REPUBLIC OF LIBERIA, Petitioner, v. **HIS HONOUR JUDGE HARPER S. BAILEY,** Assigned Circuit Judge, First Judicial Circuit, Criminal Assizes "B", Montserrado County, et al., Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT FOR THE FIRST JUDICIAL CIRCUIT, CRIMINAL ASSIZES "B", MONTSERRADO COUNTY.

Decided May 10, 1983.

1. The correction of errors by certiorari does not go to the merits of the pending case or extend beyond the intermediate order or the interlocutory judgment of the trial court sought to be reviewed and corrected. Rather, the review and correction must be strictly confined to the order or judgment of the lower court in so far as the legality of the intermediate order or interlocutory judgment is concerned.

2. When a change of venue is granted and a transfer of the case ordered, the county attorney for the county in which the case originated loses authority to prosecute the case, and the prosecuting attorney of the county to which the case is transferred is then vested with the authority to continue the prosecution of the case.

3. The dismissal of an indictment does not go to the merits of a case.

4. The prosecuting attorney may by leave of court file a motion for the dismissal of an indictment or complaint or of a count contained therein as to either all or some of the defendants, and such dismissal is not prejudicial to the defendant since the defendant is thereupon discharged from answering further the indictment and the offense, unless the withdrawal of the indictment is with reservation and until the accused is charged on another indictment.

5. The prosecution may request the dismissal of an indictment if there is no evidence or insufficient evidence to convict the defendant, or if material defect in the prosecution or the indictment is discovered.

6. The dismissal of an indictment is not a bar to further prosecution if the indictment is dismissed before a jury is selected, sworn and empanelled, or, where the case is triable by a judge without a jury, before the court begins to hear evidence.

7. A party in whose favor an act or decision complained of has been rendered shall be named as respondent and shall be served with a copy of the petition, the trial judge named therein being only a nominal party. However, if the winning party, although not named in the petition or served therewith, files returns defending the position of the trial judge, he cannot under the same breadths claim that he is not a party respondent. In such a case, the party is considered to have voluntarily appeared and to have waived his right to contest the jurisdiction of the Court over his person.

The petitioner filed a petition for a writ of certiorari to review the trial judge's denial of petitioner's application to dismiss, with reservation, the indictment against the co-respondents, defendants in the trial court. The co-respondents, who had been indicted by the grand jury for the Fifth Judicial Circuit, Grand Cape Mount County, for the crime of murder, had requested and were granted a change of venue to the First Judicial Circuit Court, Criminal Assizes "B". When the case was called for hearing, the prosecution requested, and the court granted leave, to spread on the records its withdrawal of the indictment with reservation. The application was denied by the court, the trial judge holding that the withdrawal could only be effected by the prosecuting attorney in the county in which the co-respondents were indicted, and that to permit the withdrawal would be prejudicial to the co-respondents.

In their returns to the petition for certiorari, the respondents contended that only the trial judge, who is merely a nominal party to the proceedings, was named in the petition and served with precepts, and that in any event, the trial judge did not err in denying the prosecution's application to withdraw the indictment. They therefore prayed that the petition be denied.

The Justice in Chambers rejected the co-respondents contentions, holding that the trial judge had erred in denying the prosecution's application, since the right to withdraw an indictment is vested in the prosecution by statute, to be exercised at any time before the selection, swearing in and empanelling of a jury, or, in the case of a hearing, by the court without a jury, before the judge begins to take evidence. The justice noted that the exercise of this right is not limited to the prosecuting attorney in the county in which the indictment originated but extended also to the prosecuting attorney in the county to which the case had been transferred by virtue of a change of venue.

On the issue that the petitioner had named only the trial judge as respondent in the case, the justice acknowledged that the trial judge is only a nominal party in a remedial process and that the party in whose favor the co-respondent judge had ruled should also be named as a party respondent, but he opined that, as the respondents had filed returns to the petition, they were deemed to have appeared. By that appearance, he said, the co-respondents had waived any right to contend that they were not named as party respondents or served with precepts. This was particularly relevant, the Justice observed, where, as in the instant case, the co-respondents had appeared and defended the position of the trial judge.

Hence, finding magnitude in the petition, the Justice granted the same, ordered the reversal of the trial judge's ruling, and instructed the trial court to allow the prosecution to withdraw or dismiss the indictment as prayed for.

Flaagwaa R. McFarland,then Solicitor General, appeared for petitioners. Raymond A. Hoggard appeared for respondents.

SMITH, J., presiding in Chambers.

