ABRAHAM SEALON FLOMO, Appellant, *v.* REPUBLIC OF LIBERIA, Appellee.

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

Argued April 4, 1977. Decided April 29, 1977.

1. It is the duty of the prosecution in every criminal case to prove the defendant guilty beyond a reasonable doubt irrespective of whether or not he testifies or anyone else testifies for him.
2. The failure of the defendant to move for a new trial after adverse verdict in a criminal case does not deprive him of his right to appeal.
3. A substantial or material variance, that is, a discrepancy between the pleading and proof, calls for reversal of a conviction.
4. Proof that a homicide was committed by strangulation when the indictment alleged that decedent died as a result of wounds inflicted upon her by the accused, is a substantial variance.

Defendant was indicted for murder, committed according to the indictment by infliction of wounds on the victim in the course of forcible sexual intercourse. The evidence adduced at the trial tended to prove that the death occurred as a result of strangulation. The jury found defendant guilty of murder and he was sentenced to death. This was an appeal from that judgment to the Supreme Court.

The Court reversed the conviction on the ground that the proof showed that the crime was committed by a different means than alleged in the indictment. The *judgment* was *reversed,* and the *case remanded* for a new trial.

J. Dossen Richards for appellant. *Jesse Banks* of the Ministry of Justice for appellee.

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

Society will always be revolted by the wicked and un-

lawful taking of human life. Not one of us has any moral or legal right to unauthorizedly destroy what we cannot give; and each human being has as much right to live as any other human being. These are elementary rules which govern in our political society; disregard them, and we lower ourselves to the status of the lower animal kingdom where the strong survive by killing the weak. To prevent this from happening among us, fixed rules have been legislated which control our behavior, and which fix punishment for each and every violation.

In the case of criminal and unlawful homicide, our Penal Law has defined it as either murder or manslaughter.

"*232. Murder.* Any person who:

"1. Without legal justification or excuse, unlawfully with malice aforethought, kills any human being; or

"2. Is present unlawfully aiding and abetting another directly or indirectly in the felonious killing of any human being; or

"3. With malice aforethought conspires with or counsels and advises another to kill a human being; or

"4. Unlawfully counsels or advises another to commit suicide, and the person so advised and counselled by any means whatsoever kills himself as a result of such advice and counsel, whether or not such adviser is present when the suicide is committed; or

"5. While sustaining such a relation to another as imposes upon him the duty and obligation of support, nurture and sustenance, maliciously, unlawfully and negligently permits such person to die from lack of medical attention or means of sustenance or support; or

"6. While engaged in the commission of or in an attempt to commit a felony, without a design to effect death, kills a human being, is guilty of murder and

punishable with death by hanging." 1956 Code, Title 27.

There are also other classifications of homicides, namely, excusable homicide and justifiable homicide; but for the benefit of this opinion we shall confine ourselves to murder, which is what the appellant was charged with and tried for in the court below.

According to the indictment before us which has been certified by the clerk of the trial court, appellant criminally assaulted a girl about nine years old on April 30, 1972, at the B. F. Goodrich Rubber Plantation Camp in Bomi Territory, Montserrado County, and as a result of his forcible and carnal knowledge of this girl, and also as a result of wounds inflicted upon her body during the sex act, the girl died. The relevant portion of the indictment charged that the defendant

> "without any legal justification or excuse, in and upon the body of Alfreda Scott, a female of about 9 (nine) years old, unlawfully, wrongfully, forcibly, violently and feloniously did carnally know and abuse and as a result of the forcible, violent, felonious and willful carnal knowledge or congress which the defendant aforesaid had with the said Alfreda Scott, and also as a result of the unlawful, wrongful, violent and felonious wounds which were inflicted upon the right eye, lip and several other vital parts of the body of the said Alfreda Scott by the defendant aforesaid, the said Alfreda Scott in the peace of God and of this Republic did die."

According to this indictment, these were the facts necessary to be proved at the trial: (1) that the defendant without legal justification or excuse had had sexual intercourse with a nine-year-old girl known as Alfreda Scott; (2) that during the commission of the sex act, violence had been practiced upon the said Alfreda Scott by the defendant; as a result of which several wounds had been inflicted

upon her body in several places, including her right eye, her lip, and several other vital parts of her body; and (3) that these several wounds inflicted by the defendant upon the body of the aforesaid Alfreda Scott, together with the forcible, violent and felonious sexual intercourse which he, the defendant, had with this girl, were the cause of her death.

