JAMES SAAR, Appellant, *v.* REPUBLIC OF LIBERIA, Appellee.

APPEAL FROM THE CIRCUIT COURT FOR THE TENTH JUDICIAL CIRCUIT, LOFA COUNTY.

Heard: March 18 & 19, 1981. Decided: July 29, 1981.

1. The provisions of the statute with respect to change of venue are mandatory and not discretionary on the part of the judge or court. It should thus not be regarded as a privilege but a right to be enjoyed by the accused.
2. In keeping with statute, the court has the authority to order the proceedings in criminal prosecutions transferred to another court of competent jurisdiction, if there is reason to believe that an impartial trial cannot be held in the county in which the case is pending. One accused or charged with the commission of a capital offense should not be deprived of his legal right to a change of venue, simply because he did not file a written motion along with an affidavit, sworn and subscribed to by him while he is in jail.
3. Although the venue of an action is properly laid, the court before which the action or proceeding is pending is generally authorized to change the place of the trial where there is reason to believe that it will be impossible to obtain a fair and impartial trial in the county selected, because of local prejudice, feelings, and opinions.
4. No person shall be held to answer for a capital or infamous crime, except in cases of impeachment, cases arising in the army and navy, and petty offenses, unless upon presentment by a grand jury; and every person criminally charged, shall have a right to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favour; and to have a speedy, public and impartial trial by a jury of the vicinity. He shall not be compelled to furnish or give evidence against himself; and no person shall for the same offense, be twice put in jeopardy of life or limb.
5. Except as otherwise provided by law, a witness may be cross examined as to all matters touching the cause or likely to discredit him.
6. To convict in a criminal case, not only should there be a preponderance of evidence, but also the evidence must be so conclusive as to exclude every reasonable doubt as to the guilt of the accused.
7. Under our law, an article, object, or instrument sought to be admitted into evidence must be properly identified, and when such article, object, instrument or document is not properly identified, it should not be admitted into evidence for lack of proper identification or proof of identity.
8. The judge of a court is not merely appointed to an office, but he is also elevated to a dignity. As such, he is dedicated and consecrated to the adjudication of the rights of litigants, and hence must avoid any course of conduct which would cause his impartiality to be questioned.
9. Every litigant, including the State in criminal cases, is entitled to nothing less than the cold neutrality of an impartial judge; hence, a judge who is prejudiced or otherwise disqualified may be successfully challenged.
10. It is of great importance that the courts should be free from reproach, or the

suspicion of unfairness, as the judiciary should enjoy an elevated rank in the estimation of mankind.

11. In criminal cases, a picture of all the surrounding circumstances forming the evidence should be put before the jury.
12. A court can never be the agent or the instrument of any government; nor can it align itself on the side of the prosecution in any case.
13. The proper duty of the court is to defend the rights of the weak against the strong.
14. The object of evidence is to secure a legal conviction.
15. No evidence should be received which is second handed and regarding which no testimony is produced but is rendered only producible.
16. Averments in a pleading to which a responsive pleading is required are admitted when not denied in the responsive pleading.
17. When an essential allegation in a pleading is not denied in a subsequent pleading of the opposing party, the allegation is deemed admitted.
18. Variance means "a difference, and as employed with reference to legal proceedings, it denotes some disagreement or difference between two parts of the same proceeding which ought to agree. Thus, there may be a variance between the original writ and the declaration, or between the allegations and the proof.
19. It is a fundamental and vital principle of good pleading and practice that *allegata* and *probata* must correspond; that nothing can generally be proved that is outside the allegations, and that facts must be proved substantially as alleged. If they are not thus proved, variance results.
20. Variance may also be defined as a disagreement between a party's allegations and his proofs, and to be available, it must be in some matter essential, and material to the charge or claim.
22. Since the criminality of an act consists not only in its perpetration, but also in its being perpetrated in violation of the penal laws of the place where committed, the fact and place of perpetration of the crime, are both ingredients of the crime and must be proved by the prosecution in order to convict the defendant.
23. Where the defendant's presence at the time and place of the commission of the crime is essential to his conviction, the State's evidence necessarily must show his presence at the precise place and at the precise time. Where that fact is thus essential and the evidence, taken as a whole, whether adduced by the prosecution or by the accused, is sufficient to raise in the minds of the jury a reasonable doubt as to his presence at the scene of the crime, he is entitled to an acquittal.
24. It is the rule that in criminal prosecutions, that the defendant does not have the burden of proving an alibi upon which he relies as a defense.
25. An alibi is not an affirmative defense, and the evidence to prove an alibi is not to be treated as proof offered to establish an independent affirmative matter set up by the defendant.
26. Evidence to prove an alibi is merely to disprove one of the essential factors in the prosecution, namely, the presence of the accused at the place and time of the alleged crime.
27. Since an alibi is only a denial of any connection with the crime, it must follow that if proof adduced raises a reasonable doubt of defendant's guilt, either by itself or in conjunction with all other facts of the case, the defendant must be acquitted.
28. The giving of notice to the prosecution of the accused's intention to rely upon

an alibi as a defense does not shift the burden of proof from the prosecution to the defendant.

29. The prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of defendant, unless it demonstrates that procedural safeguards to secure the privilege against self-incrimination were utilized.
30. Custodial interrogation, entails the questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.
31. Unless other fully effective means are devised to inform accused persons of their right of silence and to assure a continuous opportunity to exercise it, the following measures are required: that prior to any questioning, a person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed.
32. A confession made while an accused person in custody is interrogated by the prosecuting attorney contrary to law, is disfavoured by the law, especially if the prosecuting attorney had neglected to warn the accused that he must be careful with what he says, as any admission made by him could be used against him.
33. Where the trial in a criminal case was not legally, regularly and fairly conducted in the court of origin, the judgment rendered affirming and confirming the verdict of the empanelled jury, will be reversed and the appellant ordered discharged without day.
34. The best evidence which the case admits of, must always be produced; that is, no evidence is better which supposes the existence of a better evidence.
35. In general, hearsay evidence is not admissible except it relates to ancient facts, declarations against interest, and memorandum made in the course of business.

