# MARTIN V. KILLIX, Appellant, *v.* REPUBLIC OF LIBERIA, Appellee.

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

Argued April 27, 28, 1943. Decided June 4, 1943.

1. In criminal, as in civil cases, the grant or refusal of a new trial is generally said to rest in the sound discretion of the trial court, and the appellate court has no right to review the exercise of such discretion unless it appears that it has been abused to the prejudice of defendant.
2. Negligence of a party or of an attorney is not a ground for a new trial except in an extreme case where it is necessary to prevent a clear failure of justice.
3. Threats previously communicated are held competent evidence on a question of self-defense.

On appeal from conviction for assault and battery, *judgment reversed and remanded.*

*C. Abayomi Cassell* for appellant. *A. J. Padmore,* Revenue Solicitor, by special appointment, for appellee.

MR. JUSTICE RUSSELL delivered the opinion of the Court.

Martin V. Killix of Robertsville in the settlement of White Plains, Montserrado County, defendant in the court below, now appellant in this case, was indicted by a grand jury of the county aforesaid at the August term, 1941 of the Circuit Court for the First Judicial Circuit, Montserrado County, for the commission of the crime of assault and battery with intent to kill, the private prosecutor being one James E. Killix, a brother of the said Martin V. Killix, appellant. At the November term of said court in said year the said defendant Martin V. Killix was duly put on trial, whereupon at his arraignment he entered a plea of not guilty. A subsequent trial

resulted in a verdict of guilty against him, which verdict was sustained by the court and, after motions for a new trial and in arrest of judgment had been overruled, respectively, a judgment was accordingly entered sentencing said defendant to imprisonment for a period of two calendar years. It is upon the exceptions taken and reserved by the said defendant, now appellant, to the several rulings of the trial judge as well as to the final judgment of the court that this appeal is based.

The indictment upon which the said prisoner was arraigned and tried charges in its main part that:

> "On the night of the 21st of July in the year of Our Lord nineteen hundred and forty one (A.D. 1941), in the Settlement of White Plains, County of Montserrado and Republic of Liberia then and there being the said defendant with force and arms in and upon the body of James E. Killix of the settlement of White Plains, County and Republic aforesaid, unlawfully, violently, wrongfully, feloniously and of his malice aforethought did make an assault; and the said Martin V. Killix, defendant, with certain dangerous and deadly weapons known to the Grand Jurors as a cutlass and an axe, made of steel, iron and wood, which he the said defendant then and there held in his hands at, to and against the body of the said James E. Killix the defendant then and there being wickedly, unlawfully, intentionally, wilfully, violently, feloniously and of his malice aforethought did beat, strike, cut, wound and inflict the following injuries to wit: (1) one wound on the right temporal region about three inches long penetrating the skull; (1) one wound on the left parietal region, partly penetrating to the skull; and (1) one wound on the left eye of the body of the said James E. Killix with intent in so doing him the said James E. Killix then and there to kill; contrary to the form, force and effect of the Statute laws of Li-

beria in such cases made and provided and against the peace and dignity of this Republic."

From the record certified to this Court which contained the testimony of the witness for the prosecution which, in many parts, found corroboration in the testimony of defendant's witnesses, it appears that one Killix of Robertsville in the settlement of White Plains, in the county and Republic aforesaid, died leaving a dwelling house and sundry heirs of his body, among whom were James E. Killix, the private prosecutor, Martin V. Killix, the defendant, now appellant, and Julia Killix who afterwards married one Henry Pope; that the said three heirs for some time jointly enjoyed the possession and actual occupancy of the said dwelling house until later when James E. Killix, upon his own decision, left the house to live elsewhere, supposedly in the same settlement, leaving his brother Martin and his sister Julia to live in said home; that on July 21, 1941, the alleged date of the commission of the crime as charged, James E. Killix, the private prosecutor, was told by his sister Julia that Martin V. Killix, the defendant, had dispossessed her of the use of a room in the home which she, the said sister Julia, had been using for some time; that James E. Killix then took the matter up with his brother Martin, pointing out to him the considered unfairness and inconsistency of his act in dispossessing his sister of the room and pleading with him to reconsider his decision in this respect and hand the room back to their sister; that this did not seem to sit well with Martin V. Killix, the defendant, and consequently, after an effort on the part of James E. Killix to force measures on his brother by attempting to break a lock which the defendant had put on the door of the room in question and by actually removing a plank that had been nailed home, an altercation ensued which resulted in a fight wherein the alleged beating, striking, cutting, and wounding as charged was committed.

