IN THE HONORABLE SUPREME COURT OF THE REPUBLIC OF LIBERIA
SITTING IN ITS OCTOBER TERM, A. D. 2017

BEFORE HIS HONOR: FRANCIS S. KORKPOR, SR.....CHIEF JUSTICE
BEFORE HIS HONOR: KABINEH M. JA'NEH .....ASSOCIATE JUSTICE
BEFORE HER HONOR: JAMESETTA HOWARD-WOLOKOLIE.....ASSOCIATE JUSTICE
BEFORE HIS HONOR: PHILIP A. Z. BANKS, III .....ASSOCIATE JUSTICE
BEFORE HER HONOR: SIE-A-NYENE G. YUOH .....ASSOCIATE JUSTICE

MODESCO NYANDER.....APPELLANT)
) APPEAL
VERSUS) CRIME: MURDER
)
REPUBLIC OF LIBERIA.....APPELLEE)

Heard: April 6, 2017. Decided: February 9, 2018

MR. JUSTICE BANKS delivered the Opinion of the Court.

Whenever a murder is committed and one or more persons are charged with the commission of such grave or heinous offense, it is accompanied by two potentially foreseeable consequential effects: Firstly, the loss of life of the victim or victims, citizens or residents, whether presumptively peaceful and law abiding or otherwise a societal menace, engenders suffering, grief, pain and in many cases unforgettable agony upon family members and associates of the victim or victims, even the family of the alleged perpetrator(s) of the offense. Indeed, the act poses a challenge to the very core of the State's ability to protect its citizens and residents. Secondly, the alleged perpetrator(s) of the act, if convicted, either lose their lives to the penalty of the death sentence, or they lose their liberty for a protracted period of time in prison, including a sentence to life imprisonment. In the latter case, an alleged perpetrator, although convicted of the offense, may actually be innocent and therefore wrongly convicted while the actual doers of the crime could go unidentified and unpunished. That is why this Court, from the inception of its very existence, has guided rather jealously the rights of the accused (such as due process) and the scrupulously adhered to core guiding statutory law principle (such as the presumption of innocence unless proved otherwise beyond a reasonable doubt). In fact, consistent with those guiding principles, the Supreme Court has stated on manifold occasions that in murder trials, both the prosecution and the defense must and should exercise exceeding due care, diligence, and legal

astuteness in ensuring that the rights guaranteed by law, the Constitution included, and the principles and interests attending the criminal justice process, the victims and the alleged perpetrator(s) of the act, are fully and adequately protected. *Gauhoe and Goyzoe v. Republic,* 10 LLR 204, 206 (1949); *Nyander v. Republic,* Supreme Court Opinion, October Term, A. D. 2010.

The instant case, wherein this Court is pleaded with to exercise its constitutional appellate review prerogative, is before us on appeal for the second time. The first time an appeal was taken in the case, from a conviction of guilty by a trial jury and the entry of a judgment by the trial court affirming the said verdict, this Court, viewing the manner in which the prosecution had conducted the trial as in bewildering and characterizing the clear exhibition of a conflict of interest by the defense lawyer as amounting to gross violation of Rule 35 of the Code of Moral and Professional Ethics of lawyers, reversed the judgment of the lower court and remanded the case for a new trial. Madam Justice Wolokolie, speaking for a unanimous Supreme Court at its October term, 2010, in expressing the Court's dismay with counsel for the defense, noted that counsel should have recognized that in the face of an obvious ethical conflict of interest in the representation of the appellant/defendant, he could not and should not have proceeded to represent the appellant. This is how the Justice opined the view of the Court:

> "Clearly, it posed a conflict of interest for two spouses to be involved in a case as adversary lawyers. Records in this case show that counselor Garlawolu joined as counsel in the midst of the trial. Obviously, he knew that his wife was prosecuting this matter, and it was grossly unethical for him to have represented the defendant as adversary counsel, and such unethical behavior should warrant discipline by this Court.
> Rule 32 of the same code states: "No lawyer is obliged to act either as advisor or advocate for every person who may wish to become his client. He has the right to decline employment..."

In respect of the above quotation, this Court clearly made its view known that counsels owed their clients the duty to ensure that representation of their interests was adequate and transparent, both being elements of the due process of law principle, the principle of innocence until proved guilty, and the principle of proof beyond a reasonable doubt in a criminal trial such was pursued in the instant case.

Having given the premise upon which this Court determined at the first trial of this case that the verdict and judgment entered against the appellant should be reversed and that a new trial be had, we proceed to recount the facts of the case as revealed by the records certified to the Supreme Court.

The facts, as culled from the records, show that defendants Milton Dormue of Tarsai Town and Modesco Nyander (the latter being the lone appellant herein), of Gatayea, residents of Kpaai District, Bong County, were charged and subsequently indicted by the Grand Jury of Bong County with the alleged killing of a forty-four (44) year old female identified as Annie Kpakalah, a resident of the City of Monrovia whose dead body was found on the outskirt of Leleh, Bong County, on the 4th day of September, A. D. 2007.

According to the indictment, defendants Milton Darmue and Modesco Nyander, with evil intent, conspired, connived, developed and effectuated a scheme to, and did, in furtherance thereof murdered the late Annie Kpakalah. The indictment alleged that defendant Milton Dormue successfully convinced and persuaded the deceased to travel to Gatayea with a huge sum of money (LS$15,000.00) under the pretext that he had palm oil which she could buy; that prior to her death, co-defendant Modesco Nyander had also phoned the deceased and informed her that there was oil in Tarsai for sale; that upon her arrival in Gatayea on September 3, 2007, she was told by Dormue that there was no palm oil there, but he was nevertheless able to convince her to spend the night with his wife; that he later contacted appellant Modesco Nyander for the purpose of having the latter murder the deceased and take away her money and other personal effects; that on the next day, September 4, 2007, appellant Modesco Nyander escorted the deceased on her way to Tarsai, killed her on the way, took away her money, and abandoned her lifeless body on the outsketch of Leleh.

The indictment also alleged that on the next day, September 5, 2007, appellant Modesco Nyander appeared at the purported crime scene in an anxious mood and intimated to the onlookers, including a justice of the peace, that he had escorted his sister the day earlier; that he wanted to see the deceased's body in order to ascertain whether it was his sister; and that upon seeing the body he told the gathering that it was his sister whom he had escorted the day before.

The indictment further alleged that the appellant not only directly phoned one Sam Kpakalah, brother to the deceased, informing him [Sam Kpakalah] that his sister had been killed, but that the appellant had also admitted to the police that he had escorted the deceased on September 4, 2007, the day on which she was killed. These formed the circumstances upon which the appellant and Milton Dormue were charged with the murder of the deceased, Annie Kpakalah.

The accused were duly arraigned and entered a plea of not guilty. Whereupon a trial was commenced, evidence produced, both oral and documentary, and the case submitted to the jury for their deliberation and verdict. The jury, after deliberating upon the evidence produced by both parties, returned a unanimous verdict of guilty against appellant Modesco Nyander and a verdict of not-guilty against co-defendant Milton Dormue. A motion for new trial, filed by the appellant, was resisted by the prosecution, arguments thereon entertained by the trial court, subsequently denied by the court, and final judgment was entered by the trial judge adjudging the appellant guilty of the crime of murder and sentencing him to life imprisonment. The appellant excepted to the judgment and announced an appeal therefrom to the Supreme Court, and, as prescribed by law, filed a six count bill of exceptions in furtherance of the appeal requirements. We do not herein recite the counts of the bill of exceptions as those were well quoted in the prior Opinion of this Court. We note nevertheless that it was upon that prior appeal that this Court, for the reasons stated hereinbefore, reversed the judgment of the lower court and remanded the case for a new trial.