Appellant was indicted for the crime of murder by the grand jury of the Tenth Judicial Circuit, Lofa County. These proceedings emanate from the second trial, a new trial having been granted upon motion duly filed after appellant was tried and convicted during the first trial. When the case was called for the second trial, appellant appeared in person without counsel, and asked the court for a change of venue. In view of the announcement made by the appellant, and the absence of his lawyers, the case was suspended and the clerk of court was accordingly ordered by the judge to inform appellant's lawyers by written notice of assignment to be present in court the next morning.

The application for a change of venue made by the appellant himself was confirmed and affirmed by his counsel at the resumption of the trial of the case the next day. The court, however, denied the application on the grounds that the motion should have been filed under oath prior to the calling

of the case.

Following the denial of appellant's application for a change of venue, the defendant was duly arraigned, at which he entered a plea of not guilty. Thereafter, a jury was selected, sworn and empanelled to try the issues thus joined between him and the Republic. The trial of the case was held and after arguments *pro et con* were entertained by the court, the jury was charged and they retired into their room of deliberation, from whence they returned a verdict of guilty against the appellant. Appellant then filed motions for a new trial and in arrest of judgment. Both motions were denied and exceptions thereto noted on the record. Thereafter, final judgment was rendered sentencing appellant to death by hanging. From this judgment, defendant noted exception and announced an appeal to the Supreme Court.

Appellant contended on appeal, among other issues, that the judge committed reversible errors when: (1) he denied defendant's motion for change of venue, a legal right vouchsafed to him by the Constitution and statutory laws of the Republic of Liberia in force at the time; (2) he overruled objections made by appellant to questions interposed by the prosecution, and by sustaining objections interposed to questions propounded by the appellant; (3) he admitted the weapon, which appellant is alleged to have used in the commission of the offense, into evidence, even though objected to by his counsel, on grounds that the weapon was not sufficiently identified by the prosecution's witness who testified to it during the trial; (4) he denied appellant's motion for a directed verdict, especially so when the witnesses for the State never connected him with the commission of the crime of murder. Appellant also contended that the judge's instructions to the jury were erroneous and adverse to his interests; that the evidence was not sufficient to warrant a guilty verdict in that there was no autopsy performed on the decedent; and that the report of the coroner jury was not adduced at the trial as is required by law.

The State in its argument before the Court admitted that the conviction of the appellant for murder was based upon appellant's own confession, as stated in the records. However,

the State admitted upon questioning from the Bench, that none of its witness testified at the trial, that he was on the scene on the night of the alleged murder; that he saw the appellant shoot and kill decedent; or that he saw appellant leaving Medicoma, where the crime was committed.

The Supreme Court, upon review of the records and the argument of counsel, held as follows: (1) that the denial of the motion for change of venue was erroneous, in that one accused of or charged with the commission of a capital offense, such as in the instant case, and who has been in detention from the date of his arrest up to the time of the trial of his case, should not be deprived of his legal right for a change of venue, simply because he did not file a written motion along with an affidavit, sworn and subscribed to by him while he is in jail and his life is at stake; (2) that the trial judge committed error when he overruled appellant's objections and sustained the prosecutions objections to the several questions set forth in the bill of exceptions; (3) that the trial judge committed a reversible error when he admitted the alleged murder weapon into evidence, in that it was not sufficiently identified by the prosecution's witness who testified to it during the trial; (4) that the court's denial of appellant's motion for directed verdict was a seriously and grossly reversible error, in that the witnesses who testified for the State never connected the appellant with the commission of the crime of murder; (5) that the State failed to prove the allegations laid in the indictment against appellant; and (6) that the witnesses for the state who testified, did not positively tell the court and jury how the crime was committed by him.

The Supreme Court also held that the trial judge's instructions to the jury were grossly erroneous and adverse to the interests of the appellant, especially the judge's reference to the alleged confessions of the appellant were obtained illegally. The Court opined that by the instructions and the conduct of the trial judge, it was clear that he did not exercise the cold neutrality expected of him in the trial of the case, and that he knew fully well that the appellant was on trial before him in a case of murder in which his life was at stake. The Court also held that appellant's alibi of not being in the town

on the night of the murder, raised a reasonable doubt of his guilt, either by itself or in conjunction with all other facts of the case. Accordingly, the Court opined that the State ought to have rebutted appellant's testimony that he was not at Medicoma Town on the night of the murder, because in the absence of a rebuttal to this testimony, it was physically impossible for appellant to have spent the night at Williedu Town, as stated in his testimony, and at the same time committing the alleged crime of murder at Medicoma Town.

With respect to the appellee's contention that appellant had confessed to the crime, and the inclusion of his confession in the judges charge to the jury, the Court held that there is no indication in the records that appellant was advised of the procedural safeguards to prevent self incrimination, prior to the alleged confession. Besides, when appellant took the stand he denied that he had ever confessed to committing the crime. Therefore, the Court held that by basing the verdict and the judgement on the alleged confession, the legal rights of the appellant had been violated and infringed upon by the prosecution. Hence, it concluded that appellant was not accorded a fair and impartial trial, as required in all criminal prosecutions.

In view of the foregoing facts, circumstances, and the law controlling, the Supreme Court held that the evidence in this case was not satisfactorily, convincingly and sufficiently conclusive to warrant confirmation and affirmation of the sentence of death passed upon the appellant by the trial court. On the contrary, the Court held that there was sufficient doubt as to what was the cause of death and who was legally responsible for it. Accordingly, the judgment of the trial court was *reversed* and the *appellant discharged* without day.

Robert G. W. Azango appeared for appellant. *Jimmie S. Geizue*, Solicitor General, assisted by *S. Momo Kiawu,* of the Ministry of Justice, appeared for appellee.

MR. JUSTICE BORTUE delivered the opinion of the Court.

James Saar, the appellant in this case, was indicted for the heinous crime of murder on the 27th day of September, A. D. 1971, by the grand jurors, in which indictment it is alleged that on the 23rd day of May, A. D. 1970, in Medicoma Town, Kolahun District, Lofa County; Republic of Liberia, the appellant did unlawfully, wilfully, wrongfully, maliciously, deliberately, feloniously, with premeditation and with malice aforethought aim at, shoot at, and discharge a gun in and upon the person of Saar Malengor, the decedent, thereby inflicting several serious mortal wounds upon the person of the decedent from which mortal wounds, the said Saar Malengor did die, contrary to the form, force and effect of the statutory laws of Liberia in such cases made and provided.

