

**REPUBLIC OF LIBERIA**, Appellant, *v.* **ZANABLEE KARNGBAY**, Appellee.

APPEAL FROM THE CIRCUIT COURT FOR THE EIGHT JUDICIAL CIRCUIT,  
NIMBA COUNTY.

Heard: May 25, 1982. Decided: July 8, 1982.

1. It is far better for the Government to use its time, energy and money in order to promote fairness and justice for one man, than to save all the time and money to install injustice.
2. Any circumstance, the continuation of which may tend to deny either party his right to a fair and just trial or tends to so disturb the trial, resulting into an unfair and unjust hearing, may constitute manifest necessity.
3. Illness of the foreman of the jury, without a resulting decrease in the number of trial jury below twelve, does not constitute manifest necessity to warrant the termination of trial.
4. An accused can neither be compelled to give evidence nor shall he against his will, be compelled to produce witnesses. Hence, it is error for the court to deny the waiver of production of witnesses made by the accused, regardless of the pendency of a subpoena.
5. Where the defendant has pleaded to an indictment, a jury empaneled, and trial progressed until both the State and the defendant have rested evidence, double jeopardy attaches if the trial is terminated without manifest necessity.
6. Where double jeopardy attaches, the court shall grant a motion for Judgment of Acquittal in any subsequent trial.
7. Failure to except to the trial court's ruling re-docketing a case for another jury trial does not constitute waiver of the right of the accused to plea double jeopardy.

Appellee, Zanablee Karngbay, was indicted for murder of a ten-month old girl. After prosecution rested, appellee took the stand and testified on his own behalf. Thereafter he prayed the court for a *subpoena ad testificandum* to be issued and served on the paramount and clan chiefs of Karnplay Chieftdom.

During the pendency of the subpoena, two other witnesses appeared and testified for appellee, after which his counsel waived the production of further witnesses and asked the court for permission to argue the case. The court denied defendant's waiver of production of witnesses, disbanded the trial jury and re-docketed the case for another term of court on grounds that manifest necessity has occurred due to the unavailability of defendant's

witnesses and the illness of the foreman of the trial jury. Subsequently, during the February Term of the Court, when the case was called for trial, appellee moved the court for acquittal on grounds of double jeopardy. From the ruling granting the motion, appellant excepted and announced an appeal to the Supreme Court.

The Supreme Court, noting that as an accused cannot be compelled to give evidence against himself or at his trial, and cannot against his will, be compelled to produce witnesses, held that the unavailability of the appellee's witnesses who had been subpoenaed by the court, did not amount to manifest necessity as to warrant the disbandment of the jury in the face of the waiver of production of witnesses by appellee. The Court also held that the illness of the foreman of the jury, without a resulting decrease in the number of trial jury below twelve, did not amount to manifest necessity, in that he may be substituted by any juror on the panel without affecting the hearing. The trial having been terminated without manifest necessity, the Supreme Court affirmed the ruling appealed from and ordered the defendant released from further custody without day.

*Isaac Nyepu* of the Ministry of Justice, in association with the Assistant Minister of Justice, *Richard McFarland*, appeared for plaintiff/appellant. *E. Winfred Smallwood* of the Cooper and Togba Law Firm appeared for defendant/appellee

#### **MR JUSTICE MABANDE delivered the opinion of the Court**

Zanablee Karngbay was indicted for the murder of Zrankayea, a ten-month old girl whom the accused is alleged to have stabbed to death.

The accused is alleged to have desired to sacrifice Miss Zrankayea, daughter of Madam Tarkpor, in order that he might have become paramount chief of Karnplay Chiefdom, Nimba County. According to the records, one Sekou Kromah, a Man-dingo man, was sent for from the Republic of the Ivory Coast to make medicine with human blood for Defendant Zanablee Karngbay's success to become paramount chief. Defendant had just been discharged from hospital where he underwent a major operation and while he was convalescing, the murder was reported. On that fatal day for Madam Tarkpor especially for her daughter, Zrankayea, who was murdered, Madam Tarkpor and other adults of the town had just gone to survey a parcel of land, leaving in the town four adults namely: Defendant Zanablee Karngbay, a convalescent, an unnamed stranger, the decedent and Joseph Karngbay, a mentally incompetent who habitually threatened lives with weapon. The convalescent who had just been discharged from abdominal operation was arrested. While in custody, his new operation scar was continually sprayed with tear gas by the police. He suffered until all present gave up hope of his recovery. As pitiful and inhuman as the murder

of Young Zrankayea and the torture of Defendant Zenablee Karngbay appear from the records; the fundamental issues presented by this appeal for our determination are exclusively procedural and not factual.

