DWE WLO FLO, Appellant, v. **REPUBLIC OF LIBERIA**, Appellee.

APPEAL FROM THE CIRCUIT COURT FOR THE FOURTH JUDICIAL CIRCUIT, MARYLAND COUNTY.

Heard: March 17, 1981. Decided: July 29, 1981.

1. A bill of exceptions must specify the exceptions made to the judgment, decision, order, ruling or other matter excepted to during the trial, together with a statement of the basis of exceptions, for a review by the Supreme Court.

2. A defendant *in forma pauperis* is entitled to representation by the best lawyer available in the Bar, but where an attorney appointed by the court is capable of professionally and legally conducting the trial on behalf of the defendant, the objective of the statute is met.

3. An attorney cannot be blamed for the outcome of a case except it can be shown that he was derelict in the performance of his professional duty.

4. The voluntary admission made by a party is evidence against him, even where it does not appear that he was warned by the judge of the penalty he might incur by such admission.

5. It is not a reversible error for the trial judge to accept a plead of guilty in a capital case, where the admission is made voluntarily or without threats, fear or inducement, and where the judge adheres to the regular trial procedure in the conduct of the trial.

6. The failure of a person to reply to an oral statement made and introduced into evidence against him, where he had the opportunity to act, is an implied admission of the facts stated.

7. To constitute malice aforethought, there need not be an old quarrel, or a long period of resentment, envy or spite. Rather, malice consists of any unlawful acts, willfully done, without just excuse or legal occasion to the injury of another person.

8. The manner and means in and by which the crime was committed is not an element of the *corpus delicti* and the exact manner of the killing need not be proven. Instead, in corpus delicti, it is sufficient to show the finding of the a dead body and the appearance thereof showing acts of violence.

9. A mere possibility that death resulted from some other cause other than the act of the accused will not overcome facts leaving no rational grounds for doubt, nor will inference be drawn from incompetent evidence.

10. The cause of death and the criminal agency may be established by circumstantial evidence, especially where no question as to the cause of death is raised at the trial.

Moreover, it is not necessary that the evidence that death was caused by criminal means should be obtained from the body of the deceased. Hence, an autopsy is not essential.

11. A confession of a crime by an accused is admissible into evidence and may be used against him when properly corroborated.

12. While it is a general principle of law that the burden of proof rests on the party who maintains the affirmative, yet, where the facts lie peculiarly within the knowledge of a party to a cause, he shall be held to prove the negative.

13. The uncorroborated testimony of an accused is insufficient to establish his innocence, especially where the evidence against him is clear and convincing.

Appellant was indicted by the Fourth Judicial Circuit, Maryland County for the murder of his son. When the case was called for trial, appellant was declared *in forma pauperis,* and because the defense counsel for Maryland County was absent from court due to illness, the trial judge appointed an attorney to represented the appellant. A jury was empanelled and appellant arraigned at which he pleaded guilty to the charges. Upon a brief trial, a verdict of guilty was returned by the empanelled jury, and a judgment entered affirming and confirming the verdict and sentencing the appellant to death by hanging. From this judgment, appellant appealed to the Supreme Court.

The bill of exceptions filed on behalf of the appellant, was signed by the defense counsel for Maryland County, who, according to the records, did not participate in the trial. Among appellant's contentions was that an *in forma pauperis* was entitled to adequate representation by the defense counsel for Maryland County; that due to the absence from court of the defense attorney, the trial judge had hastily appointed an attorney who poorly represented the appellant; and that consequently, appellant was found guilty and sentenced to death. Appellant also contended that the judge committed reversible error by not ascertaining from the accused, after he entered the plea of guilty, if he had really committed the crime charged and if he was aware of the gravity of the plea of guilty. Appellant contended further that the trial court erred in accepting the plea of guilty and in referring to it in his charge to the jury. Finally, appellant contended that the evidence produced at the trial by the prosecution was not sufficient in law to sustain the conviction for the crime of murder.