In accordance with the Penal Law, 1956 Code, 27:231, under "Crimes Affecting the Person", murder is defined as follows:

> "Murder--- Any person who without legal justification or excuse, unlawfully, with malice aforethought, kills any human being; . . ." Murder is punishable with death by hanging.

When this case was called for trial during the February Term, A. D. 1972, on Friday, March 17, 1972, for the second time, the appellee was represented by the County Attorney for Lofa County, Republic of Liberia. The appellant having appeared in person in court without a counsel, was asked by the trial judge whether he had a lawyer to represent him, and he replied in the affirmative; but stated that his lawyer was not in court. He further told the court that he did not want his case to be tried by that court since it was the same court that had first tried and convicted him, which necessitated his filing a motion for new trial, and which motion was granted. The appellant went on to name Attorneys Christopher M. Mawolo, Jallah E. Fasseian and John Dougba Kennedy as his lawyers. In view of the announcement made by the appellant of his lawyers, the case was suspended for hearing until Saturday, March 18, 1972, at the hour of 10 o'clock in the morning. The clerk of court was accordingly ordered by the judge to inform appellant's lawyers by written notice of assignment to be present in court the next morning, at the hour of 10 o'clock.

The application for a change of venue made by the appellant himself was confirmed and affirmed by his counsel at the resumption of the trial of the case on Saturday, March 18, 1972. However, the court denied appellant's application for a change of venue on the grounds that said application should have been filed by the appellant, especially so since the appellant was represented by the same lawyers who officiated at the former trial, and that they should have been active and vigilant in filing the said motion under oath prior to the calling of this case on March 17, 1972.

Following the denial of appellant's application for a change of venue, he was duly arraigned at which he entered a plea of not guilty. Thereafter, a jury was selected, sworn and empanelled to try the issues thus joined between him and the Republic of Liberia. The trial of the case was held and after witnesses for the appellee had testified on the direct examination, and had been cross-examined and discharged by the court, the prosecution rested evidence.

The appellant took the witness stand and testified in his own behalf, directed, cross-examined, and was discharged from the witness stand.

Arguments *pro et con* were entertained by the court. The jury was charged and they retired into their room of deliberation from whence they returned a verdict of guilty against the appellant.

Both motions for a new trial and in arrest of judgment, filed by the appellant, were denied by the judge and exceptions thereto noted on the records by counsel for the appellant.

On the 30th day of March, A. D. 1972, final judgment in the case was rendered by His Honour Albert D. Peabody, assigned circuit judge presiding by assignment, sentencing appellant to death by hanging, upon warrant of the President of Liberia, on the first legal Friday in March, A. D. 1973, from six o'clock in the morning to six o'clock in the evening until he was dead. Appellant excepted and prayed for an appeal from this final judgment; hence, this appeal.

On the 31st day of March, A. D. 1972, appellant filed a 12-count bill of exceptions setting forth therein, specifically, the several exceptions made and taken to the rulings, verdict, and

final judgment of the trial court, which are the basis of this appeal for our consideration. In our opinion, the counts that we feel that are worthy of consideration for the just and proper determination of this case, and to which we shall address our attention, are counts one, three, four, five, six and seven.

In count one of the bill of exceptions, the appellant has contended that the denial of his motion for a change of venue was a gross violation of his legal rights vouchsafed to him by the Constitution and statutory laws of the Republic of Liberia in force at the time. The provisions of the statute in this regard are mandatory and not discretionary on the part of the trial judge or court. It should thus not be regarded as a privilege but a right to be enjoyed by the accused. That in keeping with statute, the court has the authority to order the proceedings in criminal prosecutions transferred to another court of competent jurisdiction, if there is reason to believe that an impartial trial cannot be had in the county in which the case is pending.

A glance at the ruling of His Honour Albert D. Peabody, circuit judge presiding by assignment over the February, A. D. 1972, Term of the Tenth Judicial Circuit Court, shows that according to the minutes of court, 5th day's jury session, Saturday, March 18, 1972, sheet eight of the minutes of court, the court held that a defendant may make a motion for a change of venue at any time prior to the calling of the case upon oath, where he believes that he cannot obtain a fair and impartial trial because of existing local prejudice in the county in which the case is pending. The learned trial judge further held that the motion for change of venue, should have been filed by the appellant, especially so when he is represented by the same lawyers who had represented him in the former trial. The judge maintained that the lawyers should have been active and vigilant by filing said motion prior to the call of the case on March 18, 1972. The motion was therefore denied by the court and the trial ordered proceeded with, to which ruling appellant excepted.

We feel that one accused or charged with the commission of a capital offense, such as in the instant case, and who has been in detention from the date of his arrest up to the time of the trial of his case, should not be deprived of his legal right to

a change of venue, simply because he did not file a written motion along with an affidavit, sworn and subscribed to by him while he is in jail and his life is at stake.

In 56 AM. JUR., *Venue*, § 56, we have the following law citation regarding a defendant's right to a change of venue, which reads as follows:

> "Although the venue of an action is properly laid, the court before which the action or proceeding is pending is generally authorized to change the place of trial where there is reason to believe that it will be impossible to obtain a fair and impartial trial in the county selected, because of local prejudice, feelings, and opinions."

The Constitution of Liberia (1847), Art. I, Section 7th, also provides that:

> "No person shall be held to answer for a capital or infamous crime, except in cases of impeachment, cases arising in the army and navy, and petty offenses, unless upon presentment by a grand jury; and every person criminally charged, shall have a right to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favour; and to have a speedy, public and impartial trial by a jury of the vicinity. He shall not be compelled to furnish or give evidence against himself; and no person shall for the same offense, be twice put in jeopardy of life or limb."

Count one of the bill of exceptions is, therefore, sustained.

With respect to count three of the bill of exceptions, the appellant has contended that the trial judge committed a reversible error when he overruled his objections to a question put to State witness Corpu Tamba by the prosecution to refresh his memory and tell the court and jury where the murder occurred; that is to say, whether it was in the bush or in the heart of the town? To which question appellant's counsel objected, on the grounds of cross-examining one's own witness, and to which appellant excepted. The grounds of objection, in the mind of the court, should have been sustained as they were all well taken because the question was indeed cross-examining one's own witness.