In order to grasp fully this Court's reasoning for remanding the case, we herein quote the relevant portion of the Opinion, as follows:

> *"The prosecution did not bring any witness to verify the fact in the indictment that the appellant spoke with the deceased or was in contact with her prior to the morning of September 4, 2007. Reviewing the evidence presented by the state, the prosecution attempted to establish proof of the appellant's intent to commit the crime by giving evidence to the effect that when the deceased passed through Gaytayea and spoke to the appellant, he noticed her carrying a black bag with money to purchase oil in Leleh. He then escorted her and killed her taking away her money and other valuables.*
>
> *The prosecution also in trying to establish proof of appellant as the perpetrator of the crime presented witnesses to testify to appellant's anxiety and insistence on seeing and identifying the*

body discovered along the road. Appellant's statement to the onlookers that he and the deceased were sister and brother and he had escorted her on her way to Leleh the day she was found dead made him a suspect. What if the appellant said that simply because he was inquisitive and wanted to see who had been killed? Wasn't there anyone in the village who saw the appellant walk with the deceased?

Another evidence prosecution sought to use in linking the appellant to the murder was the testimony by the brother of the deceased, Sam Kpakalah. Sam testified that the appellant called him and asked him to send him some units so he could give him updates on what was happening in Leleh concerning the handling of the murder of the deceased. Sam testified that no one had his telephone number in the area and the appellant could have only gotten the number from the decedent's phone which was also taken from her when she was killed.

Nyamah, appellant's witness on the other hand said, it was Sam who retrieved the appellants number from her phone after she had taken the phone to him informing him that Modesco, the appellant, had called to tell her about Annie's death. She said Sam thereafter called Modesco, and during the conversation, appellant asked him to put money in his phone. The prosecution gave notice that it would bring a rebuttal witness.

The prosecution rebuttal witness, Alfredson W. Tarkeweyah, testified that when the appellant was quizzed during an investigation, appellant admitted that he had said to the CID previously that after the deceased was identified, he appellant made several calls to family members in Monrovia including Sam, the deceased brother. However, when asked to identify Sam, the appellant identify someone else.

We do not see how this rebutted the testimony given by the appellant's witness. She did say that the appellant and the deceased brother spoke after she took her phone to him; subsequently, he called the appellant back after retrieving his number from her phone.

Couldn't the prosecution have established this essential fact by reverting to records made to the deceased brother's phone?

It is also alleged that there was a scuffled and beside the body was a stick with blood, a sizable tape and a pen knife with black handle found beside the deceased. Was there any attempt to link these evidence found to the appellant? Again no mention is made about the state's attempt to show evidence however slightly that the appellant was engaged in the scuffle which would have linked him to the investigative report that the deceased died fighting for her life.

It is disheartened that heinous crimes are committed and the state does not make the necessary efforts to investigate and gather evidence sufficient and necessary to make a strong and convincing case. This is a case that caused public uproar among citizens of Bong County and we are taken aback by the callousness in which

the State handled this matter. We must emphasize that in order to curb crimes in our society, the prosecution, particularly the police, must commit to handling criminal matters with due diligence, gathering concrete and tangible evidence necessary to ensure conviction and stop relying on public sentiments for conviction.

This Court has said: "Evidence in a criminal case against an accused must be conclusive, and if it be circumstantial, should be so connected as to positively connect one element within another for a chain of evidence sufficient to lead to conclusion of guilty of the accused." Davies vs. R. L, 40 LLR 659, 680-681 (2001).

We are not persuaded by prosecution's argument that a person said to be anxious to identify a body lying alongside the road and referring to the deceased as his sister is sufficient for conviction on the charge of murder.

We note that Counsellor Francis Y. S. Garlawolu was named as one of the counsels for the appellant in the court below. When he appeared to argue this case before us, these questions were put to him:

> *Ques: Counsellor, were you in this case in the court below?*
> *Ans: Yes, Your Honors, Counsellor Yangbe was the lead counsel.*
> *Ques: Who. prosecuted this case?*
> *Ans: Counsellor Serena Garlawolu.*
> *Ques: Do you think it is right or ethical to do that?*
> *Ans: I think it is right. It is wrong when you don't do the right thing.*

Rule 35 of the Code of Moral and Professional Ethics of Lawyers in our Jurisdiction, state, "It is the duty of a lawyer to preserve his client's confidences. This duty outlasts the lawyer's employment and extends as well to his employees, and neither of them should accept which involves or may involve the disclosure or use of these confidences, either for the private advantage of the lawyer or his employees or to the disadvantage of the client,....."

Clearly it posed a conflict of interest for two spouses to be involved in a case as adversary lawyers. Records in this case show that counselor Garlawolu joined as counsel in the midst of the trial. Obviously he knew that his wife was prosecuting this matter, and it was grossly unethical for him to have represented the defendant as adversary counsel, and such unethical behavior should warrant discipline by this Court.

Rule 32 of the same code states, "No lawyer is obliged to act either as advisor or advocate for every person who may wish to become his client. He has the right to decline employment....."

This Court has said that when neither the defense nor the prosecution in a murder trial exercised due care, diligence, and legal astuteness in protecting its client's or the State's interest, the Court will reverse a conviction and remand the case for a new trial. Gauhoe and Goyzoe vs. Republic of Liberia 1OLLR, 204, 206 (1949).

In our opinion, the state and defense failed to exercise due diligence in this matter which would warrant this Court to sustain conviction

as entered by the trial court. However, this Court in Bingo vs. Republic of Liberia 18LLR 377,383 (1968), stated that though it is evident that the prosecution has failed to prove its case as required by law, when it appears that missing evidence and testimony can be supplied at a subsequent trial, a remand will be ordered, so that substantial justice may be done. We therefore concluded that this matter be remanded for a new trial."

By virtue of the foregoing Opinion and the prosecution's evidence being of circumstantial nature, the Court held that the prosecution was under an obligation to produce with sufficient certainty and clarity evidence to substantiate the various allegations set forth in the indictment, such as that the appellant did call the deceased to go to Leleh for the purchase of oil; that he did escort her prior to her death; that he made a direct call to Sam Kpakalah, the deceased's brother, informing him about the death of his sister; and that the blood stain on the cloths and other weapons found on the crime scene linked him to the commission of the crime, all of which this Court said the prosecution had failed to clearly set out the evidence as required by law. We should emphasize that whilst the Supreme Court had said on a number of occasions that circumstantial evidence can be used to show the guilt of an accused, the Supreme Court has also said that as a Court of last resort, it has the constitutional duty to ensure that innocent persons not be made to suffer on mere speculation by the State. This formed the basis upon which this Court decided to reverse the prior judgment and to remand the case for a new trial.

Thus, on February 16, 2012, the trial court, in compliance with the Supreme Court's mandate, resumed jurisdiction over the case and read the mandate, and, in obedience to the said mandate, on February 20, 2012, commenced a new trial. At the new trial, the prosecution, in an apparent attempt to provide 'the *missing evidence and testimony'* for which the case was remanded, produced five regular witnesses, in persons of Joseph Farn, Mulbah Torwallie, Samuel F. Kpakalah, Kerkulah Faijue and A. B. Dorley, and four rebuttal witnesses, namely Alfredson Turkawayah, Abraham K. Dorley, Johnson Tokpah and Mrs. Helena Chilar.

We note that all the testimonies of the prosecution's witnesses in the new trial were not in any way dissimilar to those provided during the first trial, and we do not see how the new recorded testimonies provided the *'missing*

evidence and testimony' for which the case was remanded for a subsequent trial.

Like the prosecution, the defense similarly produced five regular witnesses who substantially recounted their testimonies provided during the first trial. But unlike the conduct of the first trial where the evidence clearly showed a conflict of interest on the part of the defense counsel, the new trial saw a correction and change of and replacement of the previous counsel with a new defense counsel, which act removed all semblance of a conflict of interest by the defense counsel.