The Supreme Court held that there is no showing in the bill of exceptions, clearly pointing out the purported negligent acts or errors committed by the court appointed attorney during the trial of this case, and which errors prejudiced and contributed to the conviction of the appellant. The Court said that it has not been able to gather from the records any such

irregularity. The Court held that the failure of counsel for appellant to specify what he considered as negligence on the part of the attorney who represented appellant, was fatal to his appeal. The Court agreed with appellant that in keeping with statute, an *in forma pauperis* is entitled to representation by the best lawyer available in the bar. However, the Court held that when an attorney appointed by the court is capable of professionally and legally conducting the trial on behalf of the accused, the primary object of the statute is fully met, and except it can be shown that the attorney was derelict in the performance of his professional duty, he should not be blamed for the outcome of the case.

The Supreme Court also held that a voluntary admission made by a party is evidence against him, even when it does not appear that he was warned by the judge of the penalty he might incur, provided his admission was not made from threats, fear or inducement and that such evidence when admitted will not be evidence of low grade. The Court said that the records do not show, nor has appellant complained, that the admission was made by threats, fear or inducement but voluntarily. The Court went to add that since indeed the trial judge adhered to the regular procedure, as if appellant pleaded not guilty, his failure to expressly refuse to accept the plea of guilty, does not constitute a reversible error, nor did it prejudice the nterest of the defendant.

The Court also held that the trial judge did not err when he instructed the jury and referred to the admission of the appellant. The Supreme found that the trial judge did not instruct the jury on anything that was not testified to by the witnesses on both sides and that it was a duty devolved upon the court by law to sum up the evidence on both sides. Hence, the trial judge committed no reversible error in doing so. Accordingly, the Court *affirmed* the judgment.

Edward W. Appleton appeared for appellant. *The Solicitor General* and *Momolu S. Kaiwu* appeared for appellee.

MR. JUSTICE YANGBE delivered the opinion of the Court.

Appellant was indicted for the heinous crime of murder of his own one and a half year old son, named Dwe Wlo Flo Jr., in the 4th Judicial Circuit, Maryland County, Republic of Liberia.

When the case was called for trial, the appellant was declared an *in forma pauperis.* The defense counsel for Maryland County was absent from courtroom due to illness; therefore, the trial judge appointed an attorney who represented appellant. During the arraignment, appellant entered a plea of guilty; nevertheless, jurors were duly selected, sworn to hear the evidence and to render a verdict accordingly.

After a brief trial, appellant was convicted of the crime charged and sentenced to death by

hanging to be carried out on Friday, January 12, 1973, between the hours of 6 in the morning and 6 in the evening. The judgment was excepted to and the appeal has been perfected. This case has therefore come before this tribunal for review and final decision.

Appellant tendered a six count bill of exceptions signed by a lawyer who did not participate in the trial. In the first and sixth counts of the bill of exceptions, the lawyer averred that he was the defense counsel for Maryland County, and that the accused being *in forma pauperis,* in keeping with statute, was entitled to adequate representation by him as the defense counsel for Maryland County. However, because he was absent from court for few days due to sickness, the trial judge hastily appointed an attorney who poorly represented the appellant, and the latter was found guilty and sentenced to death.

The law requires that in a bill of exceptions, the appellant must specify the exceptions made to the judgment, decision, order, ruling or other matters excepted to during the trial and relied upon for review together with a statement of the basis of the exceptions. Civil Procedure Law, Rev. Code 1: 51.7.

There is no showing in the bill of exceptions clearly pointing out the purported negligent acts or errors committed by the court appointed attorney during the trial of this case, which alleged errors prejudiced and contributed to the conviction of the appellant, nor have we been able to gather from the records any such irregularity.