The office of a writ of certiorari, and particularly as it relates to inferior courts, is to review an intermediate order or interlocutory judgment of the court, and if there be any error committed, to have the same corrected. The correction of error by certiorari does not go to the merits of the pending case or extend beyond the intermediate order or the interlocutory judgment of the inferior court sought to be reviewed and corrected; rather, the review and correction must be strictly confined to the order or judgment insofar as the legality of the intermediate order or the interlocutory judgment is concerned.

Mr. Justice Pierre speaking for this Court in the case Williams v. Bull, 13 LLR 444, 446 (1960), said: ". . Certiorari will lie in every instance where the rights of a party seem to be manifestly prejudiced by the rulings of an inferior court during the pendency of a case". Also in the case Bailey v. Kandakai, reported in 21 LLR 556 (1972), this Court held that: "The definite and specific function of a writ of certiorari is to review the records and correct prejudicial errors of a lower court during the pendency of a case."

The Republic of Liberia as the party plaintiff in a murder case venue from the People's Fifth Judicial Circuit Court, Grand Cape Mount County, to the People's First Judicial Circuit Court, Criminal Assizes "B", Montserrado County, sought the intervention of the Chambers of this Court by way of a petition for a writ of certiorari against the co-respondent judge, alleging substantially that at the call of the parse during the February, A. D. 1983 Term of the First Judicial Circuit Court, Criminal Assizes "B", presided over by His Honour Harper S. Bailey, the co-respondent judge herein, the prosecution, by leave of court, moved to dismiss, with reservation, the indictment found against the defendants, but that the trial judge denied the application and proceeded with the trial of the murder case by having the defendants arraigned and a jury selected, sworn and empanelled to try the issues joined between the Republic of Liberia and the defendants. For the benefit of this ruling, we hereunder quote the ruling of the respondent judge on the application to dismiss the indictment. It reads, as follows:

"At the call of the case at bar, both parties' counsels having announced their presence in court the case was called for hearing. The prosecution called the court's attention that he had a motion to be filed. The request was granted and in its motion it applied to court to dismiss the prosecution and cited for reliance as recorded. The court says this case is a venued case which traveled from the Fifth Judicial Circuit of Grand Cape Mount County on the request of the defendants for a change of venue. The intent of a defendant in praying for change of venue is where he finds out that his interest will not be secured within the county where he has been charged, perhaps due to public sentiments; and the prosecuting attorney for Grand Cape Mount, who indicted the defendants after a motion for change of venue was raised in that county, should have either argued for the granting of the change of venue or to dismiss

the charge as laid against the defendants in keeping with the Criminal Procedure Law, page 372, chapter 18, section 18.1. But this was not done and the change of venue was granted. The court now wonders whether there will be any justice rendered in granting the dismissal of the indictment by a distant county attorney who did not originate the issuance of the indictment now before court. The court further says that to grant such motion will be to the detriment of the defendants and also in contravention of the statute controlling criminal procedure, in re change of place of trial. Wherefore, and in view of the foregoing, this court does not see it clear to grant such motion. Hence, the motion is hereby denied and the resistance sustained. The hearing of the case is to proceed with modus operandi. And it is hereby so ordered" (sic).

It is from this ruling of the co-respondent judge that the State, through the Solicitor General of Liberia, has sought the issuance of the alternative writ of certiorari, praying the Court for a review of said ruling and to have the co-respondent judge appear to establish the legality of his denial of the application to dismiss the indictment. We understand the judge to say in his ruling, quoted above, that: (1) before the filing and granting of the application, the county attorney in the county in which the indictment was found should have prayed for its dismissal, and not having done so before the change of venue, the county attorney of the county to which the case is transferred has no legal standing to move the court for dismissal of the indictment; and (2) that the dismissal of the indictment would be detrimental to the interest of the defendants. The co-respondent judge has cited in support of his ruling the Criminal Procedure Law, Rev. Code 2: 18.1.

Our Criminal Procedure Law, Rev. Code 2: 5.7 (3)(a) and (b), regarding change of venue, provides:

"Proceedings on transfer. The following measures shall apply when a motion for a change of venue is granted:

"(a) Records. When the transfer is ordered, the clerk of the court shall enter on record the order of transfer and shall transmit to the clerk of the court to which the proceeding is transferred all papers in the proceeding or certified copies thereof and any bail taken from the defendant or witnesses, and the prosecution shall continue in that court as if the proceeding had originated in such court.

(b) Appropriate prosecuting attorney to continue prosecution. The appropriate prosecuting attorney of the county in which is located the court to which the proceed-ing is transferred shall continue the prosecution thereof.