Whilst the trend of the testimony for the prosecution tends to show that the defendant was the aggressor in this fight which the defendant strongly denied, yet there appears to have been an effort on the part of the defense to show justification in self-defense as well as in defense of property. Under the principles of criminal procedure and practice which we have adopted from the common law as ours, a party charged with the commission of a criminal offense may, under the plea of not guilty, adduce evidence in justification or excuse. Therefore it was the right and privilege of the defendant to do this at the trial of the cause in the court below. 3 Bouvier, Law Dictionary *Not Guilty* 2365–66 (Rawle's 3d rev. 1914). See *Dunn* v. *Republic,* 1 L.L.R. 401, 405 (1903).

It seems, however, that the defendant or his counsel or both were diffident in the prosecution of defendant's claim of justification by a concession of the acts charged or at least of some of them followed by the justification for their commission; and that, despite the fact that counsel's attention was called to this uncertain and indefinite position by the trial judge, which we gather from counsel's argument before this Court when Mr. Justice Shannon also took him to task for what appears to have been indefiniteness in his line of defense, he never changed his attitude.

Said counsel seemed, however, to have been convinced of his dereliction in this instance, and consequently asked leave to file a supplemental brief wherein he stated the following:

> "During the trial of the case the trial court held that appellant should make clear his line of defence, that is to say, whether he was insisting that where the wounds had been inflicted by him that he show clearly that fact by open admission and setting up justification [therefor]. Appellant's counsel took the legal view that under his plea of not guilty after hearing the entire evidence the court and the jury would be able to

arrive at a verdict and render a judgment consistent with the facts and circumstances.

"After a verdict of conviction appellant filed a Motion for New Trial and during the argument thereof appellant's counsel set out that it was his opinion that appellant's defence had been probably prejudiced because of the view held by his counsel that it was not necessary to take the line of defence suggested in paragraph one supra; and that in view of which possible error in legal opinion appellant had been illegally convicted, the new trial should therefore be awarded so as to enable appellant to make out a clear defence."

He cited in support of this submission, praying for remand of the cause with instructions awarding a new trial, 2 Blackstone, Commentaries *393. Whilst it is true that the awarding of new trials is discretionary with the court and that a review by an appellate court of the exercise of this discretion is not broadly favored, yet we have the following among the exceptions made:

"In criminal, as in civil, cases, the grant or refusal of a new trial is generally said to rest in the sound discretion of the trial court, and the appellate court has no right to review the exercise of such discretion unless it appears that it has been abused to the prejudice of defendant. . . . Such discretion, however, is not mere whim or caprice, but the exercise of a mature and deliberate judgment, founded on well established and legal principles, having for its object the promotion of justice and the protection of the innocent. The discretion confided in the trial court is perhaps the greatest protection of accused against the mistakes and prejudice of the jury, and as the consequences of refusing a new trial are serious and not fully corrected by a reversal, the trial courts have been admonished to be more liberal in granting new trials in criminal cases. So where there is a doubt as to the duty to grant a new trial it should be resolved in favor of de-

fendant." 16 Corpus Juris *Criminal Law* § 2620, at 1119–20 (1918).