Regarding count four of the bill of exceptions, the appel-

lant contended that the trial judge committed a reversible error when he overruled his objection on the grounds of, "assuming facts not proven, cross examining one's own witness, and ambiguous", to the question propounded by the prosecution to witness Willie Two Pound on the direct examination. In its question to the witness on the direct examination, the prosecution asked the witness to confirm that he had earlier said that the defendant admitted killing his friend, the decedent. The prosecution also asked the witness to refresh his memory and tell the court and jury as to whether the appellant had told him or confessed to him that he had committed the crime. The objections to this line of questioning were overruled by the court; and to which appellant excepted. The trial judge should not have overruled appellant's objection to the said question, because the prosecution was indeed cross-examining her own witness while questioning the said witness on the direct-examination. The trial judge, therefore, committed a reversible error, and count four of the bill of exceptions is sustained.

In count five of the bill of exceptions, the appellant has contended that the trial judge committed a reversible error when he sustained the objection of the prosecution to a question put to State Witness Willie Two Pound, to say for the benefit of the court and jury, how many rooms the house in which the appellant is alleged to have shot and killed decedent contained; whether the said rooms were occupied since the said witness lived in the said Medicoma Town; on the ground of immateriality, to which ruling overruling said question appellant excepted. Our statute provides as follows on the scope of "cross-examination. "

> "Except as otherwise provided by law, a witness may be cross examined as to all matters touching the cause or likely to discredit him." Civil Procedure Law, Rev. Code 1: 25.23; *Yancy and Delaney v. Republic,* 4 LLR 3 (1933).

The trial judge committed a gross reversible error when he sustained the prosecution's objection on the ground of immateriality of the question put to the said witness by appellant's counsel, because the cross-examiner under our law, is entitled, as a matter of right, to test the interest, motives, inclinations

and prejudices of a witness, his means of obtaining a correct and certain knowledge of the facts to which he bears testimony, and the manner in which he has used those means. *Bryant v. Bryant,* 4 LLR 328 (1935). In the instant case, the witness testified that they, meaning the people of Medicoma Town, asked appellant as to whether he was the one who had killed the decedent and that he replied that it was he who did it, but that he did not mean to do it. Here is a witness, who testified that he lived in Medicoma Town and that he was acquainted with both the appellant and the decedent; the question, therefore, put to him on the cross examination as to how many rooms the house in which decedent was found dead contained, was objected to by the prosecution and sustained by the court. The question should have been answered as the said question sought to test the interest, motives, inclinations and prejudices of the witness. Our law requires that a witness shall testify or depose to such facts as are within his own know-ledge and recollection. Civil Procedure Law, Rev. Code 1: 25.21. The question, therefore, should have been allowed in order for the witness to testify as to how many rooms the said house contained, and as to whether or not he testified to his personal and certain knowledge and recollection, so as to enable the jury to give credit to the weight of his said testimony. The trial judge, therefore, committed a reversible error when he sustained prosecution's objection on the ground of immateriality. Count five of the bill of exceptions being well taken, is hereby sustained.

Appellant in count six of the bill of exceptions, stated and argued before this Court, that the trial judge committed a reversible error, when he admitted the weapon, which appellant is alleged to have used in the commission of the offense, into evidence, even though objected to by his Counsel, on grounds that the weapon was not sufficiently identified by the prosecution's witness who testified to it during the trial. A recourse to the minutes of court of the 8th day's session, same being March 22, 1972, shows that after prosecution rested with further production of oral evidence with reservation to produce rebutting evidence, if need be, it prayed the court to admit into evidence the said weapon, that is to say, the single

barrel shot gun which appellant allegedly used to shoot and kill the decedent. Counsel for the appellant requested the court to deny the admissibility into evidence of the said weapon because the weapon was never properly identified by the prosecution's first witness; that as to second witness, he testified that he was unlettered, but that he could identify the gun by the rubber under the bottom. Counsel for the appellant contended that not all single barrel shotguns carry rubber under the bottom, and hence this was not a sufficient identification. Appellant contends further, that the material witness in these proceedings was and would have been Sgt. John K. Kangba, the police criminal investigator, who went to the crime scene and conducted an investigation. Not only did he conduct an investigation, but he also selected the twelve coroner jurors who held an inquest over the body of the decedent and submitted a report to him, Sgt. John K. Kangba. Besides, Sgt. John K. Kangba would have been the best witness to identity and confirm the single barrel shotgun which appellant is alleged to have used in the commission of the offense, because he is educated, unlike the other two illiterate witnesses, who identified the alleged criminal agency. Count six of the bill of exceptions being well taken, is therefore sustained.

In count seven of the bill of exceptions, the appellant has complained to this Court that the denial of his motion for a directed verdict by the trial judge was a reversible error, especially so when the witnesses for the State never connected him with the commission of the crime of murder. Appellant contended, from a careful perusal of his motion, that in all criminal proceedings, the burden of proof rests on the State, but that in the case at bar, the State failed to prove the allegations laid in the indictment against appellant in that the evidence given at the trial failed to connect the him with the commission of the crime of murder. Appellant contended further that the witnesses for the appellee, who testified, did not positively tell the court and jury how the crime was committed by him; that the testimonies of the witnesses were all based on hearsay; and that the allegation that he, appellant, confessed to the commission of the crime of murder, was

untrue.

In resisting the motion for a directed verdict, the prosecution prayed that the motion should not be granted in that the State had established a *prima facie* case. The court overruled the motion for a directed verdict because, in the mind of the court, the State had established the crime of murder against the appellant by producing evidence which included the alleged confession and the capturing of the appellant, etc. etc. This Court held in *Logan v. Republic,* 2 LLR 472 (1923), that:

> "To convict in a criminal case, not only should there be a preponderance of evidence, but also the evidence must be so conclusive as to exclude every reasonable doubt as to the guilt of the accused."

Our law further provides as follows:

> "*Defendant Presumed Innocent: Reasonable Doubt Requires Acquittal.* A defendant in a criminal action is presumed to be innocent until the contrary be proved; and in case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to an acquittal." Criminal Procedure Law, Rev. Code 2: 268.

In view of the above quoted citation of law, the trial court committed a seriously and grossly reversible error, adverse to the interest of the appellant. Count seven of the bill of exceptions is therefore sustained.