The failure of counsel for appellant to specify what he considered as negligence on part of the court appointed attorney who represented appellant, in our opinion, is fatal. Although this issue of poor handling was not argued in the brief of appellant and therefore ordinarily, does not fall within the scope of appellate review, however, for two reasons, we have elected to pass upon the same:

(a) The counsel who is charged in the bill of exceptions was the one who appeared here and argued for appellant; therefore, he did not, out of propriety, raise the issue of poor representation; and

(b) Representation of counsel in a court, especially in capital offenses, is vitally important. Civil Procedure Law, Rev. Code 1: 24.18 (2).

We are in accord with the view that, in keeping with our statute, an *in forma pauperis* is entitled to representation by the best lawyer available in the bar. However, we are also of the opinion that when an attorney appointed by the court is capable of professionally and legally conducting the trial on behalf of the accused, the primary object of the statute is fully met. We hold further that a lawyer is only professionally responsible to his client for the law and procedures in the conduct of a trial to see that his client's legal interest is properly and

legally safeguarded. Except it can be shown that the attorney was derelict in the performance of his professional duty, he should not be blamed for the outcome of the case based upon the facts; and to hold otherwise, we will be encouraging irregular and unethical conduct by lawyers in our court system. Count one of the bill of exceptions is therefore not sustained.

In count two of the bill of exceptions, it is asserted that the trial court erred in not (a) ascertaining from the accused if he really committed the crime charged; (b) enquiring from the accused if he was aware of the gravity of the plea of guilty; and (c) refusing to accept the said plea. In reliance, appellant cited the Criminal Procedure Law, Rev. Code, 2: 16.4, which reads as follows:

"A defendant may plead guilty or not guilty except that in a capital case only a plea of not guilty may be accepted. The court may refuse to accept a plea of guilty in any other case, and shall not accept such plea without first (a) making such inquiry as may satisfy it that the defendant in fact committed the crime charged and (b) addressing the defendant personally and determining that the plea is made voluntarily with understanding of the nature of the charge. If a defendant refuses to plead or if a defendant corporation fails to appear, the court shall enter a plea of not guilty."

In encountering this argument, counsel for appellee cited the Criminal Procedure Law, Rev. Code 2:16.3, which is also quoted as follows:

"No irregularity in the arraignment shall effect the validity of any proceeding in the case if the defendant pleads to the indictment or complaint or proceeds to trial without objecting to such irregularity."

In *Dennis and Dennis v. Republic,* 3 LLR 45 (1928) over 50 years ago, this court held:

"A voluntary admission made by a party, is evidence against him even where it does not appear that he was warned by the judge of the penalty he might incur, provided such admission was not made from threats, fear or inducement, and such evidence when admitted will be evidence of no low grade."

The records do not show, nor has appellant complained, that the admission was made by threats, fear or inducement, but voluntarily.

Since indeed and in truth the trial judge adhered to the regular procedure, as if appellant pleaded not guilty, his failure to expressly refuse to accept the plea of guilty in our opinion, does not constitute a reversible error, nor does it prejudice the interest of the defendant. We are of the further opinion that the object of the statute cited by the appellant is to allow the

State to prove the charge placed against the appellant, notwithstanding his plea of guilty to the indictment. The trial court has regularly conducted the trial in the face of the plea of guilty, which is also an indication that the trial judge was satisfied that the defendant was now aware of the plea of guilty. Count two of the bill of exceptions is therefore not well taken; hence, overruled.

In count three of the bill of exceptions, appellant contended that the following question was asked the mother of the child, Sieh Dusi, on the cross examination:

"Miss witness, how do you know that the defendant is wicked and please name some of his wicked acts that he might have performed on you?

This question was objected to on the grounds that it was "irrelevant and immaterial as to the plea of the defendant", which objection was sustained.

In answer to a question previous to this, the witness did mention that "he (defendant) is not crazy and is in his right mind, but he is wicked". Therefore, the trial court should not have sustained the objection interposed by the State on the grounds stated. However, we will say more later with respect to alleged wicked acts of the appellant as they relate to this case.

