James B. Lumel, **Joseph M**. **Sorsor**, **R. Richard Montgomery**, **Sakie Gotoko**, and **Cobah W. Miller**, all of the City of Monrovia, Liberia
APPELLANTS/PETITIONERS VERSUS His Honour **Timothy Z. Swope**, Assigned Circuit Judge, Criminal Court "C" and the Republic of Liberia
APPELLEES/RESPONDENTS

APPEAL. APPEAL DENIED.

HEARD: APRIL 14, 2008 DECIDED: JUNE 28, 2008

MR. JUSTICE KORKPOR DELIVERED THE OPINION OF THE COURT

The appellants in this case, who were defendants in the court below are: James B. Lumeh, Joseph M. Sorsor, R. Richard Montgomery, Sackie Gotoko and Cobah W. Miller.

They were all indicted for the crime of theft of property during the November, A.D. 1998 term of the First Judicial Circuit, Criminal Court "C", Montserrado County.

The records show that during the February, A.D. 1999 term of the court presided over by Judge Yussif D. Kaba, the appellants/defendants were arraigned and they pleaded not guilty. However, no jury was empanelled to try the case as Judge Kaba could not continue with the matter because his term had expired.

When Judge Timothy Z. Swope took over the First Judicial Circuit, Criminal Court "C" during the May term, A.D. 1999, the appellants/defendants, through their lawyer, filed a motion to be released and discharged from further answering to the charge of theft of property on the ground of double jeopardy. They contended in their motion that they were tried during the February, A.D. 1999 term of the court presided over by Judge Kaba, and that the trial was not concluded due to no act attributable to them, therefore, they should not be twice put in jeopardy of "life, liberty and the pursuit of happiness." Judge Swope denied the motion.

On June 2, 1999, the appellants/defendants filed a petition before Associate Justice Elwood L. Jangaba, then presiding in chambers, praying for the issuance of the writ of certiorari to correct what they considered "the erroneous ruling" made by Judge Swope denying their motion to release and discharge them from further answering to the charge of theft of property on the ground of double jeopardy. After holding conference with the parties, Associate Justice Jangaba refused to issue the alternative

writ of certiorari and ordered the trial court to resume jurisdiction over the case and proceed in keeping with law.

Judge Timothy Z. Swope again presided over the May, 2000 term of Criminal Court "C" and assigned the matter for trial. It appears that during the course of trial, three (3) jurors complained of illness and asked to be excused and discharged from sitting on the case. Accordingly, they were excused and discharged by the trial judge from taking further part in the case. It is not stated whether those excused and discharged were alternate jurors, or regular jurors, or a mixture of both.

Howbeit, there were only twelve jurors remaining; just a bare quorum to try the case. While arguing before us, the lawyer representing the state informed this Court that the parties, through their lawyers, specifically agreed to proceed with the twelve (12) jurors. This contention was not refuted by the lawyer representing the appellants/defendants.

Then during the course of the trial, also, the forelady of the jury, also on account of illness, was accompanied by the Sheriff of the court outside the bailiwick of the court to receive treatment. When the lawyer representing the appellants/defendants heard of this, he filed a motion requesting the court to discharge the forelady from participating in the case because, according to him, she had been "tampered with." The motion states that while going for treatment, the juror sat in public transport, mingled with the pubic and talked to people at the Family Planning Association.

The state resisted the motion contending that the forelady was indeed sick, and it would have been improper not to take her for treatment. The state contended, also, that the forelady was accompanied by the Sheriff and that she had not talked to anyone concerning the matter before the court.

Judge Swope granted the motion, discharging the forelady from participating in the matter, thereby reducing the number of jurors sitting on the case to eleven (11). When the matter could not be proceeded with further because eleven jurors, under our law, cannot sit on a jury case, the lawyer representing appellants/defendants filed a motion praying the trial court to release and discharge the appellants/defendants from further answering to the charge of theft of property, again, on the ground of double jeopardy. Judge Swope denied the motion; whereupon the appellants/defendants filed another petition for the writ of certiorari, this time before Associate Justice M. Wilkins Wright presiding in chambers, who ordered the alternative writ of certiorari issued.