A careful perusal and scrutiny of the general testimony of State witness Fallah Moore shows that what he knew about the case was that one day he was in town and he saw the appellant running, and when he asked him what he was running to, appellant is alleged to have told him that he shot the decedent with a gun and that he was going to the Clan Chief Pongay. According to Witness Fallah Moore, he arres-ted the appellant and turned him over to Clan Chief Pongay with a gun. According to his general testimony in chief, he informed Clan Chief Pongay about the killing of Saar Malengor by appellant James Saar with a gun. On the direct examination, when he was asked whether or not he could recognize the gun he made mention, if he were to see it, he answered yes. When the said weapon was handed to him to look at it and tell the court and jury what he recognized it to be, he answered that he

recognized it to be the single barrel shot gun that appellant reportedly used to shoot and kill decedent with, but he could not recognize the paper placed on it. Witness Willie Two Pound on the other hand, identified the said wea-pon to have an old rubber under it, whereas, Witness Fallah Moore referred to the said old rubber at the bottom of the gun to be a paper placed under it. Under our law with respect to identification of an article, object, instrument or document, such article, object, or instrument must be properly identified, that is to say, the proof of the identity of the article, etc.; and when such article, instrument or document is not properly identified, it should not be admitted into evidence for lack of proper identification or proof of identity. The weapon or the single barrel shot gun appellant is alleged to have used in the commission of the crime of murder was not properly identified, especially so when the said witnesses who testified to its identity, were not present at the time of the commission of the crime.

More than this, the appellant testified on his own behalf that he never handled a gun before nor did he own one, which testimony of the appellant remained unrebutted and was not denied by the appellee. In the face of this unrebutted statement of the appellant, we cannot see why the alleged gun was admitted into evidence against appellant over his objection. The trial judge, therefore, committed a reversible and prejudicial error when in ruling, held that witnesses testified and identified the said single barrel shot gun to be the property of the appellant before the killing was done; that this was the identical gun found with the appellant when he was captured; and that there was therefore no doubt that the gun had been sufficiently identified as being the weapon with which the appellant killed and murdered the decedent. Hence, the objection of appellant's counsel was overruled and the said gun ordered admitted into evidence.

It must be remembered that Witness Willie Two Pound, who identified the alleged weapon and/or single barrel shot gun which appellant purportedly used to shoot and murder Saar Malengor, told the court and jury that while in bed on the night of the incident, and after he had slept for a while, he

heard the sound of a gun, and the people were crying, and that the town chief called upon all men in Medicoma Town, Kolahun District, Lofa County. When he came out, they told him that appellant James Saar had killed Saar Malengor and had escaped into the bush. He did not mention in his general statement that he was present when the appellant allegedly shot and killed the decedent with the gun, which he identified at the trial to have been the gun used by appellant; nor did he make any reference to any gun in his testimony in chief. Yet, on the direct examination, the prosecution put the following question: "I hand you here this weapon, marked and confirmed by court "A-1"; look at it and tell the court and jury what you recognize it to be?" Answer: "This is the weapon and/or gun, and the reason why I know this gun is because of the old rubber under the bottom. Some of us do not know number, and our number is looking at the rubber at the bottom of the gun." (Sic). This question, even though not objected to by counsel for appellant, was indeed a misquotation of the witness' testimony, as he had made no reference to any weapon in his general testimony other than what was told him by his fellow townsmen that night, that it was James Saar, the appellant herein, who had allegedly shot and killed decedent.

One of the gross and serious errors complained of by the appellant in this case, and which must claim the attention of the Court, is the judge's charge to the empanelled jury, which we deem necessary to quote word for word for the benefit of this opinion, as follows:

"COURT'S CHARGE TO THE JURY:

> Ladies and gentlemen of the trial jury, you have been sitting here several days now at the trial of this case; hearing the witnesses against and for the defendant. You have heard the lawyers on both sides. They have said what they have to say. And it has now come to the time for you to make a final disposition of the case as far as your consciences go. The defendant is charged with the crime of murder. Murder is defined by our statute as, 'any person who without legal justification or excuse, unlawfully with malice aforethought, kills any human being'. In this case, James Saar of the Town of Medico-

ma was arrested, indicted on the 27th day of September, 1971, after being accused of shooting and killing Saar Malengor of the same town on the night of May 23, 1970, and escaping to the town of Williedu, where he was found and arrested the next day. This is how the evidence goes.

According to the evidence of the witnesses of the prosecution, the dead body of Malengor was discovered in the room of the house which the witnesses of Medicoma Town testified on oath, belongs to James Saar. Fallah Moore, a witness for the State, testified that he saw James Saar approaching the town, Williedu, early the next morning with a gun in his hand, and that it was then that on being asked, James Saar voluntarily confessed that he had killed Malengor with the gun he had in his hand, and that he was going to report the matter to the chief. According to this witness, James Saar was then arrested and turned over to the chief.

A perusal of the record of the trial of this case shows that not only did Fallah Moore testify to the fact that James Saar's voluntarily confessed to the killing of Malengor, but also that he did not intend to kill him. With several witnesses having testified on oath on the point of confession of the defendant, no room of any material consequence is left to doubt that the killing could have been done or was done by James Saar. Under our law, flight is evidence of guilt. The accused having been discovered to be in the town of Williedu very early the next morning after the stir, commotion and calamity caused by the killing of a human being in the town, must have created strong circumstantial evidence to the extent of incriminating James Saar as the killer of the decedent, especially so when the man found to be shot and killed was found in defendant's bedroom.

What is circumstantial evidence in this case? It is true that no one saw James Saar point, aim, and shoot the gun at Malengor. But Saar was caught the next day away from the town where he lived and where the killing was done even though he was a resident of Medicoma and not

Williedu, where he was found. This legitimately tended to show that he had done some illegal acts and was therefore escaping from it. Proof of James Saar's sudden absence from the town of Medicoma, especially during such period of calamity, leads the minds to the conclusion that nothing could be responsible for James Saar's absence from his home town during such a time except that he had killed Malengor.

Except to say that he went to Williedu to visit a lady during the night of the killings but that he does not know the name of the lady now; that he does not own a house; that he has never heard the name Malengor; that he never met the person, and that he did not know him up to the time of the killing, the defendant has neglected to disprove the amount of evidence or the weight of what has been established by the State against him by disproving that he shot and killed Malengor in his bedroom with a gun with which he fled. In the face of the evidence you have heard and the surrounding circumstances explained to you, I now charge you to go into your room of deliberation, make careful consideration of the facts, as adduced, and the law explained to you and conclude whether the defendant in the dock killed Malengor, or not. If you are satisfied upon your oath that the defendant in the dock killed Malengor, go and bring a verdict of guilt against him. On the other hand if you are not satisfied and you feel in your minds he should be acquitted, go and bring a verdict of acquittal. I therefore charge you to go into your room of deliberation. And you are so charged."