Count four of the bill of exceptions reads:

"And also because defendant excepted to the prejudicial ruling of the trial judge sustaining the prosecution's objection when on the cross examination of prosecution's witness, Dwe Wlo Freeman, who said previously that he lives in Fishtown, was also asked whether defendant also lives in Fishtown. To this question the prosecuting attorney entered objections on the grounds of irrelevancy and immateriality, which objections were sustained. . ."

In the opinion of this Court, whether both the appellant and the witness lived in Fishtown is not pertinent, nor material to the case, therefore the trial judge did not err when he overruled the objection on those grounds. Count four of the bill of exceptions is therefore not sustained.

Before passing upon counts five and again six of the bill of exceptions, it is important to summarize the evidence adduced at the trial on both sides.

First, the mother of decedent, Sieh Dusi, took the witness stand and deposed substantially, as follows:

That she and the appellant had fuss. Appellant had told his wife to go to her parents and she went. While she was there with her parents, appellant went there one day, and after an

investigation, the relatives of the mother of the murdered child told appellant that he was wrong. He admitted and apologized. The wife was advised by her relatives to go back home with appellant, but she said that her father was on the farm and she could not go in the absence of her father. Appellant went to the farm to his father-in-law and told him what his daughter had said. The father replied that his daughter was joking and he promised to talk to her, and that appellant should go and come back and appellant left.

When appellant returned, he asked his wife for their child. At the same time, appellant was looking all around, including under the cola trees. When the boy recognized his father's voice, he ran to him and appellant picked him up and carried him behind the house. Within a few minutes, appellant brought the child back from behind the house and sat him down. The mother then asked appellant what had happened to the child? Appellant picked up the boy again, and while bringing the child to the mother, but before he could reach, the child's mouth and tongue were burned up. The mother continued to ask the appellant what had he done to her son? The mother yelled, and called people for help and they came around. When they asked appellant if the child was sick when he came into town, he replied "no". Immediately the child started urinating blood. The people advised appellant and others to put the boy on appellant's back and carry him to the paramount chief, the father of the appellant, but before they could reach, the child expired. The paramount chief advised that they carry the child to Fishtown. While they were on their way, appellant threw the dead body down and ran away. Appellant's father told the people to apprehend appellant and they did.

When they reached Fishtown, the people asked appellant what had he given the child which caused his death? Appellant admitted that he gave the boy acid.

The second witness for the State was Dwe Wlo Freeman and he corroborated the entire testimony of the first witness, the mother of the decedent.

After the State rested evidence, appellant was expected to extricate himself but when he took the witness stand, he confirmed exactly what the prosecution witnesses had said and he concluded by saying:

"When I left from my father's farm the next morning, I gave my son this medicine to drink. The family brought me to my father's farm, I did not say anything to them until I got to my father. My father, Yarbo, the paramount chief, ask me what had happened? I told my father that I could not say anything. But I did not know what was wrong with my mind, and so my conscience is still beating me; because my wife said she did not want me and she is not the only woman in this world, this is why I had to kill my own child for my mind is still asking me this question. So I told him to bring me to the authority and if they wanted to hang me, I

would be more than happy, because I do not realize the use of killing my child. They brought me. This is all that I know."

It is significant to mention here that although during the trial, the two witnesses for the prosecution testified that appellant confessed several times that he gave his own son acid, and that he threw the decedent down while on their way to Fishtown and ran away, yet, when appellant took the witness stand he did not refute the testimony of these two witnesses, even though he had every opportunity to deny the highly incriminating and provocative testimony of the two witnesses mentioned hereinabove.

In 30 AM. JUR. *Evidence* 2d, §1096, it is written, *inter alia,* that: "It is well recognized that the failure of a person to reply to an oral statement may be construed and introduced against him as a tacit or implied admission of the facts stated, where the circumstances are such as to afford him an opportunity to act and speak freely, and naturally call for a reply. The weight to be given to such question is for the jury to determine, and depends upon how significant is the silence.

Counsel for appellant also contended that there is no proof in the records that appellant had malice against the decedent.

