Republic of Liberia, by and thru the Ministry of Justice Monrovia, Liberia APPELLANT VERSUS **Julie Russell Poboe**, **Ophelia Verdier**, **Doris Nelson**, **Louis Allison**, **Boakai K. Taylor** and **Jones Leviticus**, all of the City of Monrovia, Liberia APPELLEES

APPEAL. JUDGMENT REVERSED, CASE REMANDED

Heard: November 27, 2007 Decided: December 21, 2007

MRS. JUSTICE JOHNSON DELIVERED THE OPINION OF THE COURT

During the March Term of Court, 2004, the Grand Jury for Montserrado County, and for probable cause shown, presented a true bill as a result of which the above named Appellants/Defendants, along with three others, were indicted, for the Crime of theft of Property. The Appellees herein entered their plea of not guilty at their arraignment and proceeded to the trial separately from the other three, those other three having failed to appear at the arraignment proceedings. The case progressed to trial by jury under the assigned presiding Judge, His Honour Logan Broderick. As the trial progressed the prosecution on several occasions requested for continuance and subpoena for the appearance of material witnesses one of whom was the private prosecutrix in the case. The Judge having twice granted shut term postponements of the hearing to allow the prosecution produce the witnesses, and said prosecution failed, the Judge, at last, lost his judicial temperament and proceeded in this manner (a) he ordered the prosecution to rest its case despite the prosecution's request for continuance on ground that a material witness was out of the City of Monrovia; (b) The prosecution having failed to obey the order to rest evidence prematurely, the Judge, Sua sponte, rested the prosecution's case and awarded a judgment of acquittal in favor of the Appellees/Defendants; and (c) He then ordered the jurors to retire to their room of deliberation and return with a directed verdict of not guilty; (d) After the jurors failed to find a verdict, the Judge, nevertheless rendered a judgment of acquittal and discharged the Appellees from answering again to the said charge of theft of property. He also disbanded the jury.

The Republic of Liberia noted exceptions and announced an appeal from the final judgment. The case is now before us on a bill of exceptions containing ten counts. We quote the Bill of Exceptions verbatim:

1. "Your Honour, having moved an granted motion for judgment of acquittal in favor of the Defendants in this entitled cause of action without affording the state/persecution the opportunity to rest in toto with the production of both oral and

documentary evidence some of which were marked by you identified CH/1-5 and CK/1 respectively acted arbitrarily and committed an abuse of your discretion, to which prosecution then and there excepted.

2. And also because Your Honour overruled, denied and set aside prosecution's motion for continuance even though prosecution produced in open court letter informing the County Attorney-Cllr. A. Blamo Dixion that one of prosecution's material witnesses Sis. Evelina De Guglielmo was out of Monrovia and will return on June 1, 2005, Your Honour, proceeded to instruct the jury to find in favor of the Defendant directed verdict of not guilty ordered by Your Honour, to which prosecution excepted.

3. Your Honour, erred when Your Honour threatened the empanelled jurors if they did not bring directed verdict of not guilty in favor of the defendants, they would be detained and imprisoned by Your Honour.

4. Your Honour, committed reversible error when you failed, refused and neglected to sign your final judgment on May 27, 2005 the date on which Your Honour rendered final judgment in this entitled cause of action, and signed same only after several days when Your Honour took the file and records of your final judgment containing different content or version of your final judgment dated May 27, 2005.

5. Your Honour, erred when you moved for directed verdict of not guilty instead of being moved by the prosecution or the Defendants as provided by law.

6. Your Honour, committed reversible error when you conducted the trial hastily contrary to the Honourable Supreme Court opinion in the case: Divies Vs. Yancy, 10 LLR page 89, Sly.3.

7. Your Honour, erred when you moved for both judgment of acquittal and directed verdict of "NOT GUILTY" contrary to our practice and procedures in this jurisdiction since the prosecution did not rest in toto with the production of both oral and documentary evidence first.

8. Your Honour, committed reversible error when in your final ruling/judgment stated that because of this fact that the evidence produced by the prosecution as so far is insufficient to sustain a conviction of theft of property against said Defendants, when in fact the prosecution had not rested with the production of evidence both oral and documentary because it had other witnesses to produce.