The trial of the accused commenced on November 16, 1981 with four witnesses who testified for the prosecution. During the trial, the defense prayed the court for subpoena to be issued and served on the paramount chief of Karnplay Chiefdom and Clan Chief Charlie Seebah to appear and testify on his behalf.

Defendant Zenablee Karngbay testified in his own behalf. After the testimony of two of his witnesses, his counsel waived the production of further witnesses. The court denied defendant's waiver of production of witnesses and re-docketed the case for another term of court on the ground that manifest necessity had existed due to the unavailability of defendant's witnesses and the illness of the foreman of the trial jury. The trial judge disbanded the trial jury.

At the call of Defendant Zenablee's case during the February 1982 Term of Court; Defendant Zenablee prayed the court for acquittal on a plea of double jeopardy. The motion for acquittal was granted. The prosecution excepted to the ruling and appealed to this Court for a review of the trial. The important issues presented by the appeal and necessary for a final determination of this controversy are: (1) when does the rule of manifest necessity apply; (2) can an accused be guilty of waiver of right by silence; (3) does the illness of the foreman of the jury constitute manifest necessity for disbanding a jury; (4) whether the conservation of time, energy and money for the prosecution of a case is a factor constituting manifest necessity; (5) is minimum violation of the right of an accused by the State justifiable? The prosecution opened his argument by arguing that under the law a trial court may terminate a criminal trial because of manifest necessity and that such act of court does not bar future prosecution of the accused.

Counsel for defendant contended that manifest necessity did not exist at the trial to have required the compulsory termination of the hearing. He argued that there was no need to have even suspended the trial as both party litigants had submitted and waived further production of evidence and asked the court for its permission to argue the case.

According to the records, after the defendant and two of his witnesses testified, he placed on record that he had waived further production of witnesses in his favor and that he was ready for argument before the court and jury. Under the law, an accused can neither be compelled to give evidence nor shall he against his will, be compelled to produce witnesses. It is even illegal and improper for either the court or counsel to negatively comment on a defendant's refusal to testify or his waiver of any right including the right to trial by jury. But if he wants

witnesses, he is entitled to compulsory process for obtaining them. *Tay v. Republic*, 9 LLR 92 (1945); and Civil Procedure Law, Rev. Code 1:2.6.

The prosecution argued in defense of the trial judge that because of waste of time, energy and money in waiting for the return of the sheriff, manifest necessity existed for the disbanding of the jury. To this contention, we disagree. Only the return of the Sheriff could have legally informed the court of the necessity whether to wait for the arrival of the witnesses or to disband the jury. It is far better for this government and country to legitimately use time, energy, and money in order to promote fairness and justice for one man, than to save all the time, energy and money to install injustice.

Were we to grant a retrial, the cost would definitely be higher than it would have cost to argue and submit the case to the jury. A retrial would involve all that was done up to the time the jury was disbanded.

The prosecution argued that the defendant consented to the ruling disbanding the jury since he made no exception or objection thereto. We hold that where the mistrial compelling the disbanding of the jury is attributed to the outrageously bad behavior of the accused tending to create uncontrollable atmosphere for a fair trial, a judge disbanding the jury and re-docketing the case acts within the true concept of manifest necessity in protecting society's interest in justice and fairness.

The failure to object to any gross irregularity in a criminal administration is not a waiver of the right of the accused to later take advantage of the illegal acts of either the prosecution or the court for his acquittal. Every irregularity or illegality violative of due process of law when committed by the government, the court or both in a criminal trial whether noted or objected to by the accused may be counted in his favor and it is the supreme duty of the court and government to know the law and not to violate it at any time. Any violation of the law that deprives the human rights of an accused should be justly and adequately remedied by the judiciary.

The prosecution argued that manifest necessity existed during the trial because of the three-day absence from court of the foreman of the jury due to his illness. He argued that as the illness of a counsel or a judge may amount to manifest necessity for the re-docketing of a trial, even so it should be when the foreman of the jury gets ill and cannot participate in the trial. The counsel for defendant contended that unlike a judge, the accused or the lone defense counsel the attendance of each of whom is indispensable for a trial, a foreman of the jury being one of the twelve trial jurors is not so necessary that his absence from the panel may create ground for mistrial.

Every member of the panel including the alternates has equal vote as the foreman of the jury. He enjoys no more privilege or vote superior to any of the other jurors. He is appointed to merely head the panel as a temporary chairman while the trial proceeds. He, like any of the other fourteen jurors, may be removed from the panel at any stage of the trial for misconduct or illness. He may be substituted by any juror on the panel without affecting the hearing.

