AMERICAN LIFE INSURANCE COMPANY, Appellant, v. **JOHN PETER BOIMA,** Appellee.

APPEAL FROM THE CIRCUIT COURT FOR THE SIXTH JUDICIAL CIRCUIT, MONTSERRADO COUNTY.

Heard: November 26, 1983. Decided: December 21, 1983.

1. A circuit court judge who receives a mandate from the Chief Justice extending the jury session at the end of any term of court, must have said mandate read in open court as notice to the party litigants prior to the empanelling of a jury for trial of a case during the said extended period. A failure to provide such notice is a reversible error.

2. No jury shall be empanelled after the forty second day of any quarterly trial session of a term of court, unless the court's term has been extended by mandate of the Chief Justice. Judiciary Law, Rev. Code 17:3.12.

3. During the process of empanelling a petty jury, the first twelve persons selected shall serve as regular jurors and the three last persons selected shall serve as alternate jurors.

4. In the presence of all the parties concerned, the trial judge should conduct an investigation in open court into any allegations of jury tampering.

5. Any material allegation in a bill of exceptions, not denied by the trial judge while approving same, shall be deemed admitted. Civil Procedure Law, Rev. Code 1: 9.8(3).

6. The parties to a suit are entitled, as a matter of right, to the cool neutrality of the judge, which is one of the essential elements of due process.

7. In all cases, the order for the jury to be kept together must be made in open court in the presence of all the party litigants, and a trial judge commits a reversible error in orally ordering the sheriff to keep the jury together without notice to the parties and in which the expenses are borne by only one party.

8. In a trial for damages for breach of an insurance policy, where the death of the insured is denied, it is error for the judge in his charge to the jury to remark that "the plaintiff found his daughter in the morgue."

9. The trial judge, at the end of the production of evidence by both parties, with or without the request of the parties, should instruct the jury on all the issues arising out of the facts adduced on both sides as well as sum up the evidence on both sides.

10. Under our law, the jurors are the triers of all facts in a case. It is therefore prejudicial and a usurpation of the functions of the jury for the judge to suggest the amount of an award to be included in the verdict, if the jury finds for the plaintiff

Appellant insurance company who had been sued in damages appealed from the verdict and judgment of the lower court, rendered against it, claiming that irregularities were committed during the trial of the case, including the naming of the third, eleventh and twelfth jurors as alternates, jury tampering, bias on part of the judge and the adoption of wrong procedures by the court during the conduct of the trial. The Supreme Court, after a full review of the records, agreed with the contentions of the appellant, reversed the judgment and ordered the case remanded for a new trial.

The Carlor, Gordon, Hne & Teewia Law Firm appeared for the appellant. M Fahnbulleh Jones appear for the appellee.

MR. JUSTICE YANGBE delivered the opinion of the Court.

By calculation of time, excluding Sundays and holidays, from the 20th of December 1982 up to and including the 9 th of February 1983, was certainly forty-three days. Yet, the minutes of the court, Wednesday, sheet one, February 9, 1983, show that on that date it was the forty first day's jury sitting and, therefore, it was promptly brought to the attention of the trial judge. Why the minutes showed the forty first day, instead of forty third day's jury session, is not explained in the records. Perhaps, if appellee had resisted the objection, some light would have been thrown on this issue, but why the opposite lawyer elected to remain silent is another phase which is not apparent in the records. However, perusal of the records show that the day and date previous to the 9th which was Tuesday, the 8 th, and the latter was the last jury session of the December 1982 Term of the trial court. On that date, it was actually the forty second and not the fortieth, as the minutes show. This was an error of the clerk and the court should have ordered it corrected.

By operation of statute, the formal opening day of the Civil Law Court, Sixth Judicial Circuit, Montserrado County, is the third Monday in March, June, September and December of each year, and in practice, on those days the assigned judge usually orders his assignment from the Chief Justice to be read in open court, prior to the transaction of the business of the court, as notice to the public of his authority to preside over that particular term of the court. After the regular forty two day jury session of a particular term of court, a party has no reason to know that the assigned judge has been granted additional days to continue jury session, therefore, prudence dictates that prior to empanelling the jury, predicated upon the enlargement of the jury session, the judge should initially read the mandate of extension as notice to the party litigants and not to wait after he is attacked before reading the extension.

