PHILIP SMITH, Appellant, v. **REPUBLIC OF LIBERIA**, Appellee.

APPEAL FROM THE CIRCUIT COURT FOR THE FIRST JUDICIAL CIRCUIT, CRIMINAL ASSIZES "B", MONTSERRADO COUNTY.

Heard: May 30, 1994. Decided: September 22, 1994.

1. In a criminal prosecution, where the trial court disbands a jury which heard testimony of witnesses for the State, and manifest necessity for disbandment was not duly established, the defendant cannot thereafter be tried for the same offense.

2. A circuit judge assigned to preside over a given circuit shall have a ten-day pretrial chamber session followed by a forty-two day jury trial session, excluding Sundays and holidays, and in addition, a ten-day closing chamber session.

3. After a circuit judge's assignment has expired, he lacks jurisdiction to try any action in the assigned court unless the assignment has been renewed.

4. Where the term of the presiding judge has expired, "manifest necessity" will apply to defeat the doctrine of double jeopardy.

5. Manifest necessity relates to circumstances over which the court has no control. For example, illness of jurors, of the judge, of the defendant or of any person whose presence and participation is indispensable to a fair and impartial trial; expiration of the term, inability of a jury to agree and separation of the jury.

6. Under the Vehicle and Traffic Law, reckless driving is defined as follows: "Any person who operates a vehicle in wilful or wanton disregard for the safety of persons or property is guilty of reckless driving. Vehicle and Traffic Law, Rev. Code 38:10.4

7. Whenever any highway has been divided into two or more clearly marked traffic lanes, a vehicle shall, as far as practicable, be driven entirely within one lane and shall not be moved into another lane until the operator has ascertained that such movement can be made with safety".

8. It is unlawful for any person to operate a motor vehicle while his ability to operate such vehicle is impaired by the consumption or use of alcohol or a narcotic drug as defined in the Narcotic Drug Control Act.

9. Flashing lights is prohibited on all vehicles except authorized Police, Fire and other emergency vehicles, and except as a means of indicating a right or left turn.

Appellant was charged, tried and convicted for reckless driving resulting in bodily injury and property damage, by the Traffic Court for Montserrado County, from which judgment he announced an appeal to the First Judicial Circuit, Criminal Assizes "B". Montserrado County. The case was heard *de novo,* but was left undetermined when the term of the presiding judge expired without an extension. When the case was assigned during the succeeding term for trial, counsel for appellant moved the court to be discharged on grounds of double jeopardy. The trial court denied the motion, holding that the lack of completion of the trial, due to the expiration of the term of the presiding judge, was a manifest necessity. Appellant

excepted to the ruling and appealed to the Supreme Court, raising essentially two issues: double jeopardy and insufficient evidence to convict.

The Supreme Court upon review of the records, overruled appellant's contention of double jeopardy holding that the expiration of the assignment of a trial judge is a situation beyond his control and therefore manifest necessity will apply to defeat the defense of double jeopardy. With respect to the contentions of insufficient evidence, the Supreme Court held that the evidence produced by the prosecution was overwhelming, and that the failure of appellant to deny and to rebut this evidence defeats his claim of insufficient evidence. Accordingly, the Court held that double jeopardy will not attach and that the case of reckless driving resulting into injury and property damage having been conclusively established, the judgment of the trial court should not be disturbed. The Court therefore *affirmed* the judgment of the trial court.

Arthur K Williams appeared for appellant. *Jonathan Williams* appeared for appellee.

MR. JUSTICE SMITH delivered the opinion of the Court.

This case came on appeal from the First Judicial Circuit, Criminal Assizes **"B",** Montserrado County, from a judgment adjudging the appellant guilty of reckless driving resulting in bodily injury and property damage. The appellant excepted to the judgment and brought the case up to this Court on a 6-count bill of exceptions. There are only two basic issues raised in the bill of exceptions and argued in both briefs of the parties which in our opinion are decisive of this case; they are the issues of double jeopardy and insufficient evidence to convict the defendant.