9. Appellant says and submits that you erred when rendering your final judgment/ruling you discharged the 12 jurors that sat on the case from further service during the May Term, A.D. 2005 of the Criminal Court "C" because according to you they disrespected and disregarded your illegal order of directed verdict of NOT GUILTY in favor of the defendants.

10. Appellant avers that Your Honour committed reversible error when after the jurors returned from the room of deliberation and returned the verdict form unsigned, you immediately entered judgment of acquittal in favor of the Defendants.

From the above quoted Bill of Exceptions, we have culled the following issues that are determinative of this case.

1. Whether the appellant violated any rule of procedure by requesting for continuance to obtain the appearance of material witnesses one of whom was the private prosecutrix, after said prosecution had exhausted its witness list.

2. Whether the Judge erred by sua sponte, awarding an acquittal before either of the parties had rested evidence.

3. Whether the Judge after awarding the acquittal was in error when be subsequently ordered the jury to retire to its room of deliberation, and return with a directed verdict of not guilty.

4. Whether the Judge was in error when he handed down a judgment even though the jury had returned without a verdict in which judgment or ruling he discharged the Appellants from ever answering to the said charge again and also disbanded the jury.

We shall begin with the first issue. Did the prosecution violate a rule of procedure by requesting for continuance during trial in order to produce a witness that was not listed in the indictment? The practice and the law in this jurisdiction as found both in the Civil and Criminal Procedure Laws are specific as to the rules governing the production of witnesses to prove allegations made either in an indictment or in a complaint. On the issue of continuance of a trial the rule states that:

1. "Except where otherwise prescribed by law the court in which an action is pending may grant a continuance on such terms as may be just." 1 LCLR section 1.6.4 It is stated further that:

2. At any time during the trial, the Court on motion of any party, may order a continuance or a new trial in the interest of justice on such terms as may be prescribed. 1 LCLR section 26.3

From the language in each of the above paragraphs it is clear that the granting of a motion for continuance is not a matter of right. It is rather that of the sound discretion of the trial Judge. In the case at bar the question whether the prosecution violated the law by requesting for continuance or whether the prosecution should not have requested for the continuance of the case to produce any other witnesses after exhausting its witness list, we hold that the above statute allows any party to request for continuance during trial for prescribed reasons, such as illness of a witness, absence, or any condition beyond the control of the requesting party to proceed. The prosecution herein requested for continuance to allow time for production of a material witness who as alleged, was out of the City of Monrovia. The prosecution played its role by informing that the private prosecutrix was absent and prayed for continuance. That is the law. Such a request when made cannot be said to be in violation or contra to the rule. The judge in this case, in our opinion, abused that discretion by refusing to allow a few days in order that the material witness, the private prosecutrix, could be produced in Court and testify. By suspending the trial to resume on the following day's sitting was tantamount to a denial of the request for continuance.

Of course in a criminal prosecution, such as in this case, the rule is that all witnesses should be listed in the indictment and that the witness list may be amended prior to the commencement of the trial.

The relevant provision of law is as follows:

"Within five days after an arraignment upon an indictment, the prosecuting Attorney shall file with the Clerk of the Court a list of the witnesses he intends to have testified at the trial together with their last known addresses and shall serve a copy of the list upon the Defendant. The prosecuting Attorney may amend the list by adding additional names of witnesses thereto with their last known addresses at any time before trial as the Court may by order permit. The order shall provide that a copy of the amended list shall be served on the Defendant within a reasonable time before the trial. Emphasis ours, Criminal Procedure Law Rev. Section 17.4.1**.** The law as written is clear. The prosecution must submit its witness list to the Defendant before the trial commences. The purpose for this provision of law is to give the Defendant

notice to prepare his or her defense by doing background checks on the witnesses for a number of reasons e.g. motive, connections, character, reliability and so forth. If time is not allowed for such background checks before a witness takes the stand, the Defendant's defenses may suffer by being superficial, inadequate, and therefore jeopardized. There are exceptions to this rule however