It may be of interest to note that on the 8', the regular jury session of the lower court ended and, therefore, the judge should have adjourned the jury session sine die, but the judge did not, notwithstanding, the case was called, and the attorney for appellant acknowledged receipt of the assignment for hearing of the case on the 9', the next day, but he contended that he was engaged in the Debt Court, hence, he requested postponement until he was

relieved from the Debt Court. The request was opposed and the court reserved ruling until at 2: o'clock p.m. that day, but no ruling was made up to the close of the day, and the extension letter was not read. The letter is dated February 8, 1983, in which the Chief Justice said, inter alia, "in view of the fact that there are several matters pending before you for disposition and that the December Term of Court, jury session ends on Tuesday, 10th of February, A. D. 1983, you are hereby granted additional fourteen working days in order to complete the cases pending, same to begin immediately at the end of said jury session, December Term of Court 1982."

The office of His Honour the Chief Justice and that of the trial judge are located in the same Temple of Justice Building, and, therefore, it is quite obvious that it was possible the learned judge may have received the letter on the same date it was written; hence, he should have either read the letter on the 8 th, but it does appear he when he probably received it, or on the 9 received it prior to the selection of the jury, and there was no notice of the extension to the parties concerned. Although, as per the letter, jury session ended Thursday, February 10, 1983, and it was not effective until the end of the jury session which was the 10th in accordance with the intent of the letter, it is logical to assume that the effective date intended should have been on the 9th, the date the jury was selected. From every angle, it is evident that when the trial court called the case to empanel the jury on the 9th, this question of jurisdiction arose. Consequently, the crucial argument here is, were the parties, as a matter of right and law, entitled to notice of the additional fourteen working days granted the lower court, after the regular forty two jury days and prior to the commencement of the jury trial? Our answer to this query is in the affirmative, and in our judgement, the negligent failure of the judge to timely have the mandate from the Chief Justice enlarging the jury session, read in open court before empanelling the jury, was a reversible error.

The appellant has charged the judge of the lower court with gross irregularities, that is, during the selection of jurors he named the third, eleventh, and twelfth jurors as alternates, instead of the last three, inconsistent with the statute. This conduct on part of the judge, appellant considered prejudicial to its interest, because it suspected that the sole reason for the deliberate departure from the statutory procedure was to clandestinely exercise control over the panel.

The Civil procedure Law, rev. Code 1: 22.3, provides, among other things, that:

"The twelve persons whose names are first drawn and who are found acceptable shall serve as jurors and the three persons whose names are next drawn and who are found acceptable shall serve as alternates."

The quoted relevant sentence of the statute is what appellant considered was violated. The departure from the normal procedure of naming the alternates is obvious, but the minority view is that the appellant suffered no harm.

The statute regulates the trial procedures which the litigants expect to be adhered to in every case, and any deliberate deviation therefrom by the court, gives color to whatever partiality is complained of against the judge. There is no record indicating the reason for the refusals of the judge to conform to the statute, especially, after his attention was called to it.

The appellant has also complained against the trial judge for being partial, because in the motion for new trial, he was blamed for having private investigation in his chambers with the plaintiff and jurors who were members of the panel in the absence of appellant, but the judge was of the opinion that appellant should have named its informant, and appellant had the right to apply to the Supreme Court for remedial writ, although, counsel for appellant clearly stated in the motion that his client, the appellant, informed him. In my view, this was sufficient disclosure of the name of the informant of appellant and the court should have conducted an investigation to ascertain the truthfulness of the allegation, if the court felt that it was untrue.

Another novel procedure featuring in the records in this case is despite the fact that immediately after naming the three alternative jurors in violation of section 22.3 of the statute supra, and no resistance was interposed, nor did the court make any comment, counsel for appellee proceeded to outline the theory of the case and thereafter the trial commenced.

