THOMAS MASON, Appellant, *v.* REPUBLIC OF LIBERIA, Appellee.

APPEAL FROM THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT, GRAND BASSA COUNTY.

Argued January 18, 1934. Decided January 29, 1934.

1. In the event of the failure of a jury to agree, the court may disband the jury and award a new trial, and in such event the defendant cannot successfully plead second jeopardy.
2. When a trial judge unduly abridges the right of cross-examination the verdict will ordinarily be set aside and a new trial awarded, except as in the case at bar when the cross-examiner is pursuing a theme which can have no material bearing upon the merits of the case.
3. When the instruments with which a crime has been committed have been so clearly identified by the testimony of witnesses as to leave no doubt but that they were used for the purpose of committing said crime, they should be admitted in evidence.
4. Whenever a defendant accused of crime attempts to prove his good character, the prosecution has a right to adduce testimony in rebuttal.
5. Although the trial judge is bound under the law to reduce his charge to writing when requested by a party so to do, yet the request must be made at the proper time; nor is the judge bound to frame his charge in the manner counsel would dictate.
6. A judge is correct in refusing to allow a person who had served upon a coroner's jury to serve again on the trial jury in the same case. But if when attempting to disband the jury and award a new trial, prisoner's counsel objects, and the judge thereupon desists from so doing, prisoner is thereafter estopped from raising the point that the conviction thus secured was illegal.
7. A difference must be made between statutory offenses and those arising under the common law. In the former class indictments will be sufficient which conform to the words of the statute and the forms prescribed.
8. When a person is charged with a felonious homicide the jury should be given by the evidence as complete a picture as possible of all the surrounding circumstances.
9. When the evidence satisfactorily proves the commission of the crime charged, the verdict and judgment rendered thereon will be affirmed.

Appellant, defendant below, was convicted of the crime of murder in the Circuit Court of the Second Judicial Circuit, Grand Bassa County. On appeal to this Court, *judgment affirmed.*

David A. B. Worrell and *Abraham B. Ricks* * for appellant. *Anthony Barclay* for appellee.

MR. JUSTICE RUSSELL delivered the opinion of the Court.

In the case at bar the defendant is charged with the commission of the crime of murder which is the highest offense in the category of crimes with which one can be charged, because it has been punishable in all ages by death; a crime the very mention of which causes human nature however debased and degraded to shudder and tremble.

The records of the court below show, with regard to the case at bar, that on the 31st day of March, 1931, appellant was at his hamlet on his farm, in the settlement of Harlandsville, in the County of Grand Bassa, when an altercation arose between him and one of his native women by the name of Wheamie; and he, the appellant, became so enraged with the said Wheamie that he kicked, beat, bruised and wounded her, which resulted in her death on the morning of the very next day after said kicking, beating, bruising and wounding by the appellant, whereupon he was arrested and taken before one Randolph P. Hill, a Justice of the Peace for the county aforesaid, for a preliminary examination, which disclosed sufficient magnitude justifying the case's being forwarded to the Circuit Court of the Second Judicial Circuit for further examination by the grand jury in accordance with the provisions of our Justice's Code, page 17, section 40.

On the 14th day of August, 1931, during the session of the aforesaid Circuit Court, an indictment was brought against him, the said appellant, by the grand jury, and he was put upon trial on the 10th day of May, 1932, before His Honor Edward J. S. Worrell, assigned Circuit Judge for that Circuit.

* Counsellor Ricks had signed the brief and assisted in the prosecution of the appeal until his suspension from the bar of this Court by an order dated January 26th, 1934 (see pp. 58, 65, *supra*); but he was not thereafter permitted to function as counsel.—Howard, Clerk.

After a trial which lasted several days the jury returned a verdict of guilt against him; to which verdict he excepted, and filed a motion in arrest of judgment, which motion was overruled by the trial judge, who proceeded to render final judgment against him, from which final judgment he appealed to this Court of last resort.