Counsel for appellant argued that the defendant/appellant had been arraigned before Judge C. Alexander Zoe, who presided over the February 1993 Term of the Court, and pleaded not guilty. The prosecution took the stand and produced two (2) witnesses but the judge suspended the trial until the next day and never again called up the case, without assigning any reason for his act. He should have requested of the Chief Justice for an extension of his term in order to complete the trial. When Judge Frances Johnson-Morris acquired into jurisdiction of the May, 1993 Term of Court, the case was assigned and called up for trial at which time counsel for defendant moved the court to discharge the defendant on the ground of double jeopardy. The motion was denied by the trial judge. The second issue argued by counsel for appellant is that the evidence of the prosecution at the whole trial did not establish a *prima facie* case to justify the conviction of the defendant. These are the only two basic issues which both counsels argued and which they desire for us to determine.

In order for us to fairly determine these issues, we must go to the trial records to review the evidence adduced on both sides. Perusal of the records discloses that this case originated from the Traffic Court for Montserrado County where the defendant pleaded, and was tried and convicted for a traffic offense of reckless driving resulting in bodily injury and property damage. The defendant took appeal and came to the First Judicial Circuit, Criminal Assizes "B" where the appeal was first called for hearing on March 3, 1993, being the 20thday's Session of the Court, before His Honour, Judge C. Alexander Zoe who presided over the February, 1993 Term of the Court. From March 3, 1993, the trial continued up to the 9thday's Chamber Session of the Court, April 13, 1993. It is with serious regret that we have come to note that a reckless driving case on appeal had to take almost half of the February Term of court

and the entire ten days closing Chamber Session of the February Term following the 42 days jury session. We should like therefore to sound a warning not only to the judge who presided over the February Term of Court "B" but also to all judges of the courts of the Republic to make sure that clearing of the trial dockets of their respective courts must be their foremost concern when presiding. There can be no acceptable excuse for the length of time spent on this simple traffic case on appeal.

According to the trial records, the last time the case was called for resumption of the trial during the February Term, 1993, was on the 13thday of April, 1993, being the 9thday of the closing chambers session of the court when the trial was announced suspended until the following day at the hour of 10 o'clock in the morning April 14, 1993. In suspending the trial, the court noted that since both counsels were in court, written assignment was no longer necessary. The records do not show that the case was called the following day, April 14, 1993. However, April 14, 1993 was the last day of the closing chamber session of the February Term, 1993 and the judge, by expiration of his term, could no longer continue the trial. Consequently, that case remained undetermined until the May 1993 Term of the court when Her Honour Judge Frances Johnson-Morris acquired jurisdiction, by assignment, to preside over the May Term of that court. On the 2ndday of June, 1993, being the 17th day's sitting of the May Term, the case was called for resumption of trial *de novo.* It was at that time that counsel for defendant moved the court to discharge the defendant on the ground of double jeopardy. The motion was resisted, argued and denied by court on the ground that the non-completion of the trial of the appeal case was due to "manifest necessity". Counsel for the appellant excepted to this ruling and the issue was one of the counts of his bill of exceptions. He argued the issue in his brief, citing the Court to the case *Republic v. Dillon,15* LLR 119 (1962), which held that in a criminal prosecution, where the trial court disbands a jury which heard testimony of witnesses for the State, and manifest necessity for disbandment was not duly established, the defendant cannot thereafter be tried for the same offense. It was argued by the prosecution that the case was on appeal, and the judge's term having expired on April 14, 1993, he could not legally proceed to hear the case and render a valid judgment out of term time, especially at the start of the case, when no witnesses had taken the stand. We are inclined to agree with the trial judge that expiration of Judge Zoe's assignment was a situation beyond his control and hence the doctrine of "manifest necessity" will apply in such circumstances. According to the Judiciary Law, each judicial circuit shall meet four times a year and that a circuit judge assigned to preside over a given circuit shall have a ten-day pre-trial chamber session followed by. a forty-two day trial session, excluding Sundays and holidays, in addition to a ten-day closing chamber session. It is settled that after a circuit judge's assignment has expired, he lacks jurisdiction to try any action in the assigned court unless the assignment has been renewed. *Thomas v. Dennis,* 5 LLR 95 (1936). Judge Zoe's jurisdiction over the February, 1993 Term ended on the 14th day of April and perhaps he lost sight of the fact that his term was to end the next day when, during the 9thday's chamber sessions, he suspended the trial to resume the next day. In our opinion where Judge Zoe's term had expired, "manifest necessity" will apply to defeat the doctrine of double jeopardy. Manifest necessity relates to circumstances over which the court has no control. For example, illness of jurors, of the judge, of the defendant or of any person whose presence and participation is indispensable to a fair and impartial trial; expiration of the term, inability of a jury to agree and separation of the jury. *Wood v. Republic, 1* LLR 445 (1905), and *Republicv. Dillon,* 15 LLR 119 (1962).