From our interpretation of the statute quoted supra, to which the learned co-respondent judge made reference and relied upon in his ruling denying the application of the prosecution for the dismissal of the indictment, it is quite clear that when a change of venue

has been ordered, the county attorney of the county from which the case originated automatically loses authority to prosecute the case further, and the prosecuting attorney of the venued county is then, by virtue of this statute, given authority to continue with the prosecution. Therefore, it was a legal blunder for the co-respondent judge to hold, as he did, that the authority to seek the dismissal of the indictment was lodged in the county attorney for Grand Cape Mount County, from whence the case was transferred, or that the authority to proceed lie with the prosecution in the county of origin of the indictment. The dismissal of an indictment, under our law, is not on the merits. The co-respondent judge relied on sec. 18.1 of the Criminal Procedure Law, Rev. Code 2, which reads as follows:

"Dismissal by prosecuting attorney. The prosecuting attorney may by leave of court file a dismissal of an indictment or complaint or of a count contained therein as to either all or some of the defendants. The prosecution shall thereupon terminate to the extent indicated in the dismissal,"

Predicated upon the provision of the above quoted statute, the motion of the State's prosecuting attorney, made with reservation, was supported by law.

The co-respondent judge, in his ruling, held that to grant the motion of the prosecution to dismiss the indictment would be detrimental to the interest of the defendants. It is regrettable that the co-respondent judge had to reach this conclusion, for it is elementary, even for a layman, to understand that it is not prejudicial or detrimental to the interest of one who is charged with the commission of a crime where the one preferring the charge withdraws the charge. In the event of such withdrawal, there remains no case in the court against the accused, unless the withdrawal was made with reservation and until the said accused is charged on another indictment. Where the indictment of a prosecution is dismissed, there is nothing left on which to hold the defendant; therefore, the duty of the court is to discharge the defendant immediately, and the discharge of prisoner from answering further to that indictment is not a prejudicial act. The reasoning and holding of the respondent judge that the granting of the motion to dismiss the indictment would be detrimental to the interest of the defendants was therefore erroneous.

There are two main reasons why our statute makes provision for the dismissal of a prosecution by the State. They are:

(1) Where there is no evidence to convict the defendant, and (2) where a material defect in the prosecution or in the indictment has been discovered.

The dismissal, under our the Criminal Procedure Law, Rev. Code 2:18.3, is not a bar to further prosecution; provided, however, that the indictment is dismissed before a jury is selected, sworn and empaneled; and in a case triable by a court without jury, before the court has begun to hear evidence. In the light of this statute, the ruling denying the motion and

proceeding with trial of the murder case was prejudicial to the State for which certiorari will lie.

We also regret that the State did not give notice of its intention to seek remedial process in certiorari prior to the arraignment of the defendants, who, following the judge's ruling, had entered their respective plea of not guilty. It is ever more regrettable that, as disclosed by the minutes of the trial court, the prosecution participated in the selection of trial jurors who were subsequently sworn to hear the evidence in the case. (For reliance, see Sheets 7-8 of the 3' day's session of the trial court, February 16, 1983).

The co-respondent judge, as a nominal party in the certiorari proceeding, did not file a returns pro se, but according to his letter addressed to the Justice in Chambers, dated February 24, 1983, he had given the alternative writ and the petition to the defendants' counsel to make returns thereto. Accordingly, defendants filed returns in which they supported the view and position of the co-respondent trial judge. Of the four-count returns, we consider only count one to constitute a legal issue necessary to be discussed. In this count, the respondents have contended and their counsel has argued that they should have been made party respondents in the proceeding. Instead, they said, the co-respondent trial judge was the only named party respondent.

In this connection, we observe from the records that only the trial judge was made party-respondent in the certiorari proceedings, to the exclusion of the defendants in the trial court. According to the Civil Procedure Law, Rev. Code 1: 16.23, Procedure in Certiorari,the party in whose favour the act or decision complained of has been rendered shall be named as respondent and shall be served with a copy of the petition. However, in our opinion, the defendants, having filed returns defending the position of the trial judge by contending that his ruling denying the motion to dismiss the indictment is legal, they cannot under the same breath claim that they are not party respondents. We hold that they have voluntarily appeared and therefore are party respondents in this proceeding. We also hold that the joining of the defendants as party respondents is not prejudicial to their interest. Therefore, count one of the returns is not sustained.

In view of all that we have stated herein above, coupled with the legal citations in support of our position, it is our holding that the ruling of the respondent judge is erroneous and prejudicial to the interest of the State. The petition for a writ of certiorari is therefore hereby granted and a peremptory writ of certiorari ordered issued, commanding the respondent judge to resume jurisdiction over the case and set aside the erroneous ruling. And it is hereby so ordered.

Petition granted.