Associate Justice Karmo Soko Sackor, Sr. who succeeded Associate Justice Wright in chambers assigned the case, heard argument pro et con and made ruling on November 19, 2002. He denied and dismissed the alternative writ of certiorari and refused the issuance of the peremptory writ of certiorari. Justice Sackor held that double jeopardy would not lie because the termination of the case was due to "manifest necessity."

This case is before us on appeal from the ruling of Associate Justice Sackor presiding in chambers.

The lone issue for our determination is, whether or not double jeopardy will attach under the facts and circumstances summarized herein above?

Article 21 (h) of the Constitution of the Republic of Liberia provides that ..."No person shall be subject to double jeopardy." And *Section 3.1* of the Criminal Procedure Law of Liberia prescribes the confines within which double jeopardy may apply. It states:

"The doctrine of double jeopardy shall be applicable to all criminal prosecutions. Jeopardy attaches when a person has been placed on trial before a Court of competent Jurisdiction under a valid indictment or a complaint upon which he has been arraigned and to which he has pleaded, and a proper jury has been empanelled and sworn to try the issue raised by the plea or, if the case is properly being tried by a court without a jury, after the court has begun to hear evidence thereon. Termination of the trial thereafter by the court because of manifest necessity, however, shall not bar another prosecution for the offense set forth in the indictment or complaint."

We see from the quoted statute that while our Constitution gives everyone the right not to be subjected to double jeopardy, that right is not without a limit. In other words, not every termination of a case by court without concluding a trial amounts to double jeopardy. As the statute clearly states, for jeopardy to attach, there must be a valid indictment, if the case is being tried by a jury as in the case before us; the defendant must be arraigned; he/she must enter a plea; and a proper jury must be empanelled and sworn to try the issue(s) raised by the plea.

In our opinion, all of these requirements must be met before jeopardy can attach. And even where all of these prerequisites are present, the statute says that when the

case is terminated by a court due to "manifest necessity," this does not prevent the defendant from subsequent trial(s).

What constitutes manifest necessity may vary from case to case, depending on the facts and circumstances. In the case before us, the lawyer representing the appellants/defendants contended that during the February, 1999 term of the trial court when Judge Kaba did not conclude trial of the case, the appellants/defendants were placed in jeopardy.

We do not agree, because, the records do not show that a jury was empanelled to try the case, as Judge Kaba's assignment over the trial court had expired. It is trite law in this jurisdiction that a judge whose assignment over a court has expired has no authority to preside over and decide a case in that court. So, where a case is terminated for reason that the trial judge's assignment has expired, this amounts to manifest necessity, a condition beyond the control of the parties, which does not bar subsequent trial of the matter.

In the case: *Wright v. Reeves,* 26 LLR 46-47 (1977), this Supreme Court held "... the double jeopardy statute quoted supra permits termination of trial by court because of manifest necessity. In that event, such termination does not bar subsequent prosecution. Manifest necessity, to put it simply, relates to circumstances over which the court has no control, for example, illness of jurors, judge, defendant or 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. If discharge of a jury in a criminal case is grounded upon manifest necessity duly established by court, a new trial may properly be ordered."

Besides, as stated earlier, the allegation that the appellants/defendants were twice placed in jeopardy by the failure of Judge Kaba to proceed with the matter was made in a petition for certiorari filed before Associate Justice Elwood L Jangaba then presiding in chambers, who refused to issue the alternative of certiorari prayed for and instead ordered the trial court to resume jurisdiction over the case and proceed in accordance with law.

No appeal can be taken from the refusal of a chambers justice to issue an alternative in any remedial matter. Therefore, Associate Justice Jangaba having laid to rest, the allegation that Judge Kaba's failure to proceed with the case amounted to double jeopardy, the same allegation should not have been contained in another petition for certiorari which was filed before Associate Justice M. Wilkins Wright.

Concerning the first three jurors who complained of illness and were excused and discharged by the trial judge from further participation in the trial of the case, the lawyer representing the state raised in his brief and argued before us, that the trial judge excused the three jurors and discharged them after consulting with the parties; that the parties specifically agreed to proceed with twelve (12) jurors. This important statement was not refuted by the lawyer representing the appellants/defendants in his brief; neither did he do so during argument before us.