During the trial of the case, several exceptions were taken by the appellant to the ruling of the judge, the verdict of the petit jury, and the final judgment; and each of these several issues raised by the appellant as set out in the bill of exceptions we have carefully considered in all their legal phases. But inasmuch as most of them are irrelevant to the point at issue, and hence have no material bearing on the case, it is not the intention of this Court to deal with any but those which are important to a just decision of this case.

The Court wishes to observe here, that this is a case in which a life of a human being is at stake; and therefore we realize it to be our solemn duty, as the Court of last resort, to thoroughly investigate the whole case in all its ramifications, so far as it is brought within the grasp and purview of the Court, with a view to satisfying ourselves as to whether or not substantial justice has been done in the premises by the court below. For it is only in so doing that we will be able to ascertain whether or not the judgment which is now sought to be reversed was founded upon a verdict substantially supported by the testimony of witnesses in the trial of the case, because if the verdict is not supported by the evidence, then the judgment which is merely the conclusion of law upon the facts found or admitted, must automatically fall to the ground and crumble.

Let us now examine the bill of exceptions and direct our attention to the salient points raised therein.

1. Count one of the bill of exceptions states that on cross-examination, prisoner's counsel put a question to witness Peter Toliver, to wit: "Did you appear and de-

pose as a witness in this case at the trial during the November term of this court last year?" This question of the prisoner's counsel, in the opinion of the Court, had a tendency to draw from the witness his testimony given in the former trial in the proceedings which were vacated when the new trial was awarded; hence the testimony of the deposing witness could not be used in the new trial when he was present in person and was deposing in the new trial. The Court is therefore of the opinion that the trial judge did not err in overruling said question. See *Bey-Solow* v. *Gordon,* 2 L.L.R. 95, 1 Lib. Semi-Ann. Ser. 52 (1913).

2. The next point in the bill of exceptions which this Court will consider is the point of jeopardy raised in count two of said bill of exceptions which reads as follows: "And also because on the twelfth day of May A. D. 1932, Your Honour denied prisoner's motion offered for his discharge under the plea of jeopardy."

A perusal of the records evinces the fact that on the 12th day of May, 1932, prisoner's counsel filed a motion for the consideration of the court in which he set up as his grounds for said motion that at the November term of said court, during the trial of his case, the jury returned a verdict of guilt against him, the said prisoner, which verdict was contradicted by one of the jurors, whereupon the trial judge disbanded the jury and awarded a new trial. This act on the part of the trial judge, the prisoner considers to be a bar to a second prosecution. The impanelled jury returning a verdict which was not unanimous shows their failure to agree on a verdict; consequently, the court did not err in disbanding said jury and awarding a new trial. *Wood* v. *Republic,* 1 L.L.R. 445 (1905).

3. As to count 3 of the prisoner's bill of exceptions, the Court wishes to observe that it is a principle of law both common and statutory that a witness may testify to facts only, and not to opinions, except in cases of science. Li-

berian Statutes (Old Blue Book), ch. XII, p. 60, § 32. The question put to witness Peter Toliver, to wit: "Was decedent in a state of extremity at the time she told you these things which you have given in evidence?" has a tendency to elicit expert testimony which he was not qualified to give. It is the opinion of this Court, therefore, that the trial judge did not err in overruling said question.

4. Counts 4 and 5 of the bill of exceptions with respect to questions put to witness Toliver by the counsel for the defense, to wit: "Had the decedent fainted and become in a state of unconsciousness as you have said she was at the time she told you what you have stated as regards prisoner's ill-treatment towards her? And was it before or after decedent had fainted that she told you of the ill-treatment of the prisoner towards her as given in evidence by you?" were correctly overruled by the trial judge because there is no trace of any testimony in the evidence given by the several witnesses in the whole case to support same; nor was it shown that the decedent did ever come to life again after she had fainted. These two counts in the opinion of the Court are not supported by the records of the case. See sheet 3, Peter Toliver's direct testimony; sheet 8, cross-examination of same witness; latter part of sheet 2, Quaigie's statement; and the beginning of sheet 3. The opinion of the Court is, that the court did not err in overruling said counts.