Upon the parties resting with the production of oral and documentary evidence, the trial judge, on July 9, 2012, instructed the jury on the points of law and directed that they go into their room of deliberation and return a verdict consistent with the evidence and in harmony with the law. The jury, upon deliberations duly had, again returned a unanimous verdict of guilty against the defendant/appellant. The defendant/appellant excepted to the verdict and filed a three count motion for new trial, essentially contending (a) that the jury's verdict was against the weight of evidence; (b) that the prosecution had failed to prove its case beyond a reasonable doubt as the circumstantial evidence relied on by the State was contradictory; and (c) that State had failed to link the defendant with the commission of the crime of murder with which he was charged. The motion was resisted by the prosecution and heard by the trial court judge who, on July 16, 2012, ruled denying the motion for new trial.

On the next day, July 17, 2012, Judge Emery Paye entered a final judgment in which he confirmed the jury's unanimous verdict of guilty against the defendant and sentenced the defendant to death by hanging by 6:00 A. M. to 6:00 P.M. in the City of Gbarnga, Bong County, pursuant to the President's determination of the date for execution. We quote the full text of the judge's final ruling to wit:

> ***COURT'S FINAL JUDGMENT***
>
> ***From our perusal of the case file, it is observed that defendant in the dock was arrested under a valid Indictment on December 13, 2007. He was then incarcerated into the common jail pending trial. It is observed that the case was once tried and upon appeal from the conviction of the defendant, the Supreme Court upon review of the Court's final judgment remanded the case to this Court to afford the defendant a new trial.***

According To records, regular trial of this case commenced on the 11th of June 2012. Upon application of the prosecution the defendant was arraigned and he pleaded NOT GUILTY TO THE CHARGE LEVIED AGAINST HIM BY THE STATE. Based upon a plea of not guilty, the defendant joined issued with the State and as such, the onus to prove the guilt of the Defendant, if any, rests with the prosecution. In order for the prosecution to prove its case they paraded witnesses to include rebuttal witnesses who testified and rested.

The defendant took the stand along with its witnesses who testified and rested. Arguments were entertained, heard and counsels rested. Thereupon the trial Jury was accordingly charged and upon being charged proceeded to its room of deliberations and came in open Court with a UNANIMOUS VERDICT OF GUILTY AGAINST THE DEFENDANT IN THE DOCK. Said verdict having been read in open court, trial jury was polled each to ascertain whether the verdict brought by them was their true and correct one and all answered in the affirmative. Thereafter, the verdict was recorded at the instance of the prosecution and Court's final Judgment was suspended to be rendered on the 16th of July, A. D. 2012. Prior to the date mentioned a Motion for New Trial was filed by one of counsels for the defendant. Said Motion was assigned, heard and denied by this Court. The Trial jury having brought the UNANIMOUS VERDICT OF GUIIITY AGAINST THE DEFENDANT, we shall now proceed to determine whether this Court could confirm and affirm the said verdict.

Prior to the commencement of taking evidence, the prosecution informed Court and the trial jury that it intends to prove its case by circumstantial evidence.

From the evidence adduced at the trial, it is established that the defendant in the dock had earlier informed people that he escorted the deceased Annie Kpaklah. The question is what is wrong with escorting someone? But where it is proven that the defendant did mention escorting the deceased in the midst of people some of whom testified before this Court and later began to d deny same, rational minds would think that the defendant may have been involved in the murder of the late Annie Kpaklah.

From the testimony it was established that the Defendant mentioned in the midst of people the amount of money on the person of the deceased. Even though the defendant again denied later mentioning the amount the deceased had prior to her murder; the feeling that comes to mind is how did the defendant get to know the amount of cash the deceased was carrying on her person to buy palm oil. It was also established from the evidence adduced that the defendant made several calls to Monrovia to inform the deceased's family about her death. The brother of the late Annie Kpaklah testified that he received one of the calls made by the defendant in his phone. So he asked the defendant how did he get his number. According to the witness, Sam Kpaklah, he said the defendant replied that he got his number from the ground meaning

either in Gaytayea or Lehleh. Information revealed that prior to the death of Annie Kpaklah; she had a cell phone with her relatives' names and numbers to include Sam Kpaklah. So when the defendant called the deceased's brother, it is believed that he may have gotten the number from the phone of the late Annie Kpaklah. Evidence before Court established that the Defendant made Statements to the Police stating that he is a family member of the Kpaklahs and that he personally knows the deceased's brother Sam Kpaklah. But according to evidence before court when the defendant was asked to identify Sam Kpaklah in the midst of people, he was unable to do so. At the investigation, the defendant admitted coming in close contact with the deceased on the morning of September 4, 2007 when she arrived in Gaytayea in search of palm oil to buy. And witnesses testified that the defendant escorted the deceased when she was departing from Gaytayea to Lehleh. But one of the witnesses for the defendant testified that she was with the defendant throughout the day and wherever the defendant went that day she was with him. She testified that when the deceased arrived at Gaytanyea on the morning of September 4, 2007, the deceased stood far away and spoke to them and passed. This testimony contradicted the testimony of defendant himself evidenced by the record of this case. In the testimony of the defendant, he said that that morning a passenger car entered Gaytayea and slowed down in a muddy and bad spot right by the house and the passengers were discussing about an unknown dead body lying near Lehleh. But the witness for the defendant testified that that morning and throughout that day of September 4, 2007, no vehicle was seen at Gaytayea.

So analyzing these species of evidence coupled with the confused state of mind of the defendant upon hearing of the dead body of the deceased, the court is of the strong opinion that the unanimous verdict of the trial jury finding the Defendant in the dock GUILTY OF THE CRIME CHARGED is consistent with the facts of the case, the evidence adduced at the trial, the circumstances of the case, and the laws in control. Hence this court is left with no other alternative but to confirm the verdict of the Trial Jury. Accordingly, the UNANIMOUS VERDICT OF THE TRIAL JURY bringing down the defendant guilty for murder is hereby confirmed and affirmed. Having confirmed and affirmed the verdict of the Trial Jury, this Court says Defendant Modesco Nyander is hereby

A D J U D G E D

GUILTY FOR MURDERING THE LATE ANNIE KPAKLAH ON SEPTEMBER 4, 2007 near the town of Lehleh. Under our law Murder is a capital crime punishable either by life imprisonment or death by handing on the neck. The law says where the verdict of the jury is unanimous; the penalty is death by hanging.

Wherefore, and in view of the foregoing, the Defendant having been adjudged guilty, said Defendant is hereby sentenced to death by hanging by 6:00 A. M. to 6:00 P.M. in the City of Gbarnga, Bong County. The date for the aforementioned execution is left to be

determined by the President of the Republic of Liberia; so says the law, AND IT IS HEREBY SO ORDERED.

GIVEN UNDER OUR HAND IN OPEN COURT THIS 17TH DAY OF JULY, A. D. 2012
Sgd: Emery S. Paye
Cllr. Emery S. Paye
ASSIGNED CIRCUIT JUDGE PRESIDING

The appellant excepted to the above ruling and filed a nineteen (19) count bill of exceptions basically alleging that the jury's verdict was contrary to the weight of evidence; that the prosecution failed to prove its case beyond a reasonable doubt; that there existed variances in the testimonies and the allegation as charged in the indictment and that the state failed to link the defendant to the commission of the crime as charged. We also quote the nineteen (19) count bill of exceptions, as follows:

DEFENDANT/APPELLANT'S BILL OF EXCEPTIONS

Defendant/Appellant having excepted to Your Honor's Final Judgment of July 17, 2012, and announced an appeal therefrom, now presents this bill of Exceptions for Your Honor's approval, as follows:

1. That the Verdict of the Empanelled Jury brought against Defendant/Appellant on the 9th day of July, A.D. 2012, is contrary to, and against the weight of the evidence adduced at the trial. Notwithstanding, Your Honor confirmed the erroneous and prejudicial verdict of the empanelled jury and entered judgment thereon on the 17th day of July, A. D. 2012, sentencing Defendant/Appellant to death by hanging; for which erroneous and prejudicial Judgment, Defendant/Appellant excepts.