It should be remembered that this case was an appeal from the traffic court to the Circuit Court, Criminal Assizes "B" of the First Judicial Circuit. The appellant had already pleaded to the charge of reckless driving resulting in bodily injury and property damage in the traffic court; he was tried and convicted; he became dissatisfied and removed the case from the traffic court to the circuit court where he intended to show proof of his innocence and to secure the reversal of the traffic court's judgment, but before he could take the stand, after commencement of the *de novo* trial, the judge's term had expired and the judge was therefore without jurisdiction to continue the trial. In such situation, manifest necessity must apply. Therefore, it should not be concluded that the trial was improperly terminated to justify the invocation of the doctrine of double jeopardy. Appellant's contention is therefore overruled.

We come now to the second issue that the evidence of the prosecution is not sufficient to establish a *prima facie case* to sustain the conviction of the defendant. As disclosed by the records, the first witness for the prosecution was Lieutenant Kandakai Lymas of the police force. We quote a relevant portion of his testimony as follows:

"..Both operators in their testimonies told the police that they were traveling in opposite directions. Approaching the Star Hotel, the operator of unit one, Philip Smith, recklessly drove with wanton disregard for the safety of life and property, lost control of his steering, thus causing the vehicle to cross the barrel line of the road, colliding with unit two, James Tickeh, thus injuring himself and the occupants of both vehicles...".

The second witness for the prosecution, James Tickeh, also took the stand and we quote a relevant portion of his testimony for the benefit of this opinion:

"It was on the 9th of April 1992 on Thursday around 9:45 p.m. I was driving in vehicle, Taxi-0220, coming from Duala going to the Free Port. While approaching Star Hotel, one taxi was coming from Free Port going towards Duala. Taxi-5755 which was driven by one Philip Smith left his lane and jumped on the opposite lane that was made for vehicles parking. Unfortunately, he collided with my car on the opposite center lane. In that accident, I sustained injury to my left leg causing it to fracture into two, and the vehicle was damaged beyond repair from the driver door. Knowing full well he was wrong, Philip Smith came out of his car and started apologizing..."

Prosecution's 3rd and the last witness Varfully Thomas, one of the occupants of Taxi-0220, driven by witness Tickeh, testified, and we quote a relevant portion of his testimony as follows:

"April 9, 1992, at the hour 9:45 p.m., Taxi-0220 picked me up at the Logan Town Cinema. While we were coming from Logan Town, approaching the Star Hotel, I saw Mr. Smith's light flashing on us. Before I could tell Mr. Tickeh that the car light was flashing on us, the car collided with us, that is, with Mr. Tickeh's car. I then opened the door; that was when I saw the blood coming from my face and it was also the same time people came to us, that is to say bystanders. When the people got there, Mr. Smith came and told us, "My people, I am very sorry. After telling us sorry, the people put us in another taxi and took us to the hospital.... .

A question was put to this witness of the prosecution on the direct:

QUES: You told this court Mr. Witness, that Mr. Smith, the defendant in this case, came to you soon after the accident. Please say for the benefit of the record whether you experienced or noticed anything strange about Mr. Smith?.