5. It is set up in count 6 of the said bill of exceptions, that the trial judge discharged witness Peter Toliver whilst the prisoner's counsel was re-examining said witness. We must here observe that it is the prerogative of the trial judge to control the trial of a case as well as all deposing witnesses in such a way as to expedite the business of the court; but here at the same time, this Court cannot defend the conduct of the trial judge when he absolutely refused that freedom of action which the gravity of the case demanded where one was being tried for his

life, when he denied the prisoner's counsel the right of re-cross-examining the said witness, Peter Toliver. Our trial courts should exercise the greatest patience as well as diligence in the trial of capital offense because the dearest and most sacred of a man's inalienable rights is life. You may deprive a man of his liberty or deny him the pursuit of happiness, and all these may only be temporary in their ill effects. But when you take away a man's life you take all he has, and end forever his career so far as this world is concerned, and terminate all his ambitions and aspirations. Whilst courts should always guard with jealous care the rights of litigants in general, yet they should still more keenly watch with special interest every development in connection with the trial of a case where human life is at stake upon the principle that "it is far better that ninety-nine guilty persons should go free rather than one innocent person should be punished."

It is the opinion of the Court, therefore, that the trial judge erred in dismissing witness Peter Toliver while the prisoner's counsel was still carrying on his re-cross-examination. It is within the power of the trial judge to control the cross-examination and re-cross-examination in any case; but when the power is abused to the disadvantage and prejudice of a prisoner on a material point in a case, especially when the life of a human being is concerned, such an abuse will be sufficient ground for the appellate court to remand the case to be tried *de novo*. However, as the record does not show that there was any material point which the prisoner's counsel intended to establish from further re-cross-examination of witness Peter Toliver, the Court has not seen the necessity of remanding this case for a new trial.

6. The bill of exceptions in count 9 sets out "that Your Honour admitted in evidence instruments marked 'A' and 'B' against the legal objections of the prisoner's counsel." This Court cannot see upon what reasoning or principle

of legal deductions the prisoner's counsel predicates his contention as outlined in this count; neither can the Court concede the theory of law upon which he undertakes to predicate his argument raised here, and therefore will not accept his contention, because it must be considered sufficient identification in law when the witnesses introduced to prove the identity of an instrument agree on the material points to establish the identity of said instrument. (See testimony of Peter Toliver and Quaigai [*sic*].)

As to count 13 of the bill of exceptions the Court will say that the trial judge did not err in allowing witness Etta Harland to give evidence to rebut the testimony of the prisoner in attempting to prove his good character; because in the trial of a criminal case if the prisoner introduces witnesses to prove his good character, it is not error for the trial court to permit the prosecution to rebut said testimony or any part thereof. 1 Greenleaf, Evidence § 14b; *cf.* Beale, Criminal Pleading and Practice § 279.

Count 17 of the said bill of exceptions reads as follows: "And also because at the close of the argument by prisoner's counsel, he requested Your Honour to reduce his charge to the jury to writing and not to traverse the evidence in the case to the jury, but to confine your said charge to the law as found on page 47 of the Liberian Statutes (Old Blue Book) sections 10, 11 and 13. Hilliard's New Trial, chapter 11, pages 272, 273 §§ 30 and 31, to which request Your Honour acceded and promised to reduce your said charge to writing, but not as by directions of prisoner's counsel, nor in the manner in which prisoner's counsel asked."

By inspection of the entire record in the case, we fail to see the charge of the trial judge to the impanelled jury as requested by the prisoner's counsel, nor anything to show whether or not said charge was ever reduced to writing. We are strongly of the opinion that it is the impera-

tive duty of any trial judge, when so requested at the proper time by either party in a case, to reduce his charge to writing. In saying this, however, we want also to point out that the trial judge is under no legal obligation whatever to charge the jury in the way dictated by the prisoner's counsel. What we do say is that he is compelled under the law to reduce his charge to writing whenever requested by either party to a suit at the proper time so to do. It is the opinion of this Court, therefore, that the trial judge committed a serious error if he failed so to do under the circumstances outlined and shown above. See records, page 66; Circuit Court Rules, number 12; Liberian Statutes (Old Blue Book) under "Trial," ch. VII, p. 48, § 15.