To this Charge of the court, appellant's counsel excepted.

From the above quoted charge of the trial judge, it can be clearly seen that he indeed committed a reversible error as against the interest of the appellant in this case, because this Court held about forty-six (46) years ago in *Ware v. Republic*, 5 LLR 50 (1935), that:

"The judge of a court is not merely appointed to an office, but he is also elevated to a dignity. As such he is dedicated and consecrated to the adjudication of the

rights of litigants, and hence must avoid any course of conduct which would cause his impartiality to be questioned.

Every litigant, including the State in criminal cases, is entitled to nothing less than the cold neutrality of an impartial judge; hence, a judge who is prejudiced or otherwise disqualified may be successfully challenged.

It is of great importance that the courts should be free from reproach, or the suspicion of unfairness, as the judiciary should enjoy an elevated rank in the estimation of mankind."

Again, in *Yancy v. Republic*, 4 LLR 268 (1955), Syl. 1-5, this Court, speaking through Mr. Justice Russell, held that:

"In criminal cases, a picture of all the surrounding circumstances should by the evidence be put before the jury.

A court can never be the agent, or the instrument, of any government; nor can it align itself on the side of the prosecution in any case.

The proper duty of the court is to defend the rights of the weak against the strong.

The object of evidence is to secure a legal conviction.

Nor should any evidence be received which is a second handed rendering of testimony not produced but producible."

In view of the foregoing, we are of the opinion that the trial judge should have exercised nothing less than cold neutrality in the trial of this case, knowing fully well that the appellant was on trial before him in a case of murder where his life was at stake.

On Thursday, March 23, 1972, same being the 9th day's session of court, as indicated on sheets two and three of the minutes of court, the appellant took the witness stand in his own behalf and deposed, as follows:

"What I know about decedent Malengor is that on the day they arrested me, that was the day I heard about the name Malengor. This name of Malengor, whether it is a woman or man, I do not know. I was in Williedu Town, standing right in the town, when they came and arrested

me, and told me that you are the one who killed Malengor. As soon as they arrested me, they did not even give me any question, but just brought me straight to Medicoma Town. This Malengor person, if he died or did not die, I do not know anything about it; and even the gun they are talking about, I never handled gun before, nor do I own a gun of my own. It was only that day I heard that Malengor was killed with a gun. When I was brought here, I told the people that if Malengor was killed with a gun, am I to be held for that? Am I the one who killed Malengor? I told them that I was not the one who killed Malengor, and in fact I do not know anything about it."

On the cross-examination, counsel for the prosecution propounded the following questions to the appellant, which we quote, as follows:

"Q. Mr. Witness, in your general statement, you alleged that you were standing in a village Williedu when you were arrested; did you spend the night at Williedu?

A. Yes. There I slept.

Q. Mr. Witness, if you spent the night at Williedu kindly tell the court and jury in whose home did you spend the night ?

A. I left Foya and went to Williedu on that day and it being my first day going there, I did not know the name of the person in whose home I spent the night, being that the person is a woman, and she is now in Monrovia.

Q. Mr. Witness, since that was your first time going to Williedu, kindly tell the court and jury at what time of the night or day did you reach at Williedu where you alleged you spent the night ?

A. I reached at Williedu in the afternoon of that day."

Q. Mr. Witness, kindly tell the court and jury whom you left in your room when you were going to Williedu to spend the night?

A. I do not have a house and, therefore, I do not have a room.

Q. Mr. Witness, you have alleged that you lived in your

father's house. I presume then that your father looking at your size and age, gave you a room in his house to be sleeping in; is this correct ?

A. Even my brothers do not own a room, much more I. I do not have a room of my own."

It is observed from the minutes of court, Thursday, March 23, 1972, same being the 9th day's session of court, sheet five, that after the appellant testified in answer to a question put to him on the cross-examination that he lived in his father's house, counsel for the prosecution gave notice that he would bring a witness to rebut this particular answer of the defendant, appellant herein. Regrettably, however, after counsel for appellant rested oral evidence, appellee's counsel made record waiving the production of rebutting evidence. (See sheet eight of the 9th day's session of court) As a result, appellant's statement to the effect that he lived in his father's house remained unrebutted.

Here is our statute on the point, which we hereunder quote word for word for the benefit of this opinion:

"*EFFECT OF FAILURE TO DENY.* Averments in a pleading to which a responsive pleading is required are admitted when not denied in the responsive pleading. Civil Procedure Law, Rev. Code 1: 9.8 (3).

In *Chenoweth v. Liberia Trading Corporation*, 16 LLR 3 (1964), this Court held that:

"When an essential allegation in a pleading is not denied in the subsequent pleading of the opposing party, the allegation is deemed admitted."

In passing, we would like to point out here that according to the testimony of witness Fallah Moore, as recorded on Tuesday, March 21, 1972, 7th day's session of the minutes of court, sheet six, he told the court and jury that it was he who arrested the appellant and turned him over to Clan Chief Pongay along with the gun with which appellant is reported to have committed the crime of murder. However, according to the testimony of Witness Willie Two Pound, as found on sheets one and two of the minutes of court, Wednesday, March 22, 1972, same being the 8th day's session, the appellant was brought in a car the next morning while the people of

Medicoma Town were still assembled. At that time, the appellant allegedly admitted killing the decedent and told the people who had gathered on the scene that he did not mean to kill the decedent. The testimonies of these two witnesses did not corroborate each other, but rather occasioned a contradiction as to who really arrested the appellant for having allegedly committed the crime of murder. This, therefore, in our opinion, raises the question of variance. "Variance", according to law writers, means:

> " a difference, and as employed with reference to legal proceedings, it denotes some disagreement or difference between two parts of the same proceeding which ought to agree. Thus, there may be a variance between the original writ and the declaration, or between the allegations and the proof. It is with the latter aspect of variance that we are dealing here.
>
> It is a fundamental and vital principle of good pleading and practice that *allegata* and *probata* must correspond; that nothing can generally be proved that is outside the allegations and that facts must be proved substantially as alleged. If they are not thus proved, a variance results. Hence, a variance as here understood may be defined as a disagreement between a party's allegations and his proofs, and to be available, it must be in some matter essential, and material to the charge or claim." 61 AM. JUR., *Trial*, § 366.