ANS: He was drunk.

The witness came on the cross examination and there was no effort made on the cross examination tending to disprove that the defendant was drunk, nor did the defendant himself refute this answer of the witness while on the witness stand testifying in his own defense.

The statements of the three witnesses for the prosecution to the effect that both operators told the police that they were travelling from opposite directions and while approaching the Star Hotel, the defendant, Philip Smith, drove recklessly, losing control of his steering and colliding with taxi-0220, driven by James Tickeh; that the defendant was drunk; that the defendant flashed his light on TX-0220, and that immediately after the accident occurred, the said appellant went to them from his car and expressed his regrets and he apologized. These are statements pointing to the guilt of the defendant and therefore it was incumbent upon him to disprove these statements at the trial by first denying them in his testimony and producing evidence in rebuttal. What is not denied must be deemed admitted. Civil Procedure Law, Rev. Code 1:9.8(3). But let us however revert to his own testimony to see whether or not he ever denied these statements or produced any evidence in rebuttal. Here is what he said under oath on the witness stand:

"Last year, one night around 9:00 o'clock p.m., I was coming from Free Port almost reaching to Star Hotel, I was in the center lane. One ECOMOG truck was behind me when I moved from the center lane to the last lane on the right. After the truck passed, when I look the taxi-0220 was over my taxi-5755. From there, they took me to the hospital. While I was on bed; they brought James Tickeh, the driver of the other taxi, to the hospital. At 11:00 o'clock that night, the police came to the hospital and asked for the two drivers. The police asked me for my license and I gave it to them. They also asked the other driver, James Tickeh, for his license. Mr. Tickeh never give the police his license. After that, the police left. After two days, the police returned to the hospital and asked us how we were feeling, and I replied that I was feeling better. James Tickeh' s foot was broken. Afterwards, the police told us that they came to take us to the accident scene. Mr. Tickeh was given crutches. When we got on the scene, Mr. Tickeh began showing the police the spot where he was hit by me. Then I told the police that it was not true. Then we came back on the right side of the road where Mr. Tickeh hit me. When the police went there, they drew the diagram, under the car as well as the hood light, and pieces of the glasses were still there. The officer asked Mr. Tickeh for his car which was not on the scene because he had asked his brother to take the car from on the scene and carry it to his house. My car remained on the accident scene for two days. Later, the police gave my bossman permission to remove the car from the scene. I rest.

This was the testimony of the appellant in his own defense to the charge of reckless driving resulting into injury and property damage. Appellant was on the witness stand

to disprove that he was drunk; that it was him who by flashing his light on the taxi-0220 which caused the accident; that knowing that he was wrong, he got out of his taxi and expressed his regret for the happening and apologized before being rushed to the hospital. None of these statements had been denied by the appellant on the witness stand, but let's see whether on the direct examination his memory was refreshed and he denied these statements. Here are some questions that were put to him on the direct examination and his answers:

QUES: Mr. Witness, you told this court that you were traveling from Freeport and unit two was traveling from Duala when he hit you on your right side of the center lane. Now you will please walk to the board where the diagram is and show this court the point of impact as well as the point of rest?

ANS: My car should have been on the last lane on the right as the point of impact, but this diagram does not reveal this. Rather, my car on this diagram is showing in the center lane.

QUES: Mr. Witness, please say if you can remember as to whether when the officer carried the two of you, that is, you and Mr. Tickeh to the scene, that is, the accident scene, you met the two vehicles at the point of impact?

ANS: The officer only met my car, taxi-5755, on the scene, which had been parked there for two days.

QUES: Tell us if you can remember as to whether or not the officer inquired about TX-0220 or the whereabouts?

ANS: Yes.

QUES: And you said further that you were taken to the hospital immediately after the accident?

ANS: Yes.

QUES: Mr. Witness, please say for the benefit of the record whether or not at the trial before the traffic court you asked for reconstruction of the accident scene?

ANS: The diagram on the board, that is the black board, from the traffic court was correct, but this present diagram in this is not correct.