The Court's attention is drawn to the 19th count of the bill of exceptions wherein the prisoner makes reference to his motion filed, attacking the very foundation of the case, which is the indictment of the grand jury upon which he was on the tenth day of May, 1932, arraigned, tried, and afterwards convicted. The contention of the prisoner's counsel in count 1 of the said motion is as follows: "That Samuel A. White, one of the impanelled jurors in the case, was disqualified, because he was a member of the coroner's jury in the case, and had expressed his opinion, which was evidenced by the verdict of the coroner's jury upon which his name appeared."

The Statute of Liberia under the chapter relating to juries is mandatory, and hence should be strictly followed. Liberian Statutes (Old Blue Book) ch. IX, p. 50, § 6. But from the records in the case, we find that in the trial when witness Thomas J. Haynes, coroner for Grand Bassa County, was on the stand to testify on behalf of the prosecution, during the cross-examination the following question was put to him by counsel for the defendant: "Please give the names of the twelve persons who served in the capacity of Coroner's jurors in this particular case?" Answer: "They are as follows:

Thomas J. Haynes, Coroner; S. A. White, J. R. R. Nurse, F. R. Mann, L. C. Smith, Isaac Brown, C. E. Carter, J. S. Stacks, J. N. Cooper, A. D. Williams, J. N. Yancy, F. J. Jones, and J. N. Potter." The records further show that from this answer of witness Haynes the court discovered that one S. A. White, who was one of the members of the present jury in the trial case, had previously served as a coroner's juror, which is directly against the statutes just quoted, and hence made the following ruling *inter alia:* "That the fact of Mr. White's serving on both juries having been brought out by witness Haynes, and in order that the prisoner may not take advantage of it in this case, and also, that no obstacle may be placed in the way of dispensing transparent justice in the case, the court will disband the jury and award a new trial."

To this ruling the prisoner excepted on the ground that inasmuch as he did not raise that issue on behalf of his client, he objected to the court's taking that course; and further protested against the court's discharging the jury, although it had been brought out in evidence that juryman White was disqualified to serve on said jury. This act on the part of the prisoner's counsel in our opinion is illegal and inconsistent.

It is the duty of all parties litigant to take advantage of their legal rights at the proper time; failing to do so is a waiver of such rights. 2 B.L.D., "Waiver." The action of the trial judge in this instance shows very clearly that he was endeavoring to safeguard the legal rights and privileges of the prisoner as secured to him under the law. But the said counsel for prisoner having protested and objected to the said action of the trial judge in the interest of his said client, the prisoner, he is now estopped from seeking same in his aforesaid motion in arrest of judgment. 1 B.L.D., "Estoppel." The Court desires to say further that the position taken by the trial judge in suggesting a discharge of the impanelled jury was well taken and strongly supported by law, and such ought to be followed under similar circumstances.

Counts 2, 3, and 4 of the aforesaid motion which attacked the legality, sufficiency and validity of the indictment, will now have the attention of the Court.

Mr. Bouvier gives the following as a definition of the legal term "Indictment" and this Court accepts said definition as being authoritative: "A written accusation against one or more persons of a crime or misdemeanor, presented to, and preferred upon the oath or affirmation by, a grand jury legally convoked. . . . A written accusation of a crime presented upon oath by a grand jury," and in continuation, gives its essential requisites. B.L.D. "Indictment." From this definition of Mr. Bouvier just quoted, the question that presents itself for the consideration of this Court with reference to the case at bar is: Does the indictment in point conform to and agree with the definition of Mr. Bouvier? This question raised by the counsel for the defense is one of vital importance and hence the Court desires to make such observations on it as to prevent any recurrence or repetition in any of our courts hereafter.

There seems to be a misconception on the part of some practitioners in our law courts of the vast difference that exists between common law offenses and statutory offenses, and, in consequence, the necessary legal requisites in framing indictments under their respective heads. Any ordinary lawyer will admit that some difference does and should exist between them; but what that difference is, and how to translate this distinction into practical effect, is what seems to be the problem with them.