More than this, there is no evidence in the records showing that any of the witnesses who testified for the prosecution ever saw the appellant committing the alleged offense of murder for which he is held; nor was he seen by any of the witnesses for the State, escaping from the scene after the alleged commission of the crime of murder on the night of May 23, 1970, in Medicoma Town, Kolahun District, Lofa County. What is more regrettable and disappointing is the fact that the coroner jurors' report, which, according to Witness Willie Two Pound, had been reduced into writing and submitted to the police, was never adduced at the trial and admitted into evidence to form part of the records in this case.

It is assumed that decedent died of gun shot wounds

inflicted by appellant James Saar, which allegation of the prosecution, appellant categorically denied. Appellant also denied being acquainted with the decedent, or that he knew him to be a man or woman during the decedent's lifetime. Further, appellant denied ever being in Medicoma Town on the night of the fatal incident. Indeed, appellant testified that he had left Medicoma Town for Williedu Town that afternoon, and that he spent the night of the incident at Williedu Town. This testimony of the appellant created a physical impossibility for him to have been in Medicoma Town and Williedu Town at the same time when the decedent is alleged to have been shot and killed. This denial by the appellant of the allegations laid in the indictment impliedly raises the plea of alibi. Hence, it was incumbent and obligatory upon the State to have established appellant's presence at Medicoma Town, Kolahum District, Lofa County, Republic of Liberia, on the night of the incident. The State also failed to prove that appellant was in Medicoma Town when the alleged shooting and killing was done, and that it was he who did it. Before this Court can uphold a judgment of the trial court against one charged with the commission of the crime, tried and convicted, especially in a case of murder, the responsibility of the accused for the death of decedent must have been proved beyond the shadow of all reasonable doubt.

In 23 AM. JUR. 2d, pp.182-183, §150-151, we have the following provisions of law, which we quote for the benefit of this opinion, word for word, as follows:

> "*Place of Commission of Crime.* Since the criminality of an act, consists not only in its perpetration, but in its being perpetrated in violation of the penal laws of the place where committed, the fact and place of perpetration are both ingredients of the crime and must be proved by the prosecution in order to convict the defendant.
>
> *Presence of Accused at the Place and Time of Crime.* The burden of proof rests upon the prosecution in a criminal case to establish beyond a reasonable doubt all elements of the offense charged, including, where that is essential to his guilt, the defendant's presence at the place of the crime at the time of its commission. Where

the defendant's presence at the time and place of the commission of the crime is essential to his conviction, the State's evidence necessarily must show his presence at the precise place and at the precise time. Where that fact is thus essential and the evidence, taken as a whole, whether adduced by the prosecution or by the accused, is sufficient to raise in the minds of the jury a reasonable doubt as to his presence at the scene of the crime, he is entitled to an acquittal."

Further, it is stated that:

"In most states it is the rule that in criminal prosecution, the defendant does not have the burden of proving an alibi upon which he relies as a defense. The courts which take this position do so on the theory that an alibi is not an affirmative defense and that evidence to prove an alibi is not to be treated as proof offered to establish an independent affirmative matter set up by the defendant, but mere evidence tending to disprove one of the essential factors in the prosecution, namely, the presence of the accused at the place and time of the alleged crime. Since, under this view, an alibi is only a denial of any connection with the crime, it must follow that if proof adduced raises a reasonable doubt of defendant's guilt, either by itself or in conjunction with all other facts of the case, the defendant must be acquitted. And statutes which require the giving of notice to the prosecution of the accused's intention to rely upon an alibi as a defense, have been held not to shift the burden of proof from the prosecution to the defendant."

While it is true that there is no corroboration of this part of appellant's testimony, and while it is also true that the uncorroborated testimony of anyone accused of such a crime is not sufficient to acquit, *Zaigloror v. Republic,* 2 LLR 624 (1926), we feel that under the circumstances, it was the compelling duty of the prosecution to have rebutted this part of the appellant's testimony that he was at Medicoma Town on the night of the incident; for it was physically impossible for him to have spent the night at Williedu Town as stated in his testimony and at the same time committing the alleged

crime of murder at Medicoma Town.

Furthermore, the prosecution should not have waived rebutting evidence after it had given notice to the effect that it would prove that appellant was not living with his father, but owns a house in which he was living, and in which decedent was found dead. Also, it is observed from the records before us, that there was no effort made by the prosecution to have Clan Chief Pongay, the Government Authority in the area, testify, since it was stated by Witness Willie Two Pongay that he, Willie Two Pound, arrested the appellant with a gun, and turned him over to the said Clan Chief Pongay. The testimony of Clan Chief Pongay was necessary to corroborate the testimony of Witness Willie Two Pound in this respect.

Let us assume for the sake of argument, that the appellant did confess, as it is claimed by the witnesses for the prosecution that he shot and killed the decedent, and also as the indictment charges. The question which arises in the mind of the Court is, was the appellant given cautions as required by law?

Here is the law on the point in a murder case decided by the Supreme Court of the United States of America in 1966, in which Chief Justice Earl Warren spoke for the Court, as follows:

> "The prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. As for the procedural safeguards to be employed, unless other fully effective means are devised to inform accused persons of their right of silence and to assure a continuous opportunity to exercise it, the following measures are required. Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. The defendant may waive

effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently. If, however, he indicates in any manner and at any stage of the prosecution that he wishes to consult with an attorney before speaking, there can be no questioning. Likewise, if the individual is alone and indicates in any manner that he does not wish to be interrogated, the police may not question him. The mere fact that he may have answered some questions or volunteer some statements on his own does not deprive him of the right to refrain from answering any further inquiries until he has consulted with an attorney and thereafter consents to be questioned."