Moreover, we see nothing in the records before us to indicate that the appellants/defendants contested the decision of the trial judge excusing and discharging the three jurors on account of illness. To the contrary, the records clearly show that the lawyer representing the appellants/defendants participated in the trial with twelve (12) jurors sitting, to the point when one other juror, the forelady, was ordered removed and discharged by the court on the ground that she had been tampered with. This was when, the lawyer representing the appellants/defendants, for the first time, complained of the decision of the trial judge reducing the number of the trial jury to twelve (12). Under the circumstance, we hold that the appellants/defendants assented when the number of trial jury was reduced to twelve (12). Therefore, they cannot now, protest against the decision to which they assented and acquiesced, just because their desired outcome of such a decision was not fulfilled.

This Court has held that: "It is double jeopardy for a defendant in a criminal prosecution to be retried, after a competent panel of jurors at the first trial was reduced below the minimum number needed to return a verdict by the court *without the defendant's* assent" (Emphasis supplied). *James v. Krakue, 20 LLR 691 (1971).*

But we hold that where, as in the instant case, there was assent on the part of the appellants/defendants, double jeopardy will not apply to prevent the subsequent trial of the appellants/defendants.

With respect to the forelady of the jury who was escorted by the Sheriff for treatment, after also reporting that she too was ill, we note that it is the lawyer representing the appellants/defendants who filed a motion to remove and discharge that juror from further sitting on the case on the ground that she had been tampered with. The motion alleges that the juror sat in public transport with others and was seen at the Family Planning Association where she also mingled with, and talked to people. Therefore, the presumption was that she was tampered with. There is no

doubt that the lawyer filed the motion knowing fully well that the court was sitting and hearing the case with just twelve (12) jurors. He knew fully well, or aught to have known fully well, also, that if the judge granted his motion to remove and discharge one more juror from the panel, the number of the trial jury would be reduced to eleven, a situation which is not permitted under our law. This means that the matter would not be proceeded with.

The law is that "A jury for the trial of a criminal action shall be composed of twelve persons with the qualification specified in the Judiciary Law and entitled to the exemptions provided in that title." *Section 19.1,1LCL Revised, Criminal Procedure Law.*

Now, was this a clever design by the lawyer of the appellants/defendants to have his clients released and discharged from answering to the serious criminal charge against the appellants/defendants without going into the merits and demerits of the case? We hope not, because this Court has held over and over again that the purpose of a lawyer representing parties in every case is to see to it that justice is done, and not necessarily to acquit.

In any case, the trial court conducted investigation into circumstances leading to the Sheriff escorting the forelady of the jury for treatment and the point was made that she was ill. The trial judge held that "[doing to the hospital without any written order creates doubt which must operate in favor of the defendants."

The judge agreed with the contention of the appellants/defendants' lawyer that the forelady of the jury mingled with the public and was therefore tampered with.

The question we ask is, had the forelady of the jury been escorted to the hospital by written order from the court, would she not have mingled with, and talked to other people? We believe she would have, and this is the real reason for relieving her of her jury service. She was relieved and discharged because she was ill and it became necessary for her to go for treatment. Had she not been ill, there would have been no reason for her to have gone for treatment. Then, while there, as it is obvious in such cases, she interacted with the public, thereby creating doubt that as to whether or not she talked to anyone concerning the matter before court. While we agree that the decision to take her for treatment should have been made by the judge, instead of the Sheriff, there is no doubt in our minds that the judge would not have decided otherwise. We hold, therefore, in line with *Wright v. Reeves* cited above, that when a juror is released, relieved and discharged from jury service as was done in the case of the forelady in the matter before us, it amounts to manifest necessity; and where

manifest necessity is a ground for terminating a case, the defendant will face subsequent trial for the same offense.

The writ of certiorari will lie to review and correct an intermediate order, or interlocutory judgment of the lower court. But where the lower court was not wrong in its intermediate order or interlocutory judgment, as in this case, the writ will not be granted.

WHEREFORE, the ruling of Associate Justice Karmo Soko Sackor, which confirmed the ruling of Judge Timothy Z. Swope, denying the writ of certiorari, from which an appeal was taken to the full bench of this Court, is hereby confirmed. The alternative writ of certiorari is ordered quashed, and the peremptory writ denied. The Clerk of this court is ordered to send a mandate to the court below to resume jurisdiction over this case and proceed with trial in keeping with law. It is so ordered.