The sporty attitude assumed by the counsel for defendant before us in the submission of his supplemental brief wherein he alleges that he assumed the same attitude before the trial court but with no favorable effect, which submission has not been controverted by the prosecution, cannot but move the Court to a particular consideration of the point carried in said supplemental brief, especially upon the strength of the law controlling as cited in the following:

> "While courts of law exercise a liberal jurisdiction in granting new trials, they uniformly refuse them if the party applying for them has been guilty of negligence, and might by the use of reasonable diligence have been prepared for trial. . . . Since, as a rule the negligence of an attorney is equivalent to the negligence of his client, it may be stated as practically the universal rule that a new trial will not be granted either in a civil or a criminal case on the ground of the negligence or incompetence of the attorney of the party applying for it, except in an extreme case and to prevent a clear failure of justice." 20 R.C.L. *New Trial* § 70, at 287 (1918).

Whilst it is apparent that a clear, certain, and definite line of defense was not taken by the defendant at the trial of this case, a fact which has already been stated, this has been conceded by the counsel in both his argument and his supplemental brief before this Court and for which defect or negligence he makes himself responsible; yet there are other apparent errors committed by the trial judge against the interest of the defense which ought to receive mention since they involved some of the exceptions taken and reserved for this appeal with a view of definitely settling the principle for further guidance.

There were several efforts made by the defendant during the trial of the case and on his plea of not guilty to

show justification and in this to put in evidence previous difficulties, assaults, and threats on the part of the private prosecutor, James E. Killix, directed to him the said defendant, and these were each time resisted by the prosecution which found support from the court. On this point, however, the following quotation from a leading authority is pertinent:

> "In order to determine who was the aggressor, evidence of previous difficulties between the parties may be considered. Further, the fact that a previous assault has been made by the complaining witness [the private prosecutor] upon defendant may be introduced as bearing upon the question of self-defense, as tending to show defendant's apprehension of danger. And where the state has introduced evidence of a previous difficulty between the prosecutor and defendant, the latter may show that the prosecutor was the aggressor in the previous affair." 5 Corpus Juris *Assault and Battery* § 325, at 787 (1916).

Further, where the defendant, through his counsel, had taken a clear, certain, and definite line of defense to show justification, he would have been free under the law to show threats communicated to him by the prosecutor.

> "Evidence of previous communicated threats is, according to the weight of authority, held competent upon the question of self-defense. Where, however, defendant cannot invoke the doctrine of self-defense, he cannot introduce threats upon the part of the person assaulted as substantive evidence. Although, where such person testifies as a witness, it would seem that such threats are competent, as bearing upon the question of his credibility and as showing the hostile nature of his mind toward accused, under the rules applicable to witnesses generally." *Ibid.*

It is the opinion of this Court that unless this Court gives defendant an opportunity for another hearing of the case where, perhaps upon his taking and presenting a

clear line of defense as was apparently intended by him, a crystal clear defense may be made and substantial justice meted out, a clear failure of justice will ensue instead of being prevented. And since:

> "To support a plea of self-defense, however, there must be some actual attempt or offer to do bodily harm, or defendant must have had reasonable ground to apprehend a design on the prosecutor's part to commit a felony on him or do some great bodily harm, and that there was imminent danger to him of such design being accomplished. His right of self-defense is not limited, however, to the absolute necessity of the occasion, but only by what reasonably appears to him to be dangerous at the time viewed from his standpoint and no other. Accordingly he may act on apparent danger as it reasonably appeared to him at the time; the danger need not be real, nor is it necessary that he should be in peril of his life or serious bodily injury. The question to be determined is whether accused acted under an honest belief in the danger of great bodily harm without regard to whether his conduct was courageous or cowardly. . . .
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> "Where the danger is imminent the assaulted party need not await until he is struck but may protect himself by striking the first blow." *Id.* § 235, at 747–48.

The Court is of the opinion that a new trial should be awarded the defendant on the premises herein laid down and that the judgment of the court below be reversed, the cause be remanded to the trial court with instructions that the new trial prayed for be awarded and heard in a manner not inconsistent with the principles herein laid down; and it is hereby so ordered.

*Reversed.*