2. The. Prosecution paraded five (5) regular witnesses and four (4) rebuttal witnesses. They include one Security officer, namely: John Fare, Mulbah Torwallie, Samuel Kpakalah, Kerkulah Faijue and Abraham Dolley, the Security officer; Alfredson Talkwayah, Abraham Dolley, Johnson Tokpa and Helena Chilar who later testified as a rebuttal witnesses.

3. That further as to Count Two (2) above, while on the witness stand, Plaintiff/Appellee's witnesses failed to establish that they personally saw the Defendant/Appellant commit the act; rather, their testimonies were based solely on hearsay. Furthermore, it is alleged that the Defendant escorted the deceased but the witnesses did not say where did the defendant stopped the deceased. The witnesses alleged that they were informed by the defendant that he escorted the deceased, an allegation that the defendant denied. The witnesses informed the Court that there was a piece of stick and a pen knife found near the crime scene; but when witness (Abraham Dolley, the Security Officer) was asked on

the cross as to the instrument used by the defendant to commit the crime, he was not able to confirm the instrument used even though the witnesses have informed the Court that there was a piece of stick and a pen knife found near the crime scene. None of prosecution witnesses was able to identify the instrument used in the commission of the offense nor did they identify the instrument found near the crime scene to belong to the defendant. Not only did the testimony of this witness contradicts the testimony of the other witnesses, but it created serious doubt, which doubt should have operated in favor of the Defendant/Appellant

4. Defendant/Appellant says that a defendant in a criminal action is presumed to be innocent until the contrary is proved; and in the case of a reasonable doubt, whether his guilt is satisfactorily shown, he is entitled to an acquittal. REASONABLE DOUBT REQUIRES AN ACQUITTAL, SECTION 2.1, 1 LCLR, PAGE 308. In the instant case, Defendant/Appellant says that the testimony of all the Prosecution's witnesses clearly and certainly contradicted each other in respect of (i) the weapon Defendant/Appellant allegedly used in the commission of the crime; and (ii) the way or means by which the Defendant/Appellant allegedly committed the crime. Defendant/Appellant says that this glaring doubt in the testimony of the Prosecution's witnesses should have operated in favor of Defendant/Appellant and the trial jury should have returned a verdict of not guilty for the Defendant/Appellant.

5. Based upon the averments contained in Counts Two (2) through Four (4) above, Defendant/Appellant submits and says that the Honorable Supreme Court of Liberia has held that where the evidence is so uncertain ad inconclusive as to raise a reasonable doubt as to the guilt of the accused, this must operate in his favor and a conviction cannot be upheld. JOSEPH M. BERRIAN VS. REPUBLIC OF LIBERIA, 2 LLR 258; TEXT AT PAGE 259: Further, where the witnesses for the Prosecution contradict each other, a doubt results which operates in favor of the accused as the law is that an accused enters upon his trial on the presumption of his innocence until his guilt is proved beyond a reasonable doubt. J. KAMARA BURPHY VS. REPUBLIC OF LIBERIA, 25 LLR 12, Syls. 1 and 2. Finally, in order to convict all accused, the evidence must be so conclusive as to exclude every rational doubt of guilt. Republic of Liberia versus Robert A. Smith, 25 LLR 207, Syls. 2 and 4.

6. That Defendant/Appellant submits and says that there exist serious material variance between the Indictment and the testimonies of the witnesses for the Plaintiff/Appellee. This issue was raised during the trial and argued before the jury; yet, the Empanelled Jury, contrary to the argument so forcefully advanced by Defendant/Appellant legal counsels, brought a guilty verdict against him. The First Paragraph of the Indictment states that the Defendant/ being Appellant of Gatayea and Milton Dormue of Tarsah, both of Kpaai District, Bong County, Republic of Liberia, being Moved and inducted by Satan the devil, conspired to commit murder, did it on the 3rd day of September, A. D.2007, between the

villages of Gatayea sand Lehleh Kpaai District, Bong County, Republic of Liberia, at the hour of 8am and 9am in the morning of September 3, 2007, you the above named defendants, realizing that the deceased Annie Kpakalah was having the huge amount of money in the amount of L$15,000.00 or more to go buy palm oil to Gatayea. Defendant/Appellant escorted the deceased Annie Kpakalah at the above mentioned time from the village of Tarsah to Lehleh, between these two villages you the above named defendant, not having the fear of God and man before your eyes, purposely, intentionally, unlawfully, criminally, willfully, illegally and feloniously with premedication conspired and murdered Annie. Kpakalah while she was on her way to Lehleh on the aforesaid 3rd day of September, A. D. 2007. Defendant/Appellant submits that the testimony of Plaintiff/Appellee's witnesses did not lead evidence during the trial to prove this portion of the Indictment; in that, the Indictment states that there was LD$ 15,000.000; but to the contrary, Plaintiff/Appellee's witnesses testified to the amount of LD$17,000.00, and further that the Defendant/ Appellant escorted the deceased from Gatavea as opposed to Tarsah to Lehich.

7. Defendant/Appellant submits and says that the Honorable Supreme Court of Liberia has held a fundamental and vital principle of good pleading and practice is that allegata and probarta must correspond; that nothing can generally be proved that is outside the allegation and that facts must be provided substantially as alleged. If they are not thus proved, variance results. Further, that variance is defined as a disagreement between a party's allegation and his proofs; and to be available, it must be in some matter essential and material to the charge or claim. James Saar versus Republic of Liberia, 29 LLR 35, Syls. 19 and 20. A criminal charge levied against a defendant must be proved as laid in the indictment. Augustus Such versus Republic of Liberia, 35 LLR 136, Syl. 2. In the light of the facts stated in Count Seven (7) supra, and the laws cited herein, Defendant/Appellant says that the Plaintiff/ Appellee not having proved the material allegations laid in the Indictment; or alternatively stated, Plaintiff/Appellee having failed to prove the Indictment as charged, the jury should have brought a verdict of "not guilty" in favor of the Defendant/Appellant

8. That the Defendant/Appellant says and submits that after the close of argument on both sides, Your Honor failed and refused to charge the jury on Defendant/Appellant's points of law governing the trial of the case, specifically as it relates to Conspiracy and Criminal conspiracy. Defendant/Appellant submits that in all criminal prosecution, whenever reasonable doubt exists, it must operate in favor of the defendant. Further, Your Honor also failed to instruct the trial jury to disregard the statements extracted from the Defendant/Appellant while in police custody at the time of his arrest. Under our law and practice hoary with age and consistent with the constitution of the Republic of Liberia, an accursed must be represented at every stage of the investigation by

a criminal investigator (Police/CID) by a legal Counsel, which was never done in the case.. Prosecution fifth witness, in persons of Abraham Dolley, informed the court and jury that the Defendant/ Appellant was not represented by a legal counsel and that he extracted statements from him with his consent, after reading his constitutional rights to him, a statement that the Defendant/ Appellant denied. Notwithstanding, this admission made by prosecution fifth witness, Your Honor failed to instruct the trial jury to disregard said statement extracted from the Defendant/ Appellant and also that said statement should not have been given any credence consistent with law

9. That Your Honor overruled several important questions posed to the prosecutions witnesses on the cross, especially prosecution fifth witness, Mr. Abraham Dolley who testified as an expert witness for the State. For example, when this witness was asked as to how many statements did the Defendant/Appellant make to the police, same was objected to and Your Honor sustained the objection even through the witness had placed on records that the Defendant/Appellant had made several statements and allowed the prosecuting Attorneys to ask irrelevant and incriminating questions to Defense witnesses.