In effect this is what was charged in the indictment, and according to our law, and in keeping with practice and procedure in such cases, this is what should have been proved beyond a reasonable doubt at the trial, not only because human life is involved, but because this is a basic requirement in all criminal trials.

Trial of this case was had in the May 1973 Term of the First Judicial Circuit, Montserrado County, with Judge Roderick N. Lewis presiding. A jury was selected, sworn, and empanelled; they heard evidence of the State, were charged and sent to their room of deliberation, and returned a verdict finding the defendant guilty of murder. No motion for new trial was filed, and judgment was rendered sentencing the defendant to suffer death for the crime. This judgment was excepted to, and appeal taken therefrom to the Supreme Court. The case is therefore before us on a bill of exceptions containing four counts.

Before traversing these counts we would like to comment on a phase of this case which evoked much argument during the hearing before us, to wit, the failure of the defendant to take the stand and testify in his own defense during the trial. It is the duty of the prosecution in every criminal case after the defendant's plea to prove him guilty beyond a reasonable doubt, irrespective of whether or not he testifies, or anyone else testifies for him.

The responsibility of the State to prove the guilt of an accused charged with the commission of crime never diminishes, from the moment of his plea to final deter-

mination of the case. His decision not to testify is an inherent right for which he may not be blamed because he elected to exercise it. It is true that at times he does so at his own risk; but who should be more interested in his fate than he himself, and especially in capital cases? And the fact that no witnesses testified for the defense cannot render the defendant guilty if there was no clear and unimpeachable proof of this guilt produced at the trial.

As we said previously, this case has come up to us on four counts of a bill of exceptions, and those counts read as follows:

> "1. Because defendant says that after the prosecution had rested evidence, he moved the court for a directed verdict of acquittal in view of the fact that the prosecution had not established the cause of death as alleged in the indictment. Your Honor denied said motion to which defendant excepted.
>
> "2. And also because the jury returned a verdict against the defendant to which he excepted and gave notice that he would not file a motion for new trial because under existing rules of procedure such a motion is not necessary.
>
> "3. And also because defendant says that Your Honor neglected to properly instruct and charge the jury on the question of variance between the indictment and the evidence as to the cause of death. To which defendant excepted.
>
> "4. And also because on the 24th day of May, 1973, Your Honor affirmed the verdict of the jury and rendered judgment against the defendant sentencing him to death by hanging. To which defendant excepted."

During the trial the prosecution had six witnesses to testify for the purpose of establishing proof of the charges laid in the indictment. The witnesses were: Cecelia

Scott, mother of the decedent; Doctor F. B. Manuel, who examined and certified the death; George Dunham, the N.B.I. officer who testified to certain confessions alleged to have been made by the defendant when arrested; Boimah Coleman, an employee of B. F. Goodrich with whom the defendant worked; Patrick S. Nah, another N.B.I. officer who went to the scene of the crime after discovery of the body; and Maiko Rose, another N.B.I. officer.

Cecelia Scott testified that on a night in April 1972 at her home in the B. F. Goodrich Camp in Bomi Territory she awoke to find someone choking her. She noticed the accused standing over her and she yelled. This awoke the children in the house, and they started yelling, and the intruder fled from the room. Then she called for her daughter Alfreda, but got no answer, and she called again several times but still got no answer, so she went into the child's room and found her bleeding. She took up the child and carried her to the next door neighbor, and from there to the hospital where she was later declared dead by the doctor. She also testified that the accused had entered the house through a window in the boys' room, and that he had fled from the house when the yelling started, leaving his clothes behind in the living room.

Next to testify was Doctor Manuel, and for the benefit of this opinion we will quote what he said on the witness stand:

> "The body was examined April the 30th, 4:15 in the morning. The heart beat was absent. In short my findings of the body are: the body was that of a dead [girl], whose possible cause of death is asphyxiation due to strangulation of the neck. Asphyxiation means the absence of breathing because of an external cause. I think that is all I can say other than what is already in the report."

He was cross-examined as follows:

"Q. Is strangulation the only cause of asphyxiation or could there be other causes?

"A. Most likely that was the only cause.

"Q. Would you say in medical terms that strangulation is a wound?

"A. No."

The court questioned the doctor as follows:

"Q. Mr. Witness, you have testified that strangulation is not a wound. May we understand, however, that strangulation may be caused by wounds inflicted on certain parts of the body of a human being?

"A. It depends if the factor causing it is still on the neck."

The doctor's examination ended, and he left the witness stand, but there is his medical report of the condition of the body when he examined it at the hospital in the morning of April 30 as aforesaid:

"To Whom It May Concern:

"The following are the post-mortem findings on the body of Alfreda Scott, alleged daughter of Mr. William Scott, who is a teacher in B. F. Goodrich Plantation School.