Let us now see what malice is, in view of the facts and the circumstances surrounding this case, which we have already vividly portrayed above:

"Malice in law does not necessarily mean hate, ill will or malevolence, but consists in any unlawful act, wilfully done, without just excuse or legal occasion, to the injury of another person. It may properly be said not to be a thing or entity, but rather a mental state or condition prompting the doing of an overt act without legal excuse or justification, from which act another suffers injury. Where the act is done with the deliberate intention of doing bodily harm to another, it is called express malice; otherwise the malice is inferred or presumed from the act. Evil intent is legal malice, so also is gross and culpable negligence whereby another suffers injury." *Taylor v. Republic,* 14 LLR 524, 531 (1961). "To constitute malice aforethought in murder, there need not be an old quarrel, or a long period of resentment, envy, or spite." *Ibid.*

"Circumstantial evidence is that species of evidence which tends to prove a disputed fact by proof of other facts which have a legitimate tendency, from the laws of nature and the usual connection of things, and the ordinary transaction of business, etc., to lead the mind to a conclusion that the facts exist which are sought to be established. *Ledlow v. Republic,* 2 LLR 569 (1926).

We will now address ourselves to another crucial argument of counsel for appellant that

there was no autopsy performed to establish the cause of death. We quote the authority on this particular issue:

"The manner and means in and by which the crime was committed is not an 'element of the *corpus delicti* and the exact manner of the killing need not be proved. It is sufficient to show the finding of a dead body and the appearance thereof showing acts of violence. Where a cause sufficient to produce a complication resulting in death is shown, and no other cause is shown to have existed, a sufficient basis for the conclusion that the result arose from the known cause is afforded. A mere possibility that death resulted from some cause other than the act of accused will not overcome facts proved leaving no rational grounds for doubt, nor will an inference from incompetent evidence. The cause of death and the criminal agency may be established by circumstantial evidence, especially when no question as to the cause of death is raised at the trial " It is not necessary that the evidence that death was caused by criminal means should be obtained from the body of deceased. So an autopsy is not essential. . . ." *Taylor v. Republic,* 14 LLR 524, 532 (1961).

We have quoted earlier in this opinion the pertinent part of the testimony of the accused in which he did not deny administering acid to decedent which caused his death, but blamed himself.

The next question that presents itself in keeping with the authority cited above, is whether drinking acid alone is sufficient to produce complication that will immediately result to death? The other question is whether any conclusion other than the administering of the acid was the known cause of death? The answers to these questions are encouched in the decision we have reached in this opinion.

Appellant admitted on the records that he gave the child medicine, but did not name the medicine. While affirming the judgment of conviction, this Court held that: "While it is a general principle of law that the burden of proof rests on the party who maintains the affirmative, etc, where the facts lie peculiarly within the knowledge of a party to a cause, he shall be held to prove the negative. "Simpson v. *Republic,* 3 LLR 300 (1932).

This citation also finds support in Civil Procedure Law, Rev. Code 1: 25.5.

In *Toe v. Republic,* 24 LLR 462 (1976), this Court decided that the uncorroborated testimony of a person accused of a crime is insufficient to establish his innocence, especially where the evidence against him is clear and convincing. It was also held in *Kamarah v. Republic,* 4 LLR 204 (1930), that a confession to a crime by an accused is admissible into evidence and may be used against him in a prosecution of a murder when properly corroborated.

According to the charge of the judge to the jury, he did not instruct them on anything that

was not testified to by the witnesses on both sides and it is the duty devolved upon the court by law to sum up the evidence on both sides. Civil Procedure Law, Rev. Code 1: 20.7, 1:20.8.

Therefore, the judge did not err when he instructed the jury and referred to the admission of the appellant.

However, there is a divergent opinion to the effect that whilst admitting that there is a strong and sufficient evidence which conclusively links the accused with the death of the child, we should nonetheless, reduce the charge from murder to manslaughter, and considering the length of time that appellant has been in detention, we should order his discharge.