10. That Your Honor also asked questions and made statement to the hearing of the trial jury to suggest that in deed the Defendant/Appellant was the doer of the act. For example, in a question posed to Defendant/Appellant 4th witness, 41st day Jury Section at Sheet 16. The Court asked. "Mr. Witness, in whose company did you leave the late Annie Kpaklah with when you went on the farm?" This question was objected to, and even through the objection was sustained, but the impression that was created as a result of this question was to the effect that in deed the late Annie Kpaklah was left in the company of the Defendant/Appellant, as no where in the witness's testimony did he say that the late Annie Kpaklah was even in the company of anyone.

11. That Your Honor erred when you denied Defendant/ Appellant Motion for a Change of Venue before the start of the trial and also that when the Trial Jury was empanelled, Your Honor failed to appoint a foreman/Woman and a Secretary as required and consistent with our practice hoary with age in this Jurisdiction and said that the empanelled Trial Jury should appoint their own Foreman/Woman and Secretary, quite contrary to our practice in this jurisdiction. That when this was brought to Your Honor's attention, Your Honor did nothing to remedy same contending that none of the parties will be injured therefrom..

12. That the denial by Your Honor for a change of venue was injurious to the Defendant/Appellant due to the sensitive nature of this case. And further that it was difficult to select a trial jury that will not have an interest in this case as was manifested during the large turnout by individuals during the pendency of the trial.

13. That based on the averments contained in Counts Two (2) through Twelve (12) above, Defendant/Appellant says that the verdict of the Empanelled Jury is contrary to, and against the weight of the evidence adduced at the trial. Accordingly, Your Honor erred when Your Honor confirmed the verdict of the Empanelled Jury and entered Judgment thereon, sentencing Defendant/Appellant to death by hanging; for which erroneous and prejudicial judgment Defendant/Appellant excepts.

14. Defendant/Appellant says that it is irregular and illegal for the Trial Judge to refuse to charge the Trial Jury on the point of law relied upon by a party as was done by your Honor in the instant case. The law is that at the close of the arguments pro et con, the Trial Judge charges the Empanelled Jury on the points of law as it relates to the evidence adduced at trial. Also, in your charge to the Trial Jury, You told them that the Defendant/Appellant admitted to the commission of the crime, which was erroneous and prejudicial to the Defendant/ Appellant as the Defendant/Appellant did not admit to the crime charged.

15. Defendant/Appellant submits and says that as to the issue of telephone calls made by the Defendant/Appellant, when the body was discovered and identified, Prosecution failed to establish that the telephone calls made by the Defendant/Appellant to his wife was not the only call he made. Prosecution in an attempt to establish that Defendant/Appellant made calls to one Samuel Kpaklah, brother of the deceased, Annie Kpaklah, Subpoenaed the LoneStar Telecommunication Corporation to produce call log. Even though Prosecution did not provide the number on which they requested the call log for. Prosecution 4th rebuttal witness in person of Helena Chilar who worked for the LoneStar Telecommunication Corporation informed the court that they could not produce the call log due to the long period of time. Defendant/Appellant 3rd witness in person of Nyamah Nyander informed in the court as found on sheet (8) 41st day Jury Session, that when she received the telephone call from Defendant/Appellant in Monrovia, who informed her about the death of Annie Kpaklah, she immediately informed other family members of the late Annie Kpaklah, including Samuel Kpaklah, who retrieved the number that had earlier called her. This testimony as it relates to the telephone call was never rebutted by the Prosecution, yet Your Honor confirmed the verdict of the trial jury and entered Final Judgment sentencing the Defendant/Appellant to death by hanging

16. Defendant/Appellant submits and says that even though he was not with the deceased prior to tier death and despite the testimonies of witnesses who testified for and on behalf of the Defendant/Appellant to the effect that the Defendant/Appellant did not escort the deceased from Gatayea to Lehleh and that the Defendant/Appellant remained in Gatayea from the morning of the forth to the morning of the fifth of September 2007, in the company of others, an alibi was created which prosecution failed to overturn by producing rebuttal witnesses to testify to the contrary. Under the

law, ALIBI: 15 Am Jur, Criminal Law, Section 315 (1938); Allen Yancy versus Republic; 27 LLR 365, text at 414, 415; and Capps versus Republic, 2 LLR 313 (1919)

(a) In a criminal case, it is incumbent upon the state to prove, as a part of its case, that the defendant was at the scene of the crime, and any evidence that he was elsewhere, at the time, is competent and appropriate to weaken or destroy the proof which the state must offer. From this standpoint, an alibi is not only a legitimate but may be a very complete defense. In fact, it may be the only means which an innocent man may have of avoiding a conviction, it offers when established, the most perfect, physically conclusive evidence of his innocence.

(b) If a prisoner should plead alibi and produce evidence of such plea, it is error in the trial court to refuse to notice it.

17. Defendant/Appellant, says that based on the above quoted laws, and because the Prosecution failed, refused and neglected to produce a rebuttal witness, it was a fatal error which should have operated in favor of the Defendant/Appellant. The trial jury ignored this very important principal of law and brought a guilty verdict against the Defendant/Appellant.

18. That notwithstanding the filing of by Defendant/ Appellant of a Motion for New Trial within the statutory period, Your Honor denied the Motion for New trial and thereupon entered Final Judgment, sentencing Defendant/Appellant to death by hanging.

19. That based on the averments contained in Count One (1) through Eighteen (18) above, Defendant/Appellant says that the Judgment of Your Honor, confirming the verdict of the Empanelled Jury and sentencing Defendant/Appellant to death by hanging is grossly erroneous and prejudicial; for which Defendant/Appellant except.

WHEREFORE AND IN VIEW OF THE FOREGOING, defendant/ appellant submits this bill of exceptions for Your Honor's approval, in fulfillment of the second jurisdiction step in the perfection of its appeal.

The Supreme Court has set a bench standard which it has consistently followed in regard to its focus on the issues argued before it. The Court has said that it cannot and therefore will not review issues where no exceptions were taken in the lower court or consider issues not included in the bill of exceptions even though excepted to in the lower court. *Francis v. The Mesurado Fishing Company Ltd. 20 LLR 542 (1971); Obi v. Republic,* 20 LLR 166 (1971); *Universal Printing Press v. Blue Cross Insurance Company,* Supreme Court Opinion March Term A.D. 2015. This Court has also said that it has no obligation, legal or otherwise, to pass on every issue of contention raised in the bill of exceptions or contained in the briefs, but may only pass on those issues it deems meritorious,

germane to the controversy and are justiciable. *Wilson Darpul and Enoch Jasper v. Republic, Supreme Court Opinion, October Term, 2012.*

Consistent with the foregoing, we have determined, from an examination of the entire 19 counts bill of exceptions, that there are basically two cardinal issues dispositive of this appeal: (1) whether the jury's verdict is in harmony with the weight of evidence adduced at trial or corresponds to the factual circumstances which attended the death of the deceased and as testified to by the witnesses; and (2) whether there existed reasonable doubt to warrant the acquittal of the appellant. We shall focus our attention on these two issues.

As noted before, the entire case of the State is based on circumstantial evidence. We have found no evidence in the records that directly linked the appellant to the commission of the crime as charged. Under such circumstances, it was incumbent upon the State, in order to obtain a conviction or a verdict of guilty of the appellant, to so show a chain of events that a logical and reasonable conclusion can be drawn, which meets the standard of proof beyond the reasonable doubt, that the appellant was in fact the person who committed the offense with which he was charged, i.e. that the appellant in fact murdered Annie Kpakalah. See *William v. Republic*, Supreme Court Opinion, March Term, A. D. 2014.

Let us now review the evidence presented by the State to ascertain if it met the standard stated above to warrant the conviction of the appellant. The State, in an attempt to produce the missing link or evidence which formed the basis for this Court's remand of the case, produced five regular witnesses: Joseph Farn, Mulbah Torwallie, Samuel F. Kpakalah, Kerkulah Faijue and A. B. Dorley and four rebuttal witnesses namely Alfredson Turkawayah, Abraham K. Dorley, Johnson Tokpah and Mrs. Helena Chilar.