"History: Alleged assault about 4:00 A.M., April 30, 1972. Brought to hospital about 4:00 A.M. in very serious condition, then seen and declared dead about 4:15 A.M. that same morning.

"P.M. Findings (4:50 A.M., April 30, 1972): No heart beats noted, pupils dilated 5mm. Head: right eye swollen with slight hematoma. Abrasions on lower lip (2), and on upper gingiva (2). Neck: multiple scratches (like finger-nail marks), more on the lateral sides (18).

Internatal Examination: Second-degree laceration at vaginal introitus at 6–7:00 o'clock position. Blood clots and some fresh blood were noted (about 100 cc).

Autopsy: Venous congestions of neck and head veins and extra vasation of blood noted; left lung showed several small spots of hematoma.

"Remark: Most possible cause of death is asphyxiation due to strangulation.

[Sgd.] F. B. MANUEL, M.D."

We shall come back to the medical examination later, but to continue with the testimony of the other State's witnesses.

George Dunham, an N.B.I. officer, testified that he and other N.B.I. officers had viewed the body of the decedent at her parents' home, whereon they had found scratches, and were told later by the doctor that the girl had died from strangulation. They also found at the scene of the crime a part of a man's trouser's, and a pair of shorts or swimming trunks. The accused is supposed to have told them that the clothes were his. Accused is also alleged to have told the officers that he had gone to the home of the Scotts on the night in question for the purpose of stealing, and upon entering one of the rooms found decedent lying in a position which aroused his sexual urge. Before attempting to have sex with the girl he took off his trousers and shorts and left them in the parlor. He (the accused) is alleged to have returned to the girl's room, put his hand over her mouth to keep her from making a noise, and forcibly penetrated her.

The officer testified that the accused had also told them that after violating the girl, he went into another room where the girl's mother was asleep, still looking for something to steal. The mother is said to have awakened and raised an alarm, and he ran from the room; but she had followed so closely behind him, that he was not able to stop and retrieve his trousers and shorts.

The witness also said that during their investigation at the place where the accused lived with other employees of B. F. Goodrich, they were informed that the accused had returned in the early hours of April 30 without trou-

sers or shorts. His roommate is alleged to have inquired concerning his strange and unusual appearance, but the accused "covered story." We assume that means he told a cover-up story. The officers then took him to the scene of the crime, where he is alleged to have demonstrated what took place on the night of his attack upon the decedent. He is said to have taken the officers to some spot in the plantation where he had hidden under a log a Peace Corps bag containing a pair of slippers, left there prior to entering the Scott home. This story the other two N.B.I. witnesses corroborated.

Another witness for the prosecution was Boimah Coleman, who testified that during the preceding month, the accused had been employed as a tapper on the B. F. Goodrich Plantation. In the morning of Sunday, April 30, the day decedent's body was discovered, he had been shown a pair of trousers and told that they had been left at the scene where a little girl had been raped and killed. He testified that he had recognized the trousers as belonging to the accused. He then called the accused and showed him the trousers and asked him if they were his. The accused is alleged to have said that he had a pair like them, but that these were not his, and that his were at home; the officers with the witness accompanied him to his house, but he could not produce his trousers, whereupon he was arrested.

The other N.B.I. officers, Patrick Nah and Maiko Rose, did not add anything new to the story already told by the first officers, and the State rested its case, after offering in evidence several written documents including the medical report and an alleged confession signed by the accused. This later document states in more detail the story which the first N.B.I. officer told on the witness stand, and which has already been recited above.

Because of the position we have taken in this case, we will make no comment upon the testimony of the witnesses, nor say anything about the extrajudicial confession

which was put in evidence, and which it is alleged the accused is supposed to have made when he was arrested. The question of the admission of this document was raised in the appellant's brief, and heatedly argued before us. There are other issues in this case which we prefer not to traverse at this time because of our decision.

As we have shown hereinbefore, the bill of exceptions contains four counts, only two of which we deem necessary to dwell upon in this opinion. These two are: (1) exceptions taken to the judge's charge to the jury on the question of variance between the indictment and the evidence adduced at the trial; and (2) the question of the defendant's failure to file a motion for new trial. We shall discuss the latter of these two counts first.

