedition is under any circumstances a charge of a very serious nature; and the gravity of such a charge is considerably en-

hanced by an allegation that the persons participating in the conspiracy were contemplating the assassination of the Head of the State. But, nevertheless, we should always keep in mind the admonition left on record by the late Justice McCants-Stewart in the murder case of *Lawrence* v. *Republic,* 2 L.L.R. 65, 66 (1912), that "in this Court passion is stilled, and the calm spirit of the law must prevail." This expression, "the spirit of the law must prevail," indicates that no matter how grave may be the charge alleged against a party, no matter how shocked the minds of the individual judge or Justices may be at the enormity of the offense charged, the court is compelled to confine itself, in deciding questions, to the issues submitted to it for adjudication and to an objective and dispassionate consideration thereof.

In spite of the prosecution's having neglected to demur to a discussion of the insufficiency of the indictment to charge a capital crime, and having itself argued exhaustively that the crime charged was a capital one and that the indictment was sufficient to charge said capital offense, we, as the Supreme Court of Liberia, will not at this stage express any opinion upon those features of the argument partly because the accused has not yet been arraigned; partly because the prosecution took issue with the accused and argued almost exclusively about whether or not sedition is a capital offense when that issue was not in any of the counts raised in the application of defendant; but more particularly because we would be adroitly led into exercising original jurisdiction contrary to the Constitution to decide upon that or any other point not considered and decided in the court below.

It is therefore our opinion from the reasoning above that the judgment of the court below should be reversed, and the case remanded with instructions that the court below institute an inquiry to ascertain whether the proof of the commission by appellant of a capital offense is

evident or the presumption thereof great in order that if the proof be not evident or the presumption be not great appellant be forthwith granted general bail pending the trial; and that appellant have a speedy trial on the indictment found against him; and it is hereby so ordered.

Reversed.