The first witness, in person of Mr. Joseph Farn, testified that on the evening of September 4, 2007, some elders visited his house and informed him about a dead body lying between the villages of Lehleh and Gilaytanyea; that upon reaching the scene he saw the body and told the elders he would call the security to have them informed; that the next morning, September 5, 2007, the defendant appeared at his house and disclosed that he had heard about a dead body and requested to see same in order to ascertain whether it wasn't the body of his sister he had escorted the day before. The witness stated that

initially he refused to allow the defendant see the body but following the intervention of the elders he accompanied the defendant to the crime scene; and that upon seeing the body, the defendant disclosed that it was his sister who he had escorted the morning of September 4, 2007. The witness further narrated that when he questioned the defendant as to what the deceased had in her possession prior to her death, the death said she was possessed of seventeen thousand Liberian Dollars, a Black Hand bag and one pam knife; and that in response to another question, the appellant told him that he did stop the deceased on a football; and that he had to stop there because he needed to aid another lady who was in pain to board a vehicle.

According to the witness, the appellant had informed him that the deceased was from a village called Tarsai; that he had given the deceased phone's number to one Milton Dormue, a co-defendant acquitted during the first trial, who reportedly had palm oil to sell but that when the deceased met with Dormue there was no oil for her to purchase. Witness Farn also stated that the appellant requested a phone from one Mulbah Torwalee and made several calls to Monrovia and that thereafter he, (the witness) prevented the appellant from leaving the crime scene until the police arrived and when the police did arrive, the appellant was turned over to the police since he had indicated that the deceased was his sister.

This testimony of Witness Farn, a Justice of the Peace and Coroner who lived in Lehleh where the deceased body was found and who was the first to be contacted about the death of the deceased, is wanting in many respects. First, all that was narrated by him were purportedly given to him by the appellant himself, which, in the absence of aby evidence that the appellant was informed of his constitutional right to remain silent rendered the said query in violation of the Constitution, but it also fell within the realm of hearsay and created possibilities for misquotation or misinterpretation of what the appellant may actually have said. Indeed, the appellant testified, and which was corroborated by other witnesses, that he did not indicate that he had escorted the deceased from Gataryea to Lehleh.

Second, there is no indication in the witness testimony and the entire records before us any pictorial description of the distance between Gataryea, a place where the deceased is said to have met the appellant and Lehleh where

she was found dead, as would have aided an understanding or appreciation of the distance the appellant had gone in escorting the deceased. The witness testified that the appellant had said that he stopped the deceased on a 'football field', but there is no indication in the records as to how far the field was from the place where the body was found, that is, whether the field is located in Gataryea, the point where the appellant is alleged to have met the deceased, or in Lehleh where the body was found.

Here is how the witness responded to a question on the cross concerning the location of the football field where the appellant had stopped:

> "Ques: Mr. Witness, in your statement you presented to the Police, you [said that] after escorting the lady on the football field, a medicine Du Monde vehicle came for a lady who was in delivery pains; this is why he stopped on the field and went back to cater to the lady in pains. Did Mr. Modesco tell you the location of the field where he stopped the lady?
> Ans. No"

Further, the witness contradicted himself on the stand. On one occasion he stated that he visited the crime scene and identified the body of Annie Kpakalah before the arrival of the appellant; yet, on the other, he stated that although he had visited the crime scene and seen the body, he did not identify her as Annie's until the arrival of appellant who later told him that it was Annie's body. However, he disclosed that he had known Annie for about a year prior to her death. Here are his exchanges with the defense counsel on the cross:

> Ques: Mr. witness, prior to Modesco asking to see the body, did you yourself see that body and identify it to be that of Annie Kpaklah?
>
> Ans: Yes because I went along [alone]
>
> Ques: so prior to Modesco coming you had already identified the body to be that of Annie Kpalklah, not so?
>
> Ans: No
>
> Ques: You told this court, Mr. witness and the jury that you know Annie Kpaklah, not so?
>
> Ans: Yes, I know her before
>
> Ques: Mr. Witness you took oath to say the truth, and nothing but the truth, my question to you is, you have known Annie Kpaklah prior to her death. When did you get to know that the body that

was discovered was that of Annie Kpaklah, was it at the time Modesco came and identified same?

Ans. Yes, when Modesco came that is the time we went there and saw that it was Annie Kpaklah.

Ques.: how long did you know Annie Kpaklah prior to her death?

Ans. I started knowing her from 2006 in Monrovia."

From the testimony of the witness, we find it difficult comprehending that the witness would have known the deceased for more than a year prior to her death but could not identify her when he saw the body. This has to especially be of serious concern since it was the witness who first visited the crime scene on the very day the body was discovered; all other persons, including the appellant and the police officers, appeared at the crime scene a day after the body was discovered. Such a contradictory statement coming from a prime witness of the State, whose testimony was predominantly recounted by subsequent state's witnesses, raises a doubt as to its credibility and truthfulness. Yet, the jury and the court chose to ignore the contradiction and to conclude, without further more credible evidence, that the appellant was guilty of the murder of Annie Kpaklah. We do not conclude that the appellant may not have murdered the deceased; that could very well have been possible. What we do say, however, is that the State was required under the law to produce such evidence that was not emboldened with such contradiction as would create reasonable doubt as to the guilt of the appellant.

We now take recourse to the Prosecution's second witness to see if there were redeeming elements than those portrayed by the first witness as would lead to the reasonable conclusion that the appellant did commit the offense with which he was charged. The second witness, in person of Mulbah Torwallie, testified that he was part of the group that discovered the deceased's body in the bush in Lehleh. He testified that when the body was discovered, his phone was used by the justice of the peace to contact the police in Palala, but that none of them appeared on the crime scene that very day. He indicated that the next day, the appellant appeared on the crime scene and requested to see the body, claiming that his sister had traveled on the road where the body was discovered. The witness said that the appellant had stated to him that he had

heard about a death and wanted to see if it was his sister who had earlier traveled along that route. He also indicated that upon the appellant's request, they were hesitant to allow him (the appellant) view the body as police had not arrived, but that they later agreed and allowed the appellant to view the body; that upon the appellant seeing the body, he [the appellant] indicated that it was his sister who he had escorted on the football field. Thereafter, the witness continued, the appellant requested his (the witness) phone and made a call to his (appellant) wife in Monrovia, informing her about Annie Kpaklah's death; that the appellant pleaded with his wife to contact Annie's family member since he (the appellant) did not have a number for them. We quote excerpt of the witness' testimony in chief as follows:

> *"Where we discovered the body, we discovered piece of stick on the scene and also knife was there. When we discovered the body, the body was in the bush. When we got on the scene, we asked who had phone and I told them I have pone. Then they called to Palala, the Justice of the Peace called and the security answered. There was no security that went on the crime scene on that day. The next day we saw Modesco (the appellant). He said I have heard there is a dead body here let me see the body because my sister came on this side. Other people were arguing to see the body, but we did not allow it because the security had not yet come there. Modesco continued to insist that he wanted to see the body. Then while arguing from one thing to another, some people insisted that since the man said his sister followed this road yesterday and there has been no security here to come, let us allow Modesco to see the body. He went and saw the body. He said this is the body of my sister that I escorted on the football field yesterday. Then all the people went to town together. Modesco asked and said who has phone, I said have phone. Modesco called his wife in Monrovia, he told his wife that Annie Kpaklah has been killed, so please tell her family because I do not have their number. That is what I saw about the death of Annie Kpaklah."*

We have found nothing in the above testimony of the prosecution's second witness that could lead any reasonable mind to the presumption that the appellant murdered the deceased. In fact, the testimony seems much more buttressing to the content on the appellant's testimony that he appeared at the crime scene upon hearing the news of the death of Annie Kpaklan and that he made a call to his wife in Monrovia in order to contact the deceased's family

members and inform them about the incident since he did not have a number for them. The prosecution sought to cull something from the above testimony, seemingly in the hope that an inference could be drawn as incriminating the appellant when they posed the following questions to the witness on direct examination:

> "Ques: Mr. Witness, you said that when the body of Annie Kpaklah was discovered the following day, Modesco arrived to you all and said that he wanted to see the body. My question is, what form or how did Modesco appear on that day, on the 5th of September, 2007.
>
> Ans. It was early morning when he came; he was sweating [and] at the same time trembling. That is the form I saw him in.