Manifest necessity means any circumstance that may tend to so disturb the trial resulting into an unfair and unjust hearing. Any circumstance the continuation of which may tend to deny either party his right to a fair and just jury trial may constitute manifest necessity for the termination of a trial. The illness of a number of the jurors reducing the number of the trial jury below twelve, the illness of the trial judge, illness of the accused himself or his counsel, are all some of the main occurrences that may constitute manifest necessity if the illnesses are of degrees that they may render the further consideration of the trial impossible. None of these circumstances did exist at the trial. No factor of manifest necessity existed for the court to have terminated the trial and disbanded the jury.

The prosecution contended that the plea of double jeopardy does not hold in this case because the termination of the first trial was because of manifest necessity. He further argued that the ruling of the trial judge re-docketing the case for another jury trial at an ensuing term of court was not excepted to by either party and therefore, it was assented to by both parties; hence, the accused waived his right to plea double jeopardy.

Defendant's counsel argued that a retrial of the accused for the same offense under the circumstances is contrary to the doctrine of double jeopardy. Counsel for defendant also contended that as defendant had pleaded to the indictment and jury trial had progressed until both the State and the defendant rested evidence, to have the defendant tried again for the same crime before another jury is in fact a denial of his right to have been tried by the first jury and a vexation and harassment of defendant. He concluded that a second trial or repeated trials of the same defendant before more than one jury for the same cause is illegal.

During a criminal prosecution the silence of an accused is no consent, but resentment of all that the state has done from the time of his arrest up to the termination of his trial. Silence is never imputed as an assent of an accused.

It is an ancient and a continually generally accepted concept of legal tradition that once the jury has been bound together it should not be discharged until its task of hearing the evidence and announcing the verdict for which it was empanelled is legally completed. To disband the jury while its task remains undone or half accomplished is a denial of the accused of his fundamental right to trial by jury. To have the defendant retried by a second

jury is to admit that the first jury trial was illegal and to subject him to a chosen jury of the prosecution after he has been illegally held in prison and denied speedy trial before the first jury. To do so, is to invite distrust in the fairness and impartiality of the court and the second jury.

When a prisoner is arraigned before court, it should be remembered that he stands before the government's own established court, its summoned jurors for the fair execution of its own law by its own engaged counsels. Error by the trial court or the prosecution should therefore, never be calculated against the accused. Only by so doing may society's confidence in the court as an envied instrument of justice throughout the land be maintained. *Dillon v. Republic*, 15LLR 119 (1962).

The prosecution argued that if there were any violation of trial procedure, it was not sufficient to constitute the basis of invoking the doctrine of double jeopardy. We hold that there can be no little violation of the basic rights of an accused. Tyranny, like a leviathan is born; it grows from infancy to maturity before, on whole-scale basis, it begins to destroy its prey. We cannot therefore accept any excuse for the violation of the fundamental rights of an accused. To do so is to aid the prosecution in the destruction of the foundation of civilized government. The express voluntary waiver of right at the proper time not to invoke the doctrine of double jeopardy during the trial of a given case under certain clear circumstances may bar an accused from raising the plea, but such circumstance never existed during the first trial. The worldwide abhorrence of double prosecution of an accused at the whims of the prosecution cannot be overlooked on the State's plea of minimum violation of rights of the accused. The all-time conceived hope of independence and freedom is enshrined in the creation of the judiciary to guarantee the blessings of liberty bestowed on all by civilized governments. It forbids us from tempering with or covering up any of the bulwarks on which liberty and justice firmly trust.

Implicit in society's reliance on the court is the premise that the failure of the judiciary to mete out justice and fairness to both the weak and the strong or the government and the governed within the ambit of the law would be loathsome and obnoxious to the consciences of the people and impair adequate administration of criminal justice.

Every criminal trial is in all circumstances a complicated and tedious affair to manage. However, the lack of preparedness of government to handle a prosecution free from injustice and unfairness impedes the judicial policy of speedy and fair trial guaranteed to an accused. The important countervailing interest of proper judicial administration of criminal justice is removed when the plea of manifest necessity as argued by the prosecution in this case is accepted to compensate the State for its gross procedural mistakes in failing to seek

the court's immediate reconsideration of the gravity of disbanding the jury. We refuse to accept the argument of the prosecution that the denial of defendant's plea of double jeopardy would not affect his rights at the second trial.

We are therefore of the opinion that the appeal should be and the same is hereby denied. The Clerk of this Court is hereby commanded to send a mandate to the trial court ordering the presiding judge to release defendant from further custody without day and dismiss the cause. And it is hereby so ordered.

*Judgment affirmed.*