This view has diverted our attention to the definition of manslaughter, considering the facts and circumstances *supra.* Therefore, we will quote the relevant sections of the statute that was then extant when appellant was indicted, tried and convicted, in support of our conclusion in this opinion.

Any person who:

1. "without legal justification or excuse unlawfully kills any human being, malice prepense not appearing from the circumstances; or

2. while engaged in any lawful pursuit without intent to hurt, negligently kills any human being; or

3. being the aggressor in any sudden affray, unlawfully kills any human being, is guilty of a felony and punishable by imprisonment not exceeding five years." Penal Law, 1956 Code 27:233.

The provisions of the law quoted, in our candid judgment, are not applicable in this case; hence, we are not willing to conclude otherwise.

Consequently, we have no other choice but to affirm the judgment of conviction and order the Clerk of this Court to send a mandate to the trial court to resume jurisdiction in the case and enforce its judgment. And it is so ordered.

Judgment affirmed

MR. CHIEF JUSTICE GBALAZEH *dissents.*

On September 17, 1972, during the August Term of the Circuit Court for the Fourth Judicial Circuit, Maryland County, appellant was indicted for the heinous crime of murder. The indictment averred, *inter alia, ". . .* that the defendant was a wicked person and that in

perpetuation of his wicked designs he did with premeditation and malice aforethought, murder his only son Dwe Wlo Flo, Jr., aged one and one-half (11/2) years." Appellant having declared himself in *forma pauperis* at the call of the case, he was represented by a court appointed acting associate defense counsel for Maryland County.

Accordingly, appellant was arraigned and brought to trial during the November Term of the Fourth Judicial Circuit, Maryland County. The trial resulted in the conviction of the appellant as charged. The trial judge rendered final judgment on the 12th day of December, A. D. 1972, to which final judgment, exceptions were correspondingly taken and noted but no appeal was formally announced.

From a comprehensive perusal of the records in this case, four salient and pertinent issues have been presented to us for consideration and disposal, to wit:

1. Whether or not appellant was legally and adequately represented at the trial by the court appointed acting associate defense counsel?

2. Whether the trial judge committed reversible error when he accepted the appellant's plea of guilty?

3. Whether the evidence adduced at the trial by the prosecution was sufficient in law to sustain the conviction for the crime of murder as charged in the indictment?

4. Whether the judge committed reversible error when he, in his charge to the jury, referred to appellant's plea of guilty? For the sake of clarity, these issues of law will be considered and discussed in their serial order of presentation.

From an inspection of the records certified to us in this case, it is difficult to see how the appellant could have been adequately represented by the court appointed acting associate defense counsel, as contended by appellee. In capital cases such as this, the court should be particular in assigning a lawyer to defend the accused, and should make sure that the best available counsel is called in, especially in case of capital offense involving the death sentence.

Had the trial judge appointed and or required the regularly appointed, commissioned and paid defense counsel for Maryland County to defend appellant, it is more than likely that appellant would not have readily pleaded guilty and that the outcome of the case would have substantially been different. It does not appeal to reason to say that the appellant would have voluntarily entered a plea of guilty if he had been advised of the gravity of such plea with the attendant legal consequences. The fact that the appellant declared himself financially unable to engage the services of a lawyer was no excuse for the trial judge to

appoint any counsel from the bar to defend the him, more particularly so a junior, less experienced and non-paid attorney-at-law, labeling himself "Acting Associate Defense Counsel". This being a capital offense, and the life of appellant being at stake, the trial judge was under legal obligation to ensure that the appellant would be legally and adequately represented by appointing a competent and well experienced counsellor-at-law instead of appointing as an "Associate of the Defense Counsel", an attorney-at-law with far less experience in legal practice as evidenced from the records. I hold the view therefore that appellant was not legally and adequately

represented during the trial. Civil Procedure Law, Rev. Code,

1:2.2(1)(2)(3)(4)(6); and *Quai v. Republic,* 12 LLR 402 (1957).