While the question may have sought some form of appearance of the appellant that could lead to drawing a conclusion of a guilty appearance, we do not see that the response of the witness could lead to such conclusion. In the first place, did the appellant have to appear on the scene? Or was it that, as the prosecution sought to portray, the appellant wanted to make sure that the deceased was actually dead. Such a conclusion defies logic and reason, especially given the time period that had already lapsed. Moreover, how could the mere fact that a person appears on a crime scene sweating and eager to see the dead body makes he or she a suspect or the murderer? What if the person was sweating as a result of the long distance walk to the crime scene or that his/her anxiety was occasioned by the fact that a body is discovered and he/she is hoping that the deceased is not their relative. What also was the weather condition which could have contributed to the sweating? More than that, the appellant was not said to have commenced sweating after or in the course of being interrogated; rather the witness alleged that he was sweating and trembling when he arrived.

Even more perplexing is that this was the same testimony that the State relied on during the first trial and which this Court determined was not sufficient to show guilt or to sustain a conviction of the appellant; and although it has been almost six (6) years now since the Court remanded this case for a new trial, the argument of the prosecution that a person said to be anxious to identify a body lying alongside the road and referring to the deceased as his

sister is, in the mind of this Court, still insufficient to warrant a conviction on the charge of murder, without other testimonies convincing that the appellant did commit the Act. Was blood found on the appellant's clothing? Were any identifying elements of the deceased found on the persons of the appellant or on his premises? Was any object found at the scene or with the appellant or at his premises that could have connected him to the murder? We have seen no such evidence in the records or any evidence that, although circumstantial, could lead to a reasonable conclusion that the appellant murdered the deceased.

A similar conclusion can be reached with regards to the Prosecution's third witness. The third witness, Sam Kpaklah, the brother of the deceased, narrated similar account as the second witness, to the effect that it was through the appellant's wife that he first talked with the appellant and was informed about the death of Annie Kpaklah. However, he stated that having talked with the appellant, the appellant called his personal phone later requesting that he (Sam) send money on his (appellant) phone so that he (appellant) could be in constant contact with him. He opined that since nobody in Lehleh had his personal phone number, the appellant could have only gotten same from the deceased's phone. Here is an excerpt of his testimony:

> "from Redlight to Catholic Junction, my personal phone rang on my side in the taxi. Then I answered hello, who is this. He said I am Modesco and I asked him what do you say, then he said I want you to put money on this phone so that I will keep calling you to tell you what is going on here. Then I asked him, who gave you this number. He said I got it from the ground here, meaning he got my phone number from Lehleh area. I went on to my office to get the excuse to travel to Lehleh. When I got in Gbarnga, it was dark and it was on the 5th day of September, 2007. The next day I took car and went to Lehleh itself where the body was. When I got there I met other family members, the CID and the police...

From the above testimony of the witness, it seems that the only assertion the prosecution and the jury relied on to determine the appellant's culpability was that the appellant made a direct call to Sam and that since nobody, including the appellant, had the witness' phone number, the appellant could have only gotten same from the deceased. Therefore, they concluded, the

appellant murdered Annie Kpaklah and took away her phone and from said phone he retrieved Sam's number.

Here is a question posed by a juror in this light:

> Ques.: Mr. Witness, you said you do not know how Modesco got your number. But did you ask him as to how he got your number?
>
> Ans.: In my explanation, I earlier said when Modesco called me for the second time on my phone number, I asked him how you got my number to call me and he said I got it from here in Lehleh."

To this testimony of the witness, the defense gave notice that they would produce a rebuttal witness to show that it was through the appellant's wife that Sam got the appellant's number.

Prosecution 's fourth witness, Kerkulah Paijue, narrated similar accounts as the previous witnesses to the effect that upon discovery of the body in Lehleh, appellant appeared the next day where the body was found, sweating and anxious and indicated to them that he had heard about a death news and wanted to see the body as he had earlier escorted his sister up to a 'football field' the day before and that upon seeing the body, the appellant identified it as the deceased Annie Kpaklah. However, unlike the other witnesses who could certainly state the dates of these events, the witness stated that as a native man, he could not remember the dates when the body was found and the date he encountered the appellant.

Prosecution's fifth witness, A. B. Dorley, of the National Bureau of Investigation (NBI), testified that during preliminary investigation conducted by the Police, the appellant disclosed that he escorted the deceased on September 3, 2007, but later denied same; that he misled the investigation when he indicated that the deceased was his sister; that the appellant stated that he got Annie's death news from some passengers on board a pickup which passed in Gaytayea early morning [on] September 5, 2007, but that he could not identify the vehicle and the passengers on board. Because the testimony of witness Dorley formed an integral reason for the charge of murder levied against the appellant and his subsequent indictment, we quote verbatim the witness' statement in chief:

"I remembered after the CSD received information about the death of Annie Kpaklah on the 4th of September, 2007 in the outskirts of Lehleh, thereafter a team of CSD investigators led by Captain Joseph Nukah Gono, CSD commander was dispatched to the crime scene. They went there and conducted investigation on the crime scene and the team returned to the Police Headquarters in Gbarnga where we jointly investigated the case. While on the 6th of September, 2007, the late Joseph Nuka Gono who was CSD commander proceeded to Lehleh on a follow-up. After the followup he returned to the headquarters based upon information that he gathered from the crime scene, defendant Modesco Nyander was arrested on September 11, 2007 and investigated and detained on the charge of murder pending trial by the court. During the police preliminary investigation that was conducted with defendant Modesco Nyander, he said that on September 3, 2007, he escorted thee deceased Annie Kpaklah on the road leading from Lehleh to Gaytanyea which he later denied. Then he said again that on the 5th of September, 2007, during the morning hours, he saw a commercial vehicle that was coming from Lehleh to Palala and he was told according to him by the passengers on board that the deceased Annie Kpaklah was seen dead on the outskirt of Lehleh of which he said he could not identify the vehicle and passengers on board the vehicle. He also mentioned that he was the only person who was awake at the time when the vehicle came to Lehleh. He also mentioned that the deceased Annie Kpaklah was his sister, which was not true. He also mentioned that the deceased had in her possession the amount of L$15,000.00 and also said that it was L$17,000.00. During the course of the investigation conducted by the Police CSD, the CSD sent for the brother of the deceased so that the defendant Modesco Nyander will [would] identify this person as a brother of the deceased Annie Kparklah. During the court of the preliminary investigation conducted by the Police CSD, defendant Modesco Nyander had mud all over his body. So far I stop there, this is what I remembered during the course of the investigation by the CSD."

The above testimony of witness Dorley, a witness for the prosecution, is contradictory to the statements of the previous witnesses who were also produced by the prosecution. Unlike all of the previous witnesses who testified that the appellant indicated to them that he escorted the deceased on the 4th

day of September 2007, witness Dorley stated that the defendant mentioned to the investigation that he had escorted the deceased on the 3rd of September. According to all the previous witnesses, the appellant appeared at the place where the body was lying and indicated to the on lookers that he had heard about a death news and wanted to see whether it was his sister who he had escorted the day before. By this statement it means that the appellant only got to know about the death of the deceased upon reaching the crime same. However, witness Dorley's testimony gives the impression that the appellant knew exactly about the death of Annie as he was informed by the passengers on board the vehicle.