In our opinion, the silence of appellee' s counsel and the failure of the trail judge to act, are clearly indicative of the truthfulness of the charges made against the judge as being biased and prejudicial.

Again, on the 24th of February, 1983, counsel for plaintiff in the lower court brought to the attention of the trial judge that some of the jurors had been discussing the case and had already pre decided the case prior to its submission to them for deliberation thereon. Consequently, the court instituted an investigation into the allegation. During the probe, it was brought out that Jurors Sarah Johnson, Martha Johnson (Wilson) and Miss Gittens were the jurors who had been discussing the case and who had preconceived notions thereof. Yet, the trial judge expelled from the panel only Sarah Johnson and Martha Johnson (Wilson) leaving Miss Gittens who, according to the foreman of the jury:

"I heard Miss Martha Wilson said that the person that died is an old lady not a little girl and I told Miss Gittens to stop the argument because I do not want for the judge to get annoy with me. I rest."

Every issue of law or fact which does not require determination by jury must be decided by the Court. Civil Procedure Law, Rev. Code 1: 23.1. However, the court has a right to suspend a ruling on a particular point of law or fact in the middle of the trial, but a decision must be made on the issue later at an appropriate time.

In this case, representation of appellant in the lower court by Attorney Francis Garlawolu was questioned, but the court felt that to rule on the issue at the time would have prejudiced the case, hence, the ruling on the issues was deferred, but the court failed to rule on the point of contention as per its own promise earlier. See sheet six February 21, 1983, which precludes us from passing upon same in appellate capacity for want of original jurisdiction.

Further, appellant claimed that the trial court orally ordered the jury kept together and they actually slept at the Temple of Justice on the 21' of February, 1983, without any record made thereof, nor any notice to the appellant on that date, at the exclusive expense of the appellee, predicated upon the private arrangement between the judge and the appellee and when appellant learned of it, it moved the lower court.

Certainly, under the adversary system, as a matter of right, each party litigant is entitled to notice of any order given by the court in connection with the trial, with or without request from a party and the maintenance of a panel in a civil trial must be prepaid equally by the parties, to be later charged against the losing party at the end of the case. The trial judge, therefore, committed a reversible error when he orally ordered the sheriff to keep the jury together without notice to the appellant and at the sole expense of the appellee.

One of the principal controversial issues in this case is, whether Annie Boima, the insured, died in the accident which occurred August 19, 1980, involving vehicle with license plate No. TB-932. There was evidence adduced on both sides at the trial, therefore, it was within the sole province of the jury, as trier of facts, to determine the credibility and the effect of the evidence. Phillips v. Republic, 4 LLR 11 (1934). Consequently, the trial judge usurped the function of the jury when in his charge he said, inter alia, that "the plaintiff found his daughter in the morgue." The judge also acted ultra vires and committed a reversible error when after charging the jury in writing, he suggested orally that if the jury found for plaintiff, it should award $100,000.00 as general damages.

A judge is partial when he instructs the jury on only issues of law and only sums up the evidence of one side at the end or earlier during the trial.

The appellee had every right and opportunity to defend the court below in the resistance to the motion and the trial judge also should have approved the bill of exceptions with reservation, if he felt that the contents thereof where untrue. In the absence of any traverse, specified denial or by implication and reservations on the bill of exceptions, we are of the considered opinion, that the notion that every allegation of fact or law in any pleading if not denied specifically or by necessary implication shall be taken as admitted, is applicable in this case. Civil Procedure Law, Rev. Code I 9.8 (3); Horton v. Horton, 14 LLR 57 (1960) and Chenoweth v. Liberia Trading Corporation, 16 LLR 3 (1964).

Appellee has argued, with emphasis, and cited many authorities to the effect that, to award special or general damages is solely within the sound discretion of the jury, except it can be established that fraud was perpetuated during the assessment.