Since the case in point is one emanating from the statutory side of the question, we shall confine ourselves to that division of criminal offenses.

Mr. Wharton in his *Criminal Procedure,* as well as his *Pleadings and Practice,* under statutory offenses, or offenses created by statute, says that:

> "Where a statute prescribes or implies the form of the indictment, it is usually sufficient to describe the of-

fense in the words of the statute, and for this purpose it is essential that these words should be used. In such case the defendant must be specially brought within all the material words of the statute; and nothing can be taken by intendment. Whether this can be done by a mere transcript of the words of the statute depends in part upon the structure of the statute, in part upon the rules of pleading adopted by statute or otherwise, in the particular jurisdiction." 1 Wharton, Criminal Procedure (10th ed., 1918) 308 et seq., § 269; Wharton, Criminal Pleading and Practice (9th ed., 1889), § 220.

In his *Criminal Pleading and Practice,* Wharton, continuing, says:

"On the general principles of common law pleading, it may be said, that it is sufficient to frame the indictment in the words of the statute, in all cases where the statute so far individuates the offence that the offender has proper notice, from the mere adoption of the statutory terms, what the offence he is to be tried for really is." *Ibid.*

From inspection of the indictment in this case, we observe that it is framed in the exact words of the Revised Statutes of Liberia, being the statutes upon which the indictment is founded. In all appeals in criminal prosecutions, this Court will support all indictments framed in conformity with the Revised Statutes of the Republic of Liberia. It is therefore the opinion of the Court that the trial judge did not err in sustaining said indictment. 2 Rev. Stat. 496, form 272.

The Court will now proceed to further consider the evidence adduced at the trial of this case upon which the verdict and final judgment are based.

"When a person is accused of a felonious homicide, it is both the right and the duty of the prosecution to give evidence of all those surrounding facts and circumstances which have any bearing upon the manner

of the death, and any tendency to show whether it was natural, accidental, or felonious, and if the latter, whether the deceased was *felo-de-se,* or died by the hand of another. The jury should be given as complete a picture as possible of all the surroundings; and this, irrespective entirely of any question of subsequently connecting the defendant with the transaction by other proofs. Such evidence is a necessary preliminary to any which shall be offered to connect any particular person with the homicide; and the more full and complete the prosecution make it, the better do they discharge their duty to the public, and if he is innocent, to the defendant also." 13 R.C.L. 906, § 211.

During the trial of this case, the prosecution brought on the stand one Peter Toliver as a witness, who deposed *inter alia:* "That the prisoner had his hammock up, and Wheamie, the decedent, came and sat in it, when prisoner said to decedent, 'Get up so I can lie down.' Decedent said, 'I am not going to do it.' Prisoner said, 'Let both of us sit in the hammock.' Decedent said, 'I have Sarah's baby in my hand.' Prisoner took the baby from the decedent, and sat in the hammock with the decedent; then he said to decedent, 'I told you to get up and let me sit down.' Prisoner then loosed the hammock and he and decedent fell. Decedent said to prisoner, 'Why you cut the hammock whilst I was sitting in it?' Prisoner hung up the hammock again and whilst lying in it, decedent cut it and ran. This enraged the prisoner, and he began to beat, bruise and kick decedent in the pit of her stomach whilst she was in a state of pregnancy, which kicking caused decedent to fall backward on the ground; and from these several wounds received by decedent from the prisoner, her death ensued the next morning." See record sheet 2, Peter Toliver's testimony.

This evidence of Peter Toliver is corroborated by wit-

ness Quaigie in all its material points. See record sheet 12, as well as the evidence of Thomas B. Lewis, M.D.

From the testimony of these witnesses the Court has come to the conclusion that the prosecution has proved its case beyond a reasonable doubt. Therefore, it is the opinion of this Court that the verdict and judgment in this case are supported by the evidence adduced at the trial and consequently the judgment of the court below should be affirmed; and it is so ordered.

Affirmed.