According to our latest statute, a new trial after a jury's verdict "may be granted only on the ground of newly discovered evidence." Rev. Code 2.22.1. The fact that the defendant gave notice that he would not file such a motion could not, and did not, in any way deprive the trial court of its sworn duty to render judgment in pursuance of the verdict. Where the defendant failed after adverse verdict to ask for a new trial, he thereby waived his right to do so, even had he not given such a notice on the record. The failure of the defendant to move for a new trial after adverse verdict in a criminal case should not deprive him of his right to appeal, which right he can only enjoy after judgment has been rendered against him. On the other hand, where judgment is not rendered for any reason after verdict, the rights of both sides are adversely affected, and the trial would have thereby resulted in a useless expense imposed unnecessarily upon the State. Moving for new trial after the verdict is an election of the losing party which he may waive, just as he may also waive the announcement of appeal after adverse judgment.

And now we come to consider the latter of the two points of the bill of exceptions which we think relevant to

the position we have taken in this case—variance. According to most authorities, variance on a material issue in the case is always ground for reversal of the judgment. Let us look at some well-known authorities on this principle. In 1 Underhill, *Criminal Evidence,* § 85 (5th ed., 1956), we find the following:

> "A variance is a discrepancy between pleading and proof, that is, between the allegations of the indictment or information and the evidence offered at the trial. It is a general rule that a crime must be proved substantially as alleged. A substantial or material variance calls for reversal of a conviction; an immaterial one does not.
>
> "A variance is material if the discrepancy is such as may mislead the accused in preparing his defense, or if it may expose him to the danger of again being put in jeopardy for the same offense."

And the note under this section found on the same page reads: "Crime must not only be proved as charged but it must also be charged as proved." On page 149 of the same book in section 91 under the heading, "Variance as to Means Used in Committing Crime," it is written: "The prosecution must show that the crime was committed in the manner and by the means alleged in the indictment." Also 27 AM. JUR., *Indictments and Informations,* § 177 (1940).

In this case the indictment has charged that decedent died as a result of wounds inflicted by the accused upon various parts of her body during his forcible sexual intercourse with her. According to the medical report marked and admitted in evidence as well as the expert testimony of the doctor on the witness stand, the "most possible cause of death is asphyxiation due to strangulation." During the testimony of the doctor this question was put to him: "Would you say in medical terms that strangulation is a wound?" His answer was, "No." If strangulation is not a wound, then the doctor said in effect

that the decedent did not die as a result of any of the wounds inflicted upon her, as the indictment has alleged.

Perhaps to clarify the issue of whether or not strangulation and wound could possibly mean the same thing, let us resort to proper medical authority for the definition of the two words. According to MALOY'S MEDICAL DICTIONARY FOR LAWYERS (2nd ed., 1951), "strangulation" means: "To choke, throttle; to stifle, suffocate. Compression or constriction of a tube as the windpipe or the intestine. Stopping respiration; shutting off the circulation in the intestine." A "wound" is defined by the same author to be: "An injury by which the skin is divided. A lesion (injury) as a stab, cut or rent. A traumatism." Therefore, where the indictment charged that death had been caused by an injury resulting from the breaking of the skin such as a stab or a cut or a rent, and the evidence at the trial showed the most probable cause of death to be by suffocation, we do not feel that charges in the indictment were proved as laid. Therefore material variance does exist between the information and the proof because, while the indictment accused the defendant of having committed the crime by one means, at the trial the prosecution proved that it had been done by another. How could he properly defend himself against such a charge?

Unless the allegations laid in the indictment are proved at the trial, the defendant cannot be said to have been fairly treated. Under his plea of "Not guilty" he had joined issue with everything contained in the indictment. Therefore it immediately became the State's responsibility to prove everything it had charged. For instance, had the prosecution proved that death had been caused by the wounds inflicted during the sexual intercourse accused is alleged to have had with the girl? The medical report did not so state, nor did the doctor's testimony with any certainty establish what was actually the cause of death. "Most possible cause of death is asphyxiation due to strangulation," as stated by the medical report, as well as

the testimony of the doctor on the witness stand, leaves much to be explained; and especially after the doctor admitted that he had performed an autopsy.

In *John* v. *Republic* 7 LLR 261, 271 (1941), we quoted from 3 Greenleaf, *Evidence,* § 10 (16th ed., 1899), as follows: "It is a cardinal doctrine of criminal jurisprudence . . . that the accused has a right 'to be informed of the nature and cause of the accusation' against him; or . . . to have the offense 'fully and plainly, substantially and formally, described to him.' This is the dictate of natural justice as well as a doctrine of the common law."

In view of the circumstances as revealed at the trial of this case, we are not convinced that the judgment of the trial court can be upheld without doing great injustice to the appellant. We have therefore reversed the judgment, and remand the case for a new trial.

Reversed and remanded.