These contradictory and conflicting statements of witness Dorley, a member of a team of investigators, raise serious doubt as to the culpability of the appellant. This is so because, as culled from the testimonies of the prosecution's witnesses, the investigators did not witness the direct commission of the crime but they relied on the statements from the residents of Lehleh who visited the place where Annie's body was found. In fact, it was the statement of witness Joseph Farn, the Justice of the Peace, who first encountered the appellant and under whose authority the appellant was temporarily detained and subsequently turned over to the police, that formed the basis for the investigation by the team of investigators and it was the very statement that all of the other witnesses recounted. To present a testimony completely in conflict with previous witnesses on the same side and trying to prove the same crime against a particular person, is nothing less than pictorial of doubt, reasonable enough to justify the acquittal of the appellant.

But assuming arguendo that witness Dorley's testimony is something to follow, we do not see how the circumstances narrated by him could lead to the conclusion that the appellant murdered Annie Kpaklah. Even if it is true that the appellant got the death news of Annie from a vehicle which he could not identify or from some people that he did not know, how does that support the conclusion that he killed Annie? Are we to conclude that if a strange person conveys a message to a receiver and the person receiving the message cannot identify or locate the conveyer of the message, he or she is therefore guilty or liable for the act reported of which the person is informed? We do not believe that the law contemplates that such incident, standing alone without any real

concrete evidence otherwise, is sufficient to draw the conclusion of guilt upon a person.

We are again saddened, the same as we noted at the first appearance of this case, that heinous crimes are committed and the state does not make the necessary efforts to investigate and gather evidence sufficient and necessary to make a strong and convincing case; we are taken aback by the callousness in which the State handled this matter. We must re-emphasize that in order to curb crimes in our society, the prosecution, particularly the police, must commit to handling criminal matters with due diligence, gathering concrete and tangible evidence necessary to ensure conviction and stop relying on public sentiments for conviction.

It is unfortunate that at this subsequent trial we are still faced with the many missing evidence circumstances creating doubt as to the guilt of the appellant to the effect that as noted earlier the prosecution yet did not bring any witness to verify the fact in the indictment that the appellant spoke with the deceased or was in contact with her prior to the morning of September 4, 2007; prosecution attempt to impress upon us that appellant's statement to the onlookers that he and the deceased were sister and brother and he had escorted her on her way to Leleh the day she was found dead made him a suspect. What if the appellant said that simply because he was inquisitive and wanted to see who had been killed? We stay wonder whether there wasn't anyone in the village who saw the appellant walk with the deceased?

Another evidence prosecution still sought to use in linking the appellant to the murder was the testimony by the brother of the deceased, Sam Kpakalah. Sam testified that the appellant called him and asked him to send him some units so he could give him updates on what was happening in Leleh concerning the handling of the murder of the deceased. Sam testified that no one had his telephone number in the area and the appellant could have only gotten the number from the decedent's phone which was also taken from her when she was killed. Nyamah, appellant's witness on the other hand said, it was Sam who retrieved the appellants number from her phone after she had taken the phone to him informing him that Modesco, the appellant, had called to tell her about Annie's death. She said Sam thereafter called Modesco, and during the

conversation, appellant asked him to put money in his phone. The prosecution gave notice that it would bring a rebuttal witness.

The prosecution rebuttal witness, Alfredson W. Tarkeweyah, testified that when the appellant was quizzed during an investigation, appellant admitted that he had said to the CID previously that after the deceased was identified, he appellant made several calls to family members in Monrovia including Sam, the deceased brother. However, when asked to identify Sam, the appellant identify someone else.

We do not see how this rebutted the testimony given by the appellant's witness. She did say that the appellant and the deceased brother spoke after she took her phone to him; subsequently, he called the appellant back after retrieving his number from her phone. Couldn't the prosecution have established this essential fact by reverting to records made to the deceased brother's phone?

It is also alleged that there was a scuffled and beside the body was a stick with blood, a sizable tape and a pen knife with black handle found beside the deceased. Was there any attempt to link these evidence found to the appellant? Again no mention is made about the state's attempt to show evidence however slightly that the appellant was engaged in scuffle which would have linked him to the investigative report that the deceased died fighting for her life.

This Court has said, "Evidence in a criminal case against an accused must be conclusive, and if it be circumstantial, should be so connected as to positively connect one element within another for a chain of evidence sufficient to lead to conclusion of guilty of the accused." *Davies v. Republic*, 40 LLR 659, 680-681 (2001).

It is worrisome that heinous crimes are committed and the state does not make the necessary efforts to investigate and gather evidence sufficient and necessary to make a strong and convincing case, but we are equally disturbed the callousness shown by the State apparatus, and especially the Prosecution, in the handling of this matter. We note that the appellant herein was arrested and detained on September 11, 2007, and have spent more than ten (10) years in prison without the State even being able to present the necessary evidence to sustain his conviction. And as much as we do not make judgment that the appellant did not commit the crime with which he was charged, we do not

believe that the state has made a sufficiently good case to sustain a conviction. We are not inclined under the circumstances to allow the appellant, a citizen of this Country to suffer at the detriment of the State where the evidence against him is not convincing enough to sustain his conviction. The State is at all times required to offer sufficient evidence or proof as is mandatorily required under the law, and especially as regards poof beyond reasonable doubt, in order to properly sustain a judicial conviction. *Musa Solomon Fallah v. Republic of Liberia, Supreme Court Opinion, March Term 2011.* A judicial conviction connotes (I) that the offense must be correctly charged in a valid indictment; (2) that only legal evidence should be placed before the jury which is asked to convict; and (3) that the evidence thus sifted should satisfactorily establish the guilt of the accused beyond a reasonable doubt. *Darpul and Jasper v. Republic, Supreme Court Opinion, October Term, 2012.* We do not see all of those elements exhibited in the instant case. Our Constitution and criminal statutes clearly set out as a part of our criminal jurisprudence that a person is presumed innocent until the contrary is proved in a court of law. This is buttress by the fact that the Constitution also states that no person shall be deprived of his life, security of the person, property, and any privilege except by the due process of law. No lower standard can be held and no lower standard can find acceptance in our courts. This does not mean that persons who commit criminal offenses should not be held to account for the offense committed. What is does mean is that the State must be more vigilant and aggressive in the pursuit for and collection of the evidence needed to sustain a conviction.

It is often said in the legal realm that it is better for a thousand guilty persons to be acquitted than for one innocent man to be convicted as one of the most important legal presumptions is that of innocence. This presumption, which in legal phraseology gives the benefit of a doubt to the accused, is so cogent that it cannot be repelled by any evidence short of what is sufficient to establish the fact of the criminality with moral certainty. *Williams v. Republic, Supreme Court Opinion, March Term, 2014.*

Therefore, the defendant, having spent ten (10) unbroken years in prison without the prosecution being diligent enough to produce the requisite evidence, even at a second trial, which could establish and sustain his guilt, we

are left with no other option but to reverse the ruling of the court below and order that the appellant be set free without delay.

WHEREFORE, and in view of the foregoing, it is the holding of this Court that the trial jury's verdict and the trial court's judgment sustaining the said verdict, being contrary to the weight of the evidence adduced at the trial and the law governing such cases, the said verdict and judgment are herewith reversed. The appellant is ordered immediately released from further detention and all of his civil rights, liberties and all other constitutional and statutory privileges and guarantees are ordered restored to him forthwith.

The Clerk of this Court is ordered to send a mandate to the lower court directing the judge presiding therein to resume jurisdiction over this case and to give effect to this judgment. AND IT IS HEREBY SO ORDERED.

Judgment reversed

When this case was called for hearing, the appellant was represented by Albert S. Sims of Sherman and Sherman, Inc. The appellee, Republic of Liberia, was represented by Counsellors Augustine C. Fayiah, Assistant Minister for Litigation, Ministry of Justice, Cornelius Flomo Wennah, County Attorney, Bong County, David W. Waah, Consultant, Ministry of Justice and Garto Tate, Legal Counsel, Ministry of Justice.