As already pointed out hereinabove, the charge of murder is one of the most atrocious crimes under our penal law in that it involves the accused's life if found guilty. It therefore goes without saying that the trial judge should not have hurriedly accepted appellant's plea of guilty without, as a matter of law, explaining and advising appellant of the nature and gravity of the charge preferred and the attendant legal consequences: Civil Procedure Law, Rev. Code 1:16.4. I am of the conviction that the trial judge committed a reversible error when he readily accepted appellant's plea of guilty without satisfying himself that the appellant understood the charge preferred against him and also whether appellant was making a voluntary admission.

It is quite plain from the evidence adduced at the trial that the State has not been able to prove its case against the appellant. Without going into a lengthy discussion of the evidence, it is clear to my mind that the prosecution has not fully established the proximate cause of decedent's death.

My learned colleagues are tempted to rush to a conclusion of murder merely because appellant "admitted" giving "medicine" to his late son as a result of which his son allegedly died shortly thereafter. In the opinion of my learned colleagues, who now constitute the majority in this case, the chain of causation was intact, and accordingly they have unfortunately been tempted to come to a hasty conclusion that the decedent died proximately from the medicine so administered.

This court cannot and should not assume and usurp the functions of a medical expert; functions that the majority have regrettably assumed. There is no showing anywhere in the records certified to us that a medical certification of the mode of death, a legal necessity, was performed or that pathological and toxicological findings were made to determine the cause of death. It is not shown anywhere in the records either that a medical practitioner as

called by the prosecution to determine the nature and chemical effects of the "acid" allegedly given to the decedent. This was vitally important in view of the fact that the decedent died under suspicious and strange circumstances. Civil Procedure Law, Rev. Code 1: 7.2-7.5. The English courts, followed by the majority of the American jurisdictions, have always held that autopsies are a necessary legal *sine qua non* in cases of homicide especially those homicidal cases surrounded by suspicions and doubts. CURRAN AND SHAPIRO, LAW, MEDICINE, AND FORENSIC SCIENCE, 186-217, 218-229, (2"d ed.)

It is possible that the child might have been sick and that the medicine given to him by his father, the appellant, might have accelerated adverse effects on the child, thereby aggravating his (the child's) condition and consequently resulting into his untimely demise. The fact that the child appeared to his mother (appellant's wife) and principal witness for the State to be in good health should not be unduly given credit. The mother was and is not a medical expert to be able to tell the physical therapy of her child. Her testimony in this respect should thus been ignored as she was not an expert witness as my learned colleagues have been tempted to believe. *Dunn v. Republic,* 1 LLR 401, 405* (1903); and *Nimeley et. al. v. Republic,* 21 LLR 348 (1972).

A causal glance at the records certified to this court also reveals that appellee failed to produce an eye-witness who could confirm to have actually seen appellant administering the alleged "acid" to the decedent. The only source of information as to what actually transpired between appellant and his son was, and still is, appellant himself by his alleged admission; a confession that has not been proven to have been made by appellant willingly, knowingly, voluntarily and intelligently. Nor has it been shown and proven beyond a reasonable doubt that appellant was advised of his legal rights as required by the warning statute: Civil Procedure Law, Rev. Code, 1:2.3; *Miranda v. Arizona,* 16 L. Ed. 2d. 694. It is also not clear as to whether or not a coroner jurors' report was sought and obtained by the prosecution as per statute. Indications are that this was also not done. Nor was any of the contents of the alleged acid retained and produced in court for examination.

Autopsies are a vital *sine qua non* in all homicidal cases, especially when fraught with dubious circumstances such as in the case at bar. This is also clear from appellant's testimonies, a material portion of which I quote:

"My father Yarbo, the paramount chief, started asking me what had happened? I told my father that I could not say anything. But I did not know what was wrong with my mind and so my conscience still beating me; because my wife said she did not want me.... So I told him to bring me to the authority and if they wanted to hang me, I would be more than happy because I do not realize the use of killing my child."