These are just few of such questions' on the direct examination of the witness which ought to have illicited from him what he left out in his statement in chief and which should have refreshed his memory to say something in rebuttal to the statement of flashing light on the other taxi; apologizing for his wrong and being drunk, etc. But let us revert to the testimony of defendant's second witness to see whether or not his statement refutes any of the statements of prosecution's witnesses:

Here is a relevant portion of witness Boye Wethan' s testimony:

"I was in the taxi coming from in town going to Duala, this 5755 taxi was in front of an ECOMOG car that was coming from behind us. It was in the night. We were in

the center lane so the ECOMOG truck blew its horn behind us. So all the cars moved over to the last lane, the ECOMOG car passed. Trying to get back on the lane, the only thing I saw was TX-0220 on TX-5755..."

Also, the fourth witness for the defendant Laminee Sackon testified as follows:

"It was one night about 9:00 p.m. we were traveling around Point Four area and while on our way going, there was ECOMOG truck behind us while we were ahead going. At that time, Mr. Philip Smith was on the center lane going. When the ECOMOG truck blew its horns behind, Philip Smith left the center lane and took the right lane. At that time we were approaching Star Hotel and the ECOMOG truck passed. When the ECOMOG truck passed, Philip Smith was trying to get back on the center lane, when I just saw the other taxi collide with Philip Smith taxi and we all started shouting..."

With such statement, counsel for defendant rested with the witness without any attempt to illicit from him as to whether the driver of TX-0220, that was coming from the opposite direction, left his lane also as did Philip Smith and came to the center lane on which defendant Smith jumped. Nevertheless, the defendant's witness said that defendant was on the center lane going but gave way to the ECOMOG truck, by going on his right lane and after the ECOMOG truck passed, the defendant was trying to get back to the center lane when the accident occurred.

From the testimony of the defendant in his own defense, and that of his witness, which are shown to have corroborated, it is clear that after the ECOMOG truck had passed, the defendant was trying to get back on the center lane when the two vehicles collided. There is no evidence shown that TX-0220, which was traveling from Duala on the center lane, left the lane for any purpose. We cannot therefore conceive why appellant who abruptly jumped from the last lane of the road on his right to the center lane, when the accident occurred, could claim that the evidence of the prosecution was insufficient to sustain a conviction.

Under the Vehicle and Traffic Law, reckless driving is defined as follows: "Any person who operates a vehicle in wilful or wanton disregard for the safety of persons or property is guilty of reckless driving." Vehicle and Traffic Law, Rev. Code 38:10.4 Whenever any highway has been divided into two or more clearly marked traffic lanes, the following rules, in addition to all others consistent herewith, shall apply and our emphasis is on section 10.38(a) of the Vehicle and Traffic Law, which reads as follows:

1. "A vehicle shall, as far as practicable, be driven entirely within one lane and shall not be moved into another lane until the operator has ascertained that such movement can be made with safety". *Id,* 38:10.38.

Varfully Thomas, witness for the prosecution, in answering to a question on the direct examination said that he observed that defendant was drunk. There was no effort made by the defendant to refute this statement. The traffic statute provides that: "It is unlawful for any person to operate a motor vehicle while his ability to operate such vehicle is impaired by the consumption or use of alcohol or a narcotic drug as defined in the Narcotic Drug Control Act. *Id,* 38:10.90 (1).

With respect to flashing light by the defendant as testified to by prosecution's witness Varfully Thomas, which was never rebutted, the traffic statute also provides that blinking lights are prohibited on all vehicles except authorized Police, Fire and other emergency vehicles, or except as a means of indicating a right or left turn in compliance with the provision of sections 6.47 and 6.48 of this title. *Id.* 38: 6.60.

In view of all that we have narrated herein above, and the law cited in support thereof, it is our holding that double jeopardy will not attach in this case, and that the case of reckless driving resulting in bodily injury and property damage has been conclusively established and therefore the judgment of the trial court should not be disturbed. And it is hereby so ordered.
Judgment affirmed.