It was, therefore, prejudicial, erroneous and adverse to the interests of the appellant when the trial judge in his charge to the jury, referred to and emphasized on the alleged confession made by the appellant, according to the witnesses for the prosecution. If at all the appellant did make any confession, as it is stated by the witnesses for the State, which allegation the appellant denied, there is no showing in the records certified to us that the appellant, was ever cautioned by the police, the LNG Officers, Clan Chief Pongay, and the town chief of Medicoma Town. This court held in *Teddaway v. Republic*, 5 LLR 126 (1936), that:

"A confession made while an accused person in custody is interrogated by the prosecuting attorney contrary to law, is disfavoured by the law, especially if the prosecuting attorney had neglected to warn the accused that he must be careful with what he said, as any admission made by him could be used against him."

There is no indication in the records before us that appellant was ever informed of the nature of the offense of which he was accused or suspected; that he had the right to have legal counsel present at all times while he was being interrogated; or was making any statement or admission regarding the offence for which he was accused or suspected; and that any statement or admission made by him might be used against him in a criminal prosecution. Therefore, it goes without saying, that the legal rights of the appellant in this case were indeed violated and infringed upon by the prosecu-

tion. Hence, appellant was not accorded a fair and impartial trial as it is required in all criminal prosecutions.

We would here like to remark that, where the trial in a criminal case was not legally, regularly and fairly conducted in the court of origin, the judgment rendered affirming and confirming the verdict of the empanelled jury will be reversed and the appellant ordered discharged without day. This Court held in *McBurrough v. Republic*, 4 LLR 25 (1934), that:

> "If the Court, after considering all the evidence, has not an abiding conviction of the truth of the charge, the defendant should be discharged." *Yancy v. Republic*, 4 LLR 268 (1935). Also, Mr. Justice Horace speaking for this court in *Republic v. Smith,* 25 LLR 207 (1976), held that:
>
> In order to convict an accused, the evidence must be so conclusive as to exclude every rational doubt of guilt."

From the evidence adduced at the trial of this case, there is no showing that any of the witnesses who testified for the State saw the appellant committing the alleged crime; nor did any of them testify that the purported single barrel shot gun they identified as being the weapon used by appellant in the commission of the said crime of murder, was the identical gun appellant shot and killed decedent with, they not having been present when the alleged crime was committed for them to have testified with every degree of certainty to this effect. As such, they could not testify or depose to such facts as should have been within their own certain knowledge and recollection. They testified to what was told them. Aside from this fact, not a single one of the said witnesses testified at the trial that he saw the appellant immediately after the commission of the said crime of murder, absconding and escaping from the scene of the incident. Their testimonies, therefore, were nothing but hearsay. Our statute on best evidence rule requires that:

> "The best evidence which the case admits of must always be produced; that is, no evidence is better which supposes the existence of better evidence." 1956 Code 1:6: 685.

Our statute on hearsay evidence which was in vogue at the time of the trial of this case has this to say on the point:

> "*Hearsay Evidence.* In general, hearsay evidence is not

admissible; but hearsay evidence is admissible to the extent and under the circumstances stated in section 688-690 below or as otherwise established by law." *Ibid.*, 6: 687.

The exceptions to this rule, as stated in Sections 688-690, read as follows:

"*Ancient Facts.* Declarations of deceased persons concerning ancient facts of which they, from their situations, were likely to have knowledge of, such as marriages, births, deaths, and pedigrees, may be received as evidence.

"*Declarations Against Interest.* The admissions or declarations against his own interest made by any deceased person under whom a party to a cause derives title to any property in dispute, if made while the interest of such deceased person in such property continued, shall have the same effect, as if made by the party to the cause who has derived his title from the declarant.

"*Memorandum Made in the Course of Business.* A memorandum made in the ordinary course of business by a deceased disinterested person shall be competent evidence."

From the citations of law just quoted hereinabove, these exceptions do not fall within the category under the said hearsay evidence now under consideration by this court. However, and notwithstanding the fact that no one saw the appellant with the alleged single barrel shot gun allegedly used by him in the commission of the crime of murder, yet the witnesses who testified for the prosecution purportedly identified the said single barrel shot gun to have been the self-same and identical gun that he allegedly used in shooting and killing decedent.

During arguments before us, counsel for the prosecution admitted that no witness testified at the trial that he was on the scene on the night of the alleged murder by appellant and that he saw the appellant shoot and kill decedent, or that appellant was seen leaving the Town of Medicoma where the crime was committed. They argued further that the conviction of the appellant for murder was based upon his own confess-

ion, as stated in the records now before this court. Regrettably, they failed to argue that the appellant was accorded every caution and legal rights as in keeping with our law hereinabove cited. It was also admitted by counsel for the prosecution that there was no autopsy performed, and that the report of the coroner jury was not adduced at the trial as is required by law; therefore, it did not form part of the record in this case. They further argued that the production of the said coroner jury's report was not necessary for the conviction of the appellant for murder.

In 30 AM. JUR. 2d., *Evidence*, § 1170, we have this citation of law, which reads as follows:

> "In a criminal prosecution, in order to warrant a conviction, the prosecution is required in the discharge of the burden imposed upon it, of establishing by proof all the essential elements of the crime with which the defendant is charged in the indictment, to establish beyond a reasonable doubt that the accused is guilty of that crime, and in the absence of such a degree of proof of the defendant's guilt, he is entitled to an acquittal, regardless of whether his character is good or bad. It is not sufficient that the preponderance or the weight of the evidence point to the guilt of the accused, nor can the accused be convicted on general principles or on mere suspicion. This rule is obviously based upon broad principles of humanity, which forbid the infliction of punishment until the commission of the crime to a reasonable certainty is established. It has received the sanction of the most enlightened jurists in all civilized communities, and in all ages; and with the increasing regard for human life and individual security, it is quite apparent that the energy of the rule is in no degree impaired. The presumption of innocence attends all proceedings against the accused from their initiation until they result in a verdict which either finds him guilty or converts the presumption of innocence into an adjudged fact; it has relation to every fact that must be established against him to prove his guilt beyond a reasonable doubt."

In view of the foregoing facts, circumstances, and the citations of law hereinabove quoted in support of our position,

we do not feel that the evidence in this case has been satisfactorily, convincingly, and sufficiently conclusive to warrant confirmation and affirmation of the sentence of death passed upon the appellant by the trial court. On the contrary, however, we are of the considered opinion that there is sufficient doubt as to what was the cause of death and who was responsible for it in the contemplation of law. The judgment of the trial court is, therefore, reversed and the appellant is hereby discharged without day. And it is hereby so ordered.

Judgement reversed, appellant discharged.