Under normal circumstances we are in full agreement with this theory, but we are also of the opinion that in every trial, executive, legislative or judicial, the judge as the arbiter must afford the party full opportunity to be heard and to defend in an orderly manner adequate to the nature and circumstances of the case. Wolo v. Wolo, 5 LLR 423 (1937). As we pointed out earlier, it is quite clear from every indication that the biased attitudes of the trial judge in the lower court during the trial of this case, cannot be over emphasized, and that all the rules of due process of law were utterly abused, consequently, the trial was conducted with everything less than the cool neutrality of an impartial judge in a judicial proceeding.

We also take recourse to Nicol v. Liberia Electricity Corporation, decided March 1983 Term of this ench, 31 LLR 315 (1983) and Neville v. Killen, decided during this very term of this Court, 31 LLR 587 (1983). In the first case, we reversed the judgement and remanded the case. This is what our distinguished colleague, Mr. Justice Koroma, who spoke for us, said: "In view of the above circumstances, facts and legal citations herein quoted, it is our holding that the trial judge committed a reversible error when he admitted the criminal judgement into evidence over and above the objections of the appellant in this case and by this act, influenced the minds of the jury in the consideration of their verdict. Therefore, the verdict of the trial jury in the trial court is hereby set aside and the judgment confirming the same is hereby reversed, and the case remanded." In the second case, in remanding the case again, Mr. Justice Smith, speaking for the Court also said: "Where the trial in the lower court is irregular and the jury is not permitted to exercise their rights and reach a conclusion from the dictate of their own consciences, this Court ought to reverse the judgement and remand the case for a new trial.

In view of the foregoing, it is our candid opinion that the judgement in this case should be, and the same is hereby reversed and the case remanded for new trial."

Let us again quote another authority on the irregular conducts of the trial court and grounds for remand, and it reads thus: "Likewise, new trial or other proceedings have been ordered because of a misapprehension of law or facts; and amendable defects in the pleadings; and have also been ordered because of a defect of parties to the action; errors in rulings on pleadings; errors in the admission or exclusion of material evidence; errors in the instructions to the jury; and numerous other errors, defects, or mistakes by counsel or the trial court or both, which have prevented such a full and proper trial or proceedings as the law contemplates in order to do justice to all parties concerned." (Emphasis ours.) 58 C.J.S., New Trial, § 1939.

Continuing, the aforementioned legal authority states further: "On reversal of a judgement, order, or decree, for errors, defects, or irregularities, committed or occurring during the course of the trial or proceedings in the court below, which can be satisfactorily corrected in no other way, an appellate court will usually order a new trial or other appropriate proceedings." Id.

In Lawrence v. Republic, 2 LLR 65 (1912) and Yancy v. Republic, 4 LLR 3 (1933), those cases were remanded because of the improper conduct of the trial judges.

We are of the considered opinion, that where it is alleged that the jury had been tempered with, in the absence of any investigation to ascertain the truthfulness of such allegation, to affirm or modify wholly or in part the judgement before the appellate court, it would compound the errors and assume the function of the trial tribunal as well as the jury. Consequently, the proper procedure is, in the interest of justice, to reverse the judgement and remand the case with instructions to the lower court to hear the case anew so that the jury will freely exercise its right and determine the questions of facts relative to the award of special or general damages, without any undue interference of the trial court, as was done in this case.

In consequence of the above, we must respectfully submit that, any action other than a remand for a new trial in this case, will contravene the statute and numerous opinions of this Court. For, we reiterate that where this court, in the instant case, becomes judge of the facts, it tends to assume the role of the jury in the course of the appellate function by rendering such judgment that should have been rendered in the lower court or reducing the amount awarded, which was suggested to the jury by the trial judge in his oral instructions to the jury.

Predicated upon the irregularities committed by the trial court during the conduct of this case, as we pointed out above, the judgement of the court below is reversed and the case is ordered remanded to the trial court to resume jurisdiction in the case and conduct a jury trial anew in a fair and judicial manner. Costs to abide final determination. And it is so ordered.

Judgment reversed; case remanded.