The aforesaid testimony clearly shows that the appellant was not of sound mind; and that the trial judge should have halted the trial proceedings, and should have referred the appellant to a Government psychiatrist for a medical examination so as to ascertain his true state of mind. This was legally necessary, even though appellant failed to give a written notice to the court as to his mental condition at the time of committing the alleged crime and at the time of entering his plea. The court, on its own motion, should have entered a plea of insanity for the appellant. In *Garlo v. Republic,* 20 LLR 234 (1971), this Court held that:

"Where the defense in a criminal case has not been conducted with due care, diligence and astuteness, a judgment of conviction will be set aside, and a new trial ordered on the grounds that the defendant did not receive a fair and impartial trial."

The trial judge was not right in charging the jury the way he did, as the charge was highly prejudicial and fraught with distorted facts. Besides, the charge was by and large, biased against appellant and failed to take into account appellant's legal defenses especially in so far as the plea of insanity and autopsy were concerned.

It is elementary to over-emphasize at this juncture that in homicidal cases, intent must be specifically proven. An element of every criminal offense is intent, and to constitute the crime of murder intent must be accompanied with malice and aforethought. *Lawrence v. Republic,* 2 LLR 65 (1912).

From the above points of view, it is obvious that the evidence adduced by the prosecution in support of its case raises lots of doubt and appellant should as consequence thereof, be given the benefit of these doubts. Civil Procedure Law, Rev. Code 1:2.2. The trial judge's ruling contrary in this respect, was thus a reversible error.

The prosecution is under legal pains to prove its case beyond a reasonable doubt. It is true that appellant admitted giving medicine to his son, which medicine purportedly killed the child as conceded by appellant. There is however nothing in the records to show that appellant admitted giving acid to his son, which acid instantly killed the son as alleged by appellee's principal witnesses, Sieh Dusi (decedent's mother) and Dwe Wlo Freeman. The allegations made by the two prosecution witnesses, particularly the latter, was hearsay as they were not actually present to see what actually took place. It is thus interesting to note that the trial judge, in his charge to the jury, attempted to put into appellant's mouth words that were actually said by the two prosecution witnesses and for the purpose of this dissenting opinion, I quote the relevant pertinent portion of said charge:

"Unlike other cases, this is a different case. In other matters, the defendant and the State joined issues; that is to say, the State says that defendant has done wrong, and the

defendant denies the allegations. Issues joined. In this case, the State charged the defendant with having committed murder. The defendant came on the stand and voluntarily told you that what the State say is true. . . . Under the circumstances, ladies and gentlemen of the empanelled jury, you are to retire into your room and bring in a verdict in conformity with the voluntariness of the admission, and consistent with the witnesses against him; and it is hereby so ordered."

Such charge was thus prejudicial as it tended to give a directed verdict to the jury, besides being contradictory and misleading. The charge was laden with unsupported factual issues that had not been testified to by appellant. *Saleh v. Montgomery,* 21 LLR 125 (1972); *and Sackor v. Republic,* 21 LLR 394 (1972).

In conclusion, it is my considered judgment therefore that in addition to the State's failure to establish a *prima facie* case of murder against the appellant, the appellant did not have a fair and impartial trial in the trial court.

In reviewing this case I have carefully considered the evidence to enable me to decide whether the facts as laid in the indictment were sustained at the trial. Nothing is or can be dearer to man than his life; hence, no other man nor legal tribunal has the right to deprive one of life except by due process of law backed by unequivocal evidence. For the aforementioned reasons, and given hat the Supreme Court is one of last resort, this Court should be methodical in weighing facts and evidence in cases that might dispossess a man of his God-given life. Thus, I disagree with my learned colleagues and respectfully dissent.

In view of the foregoing facts and points of law I have raised, I strongly feel that the judgment of the trial court should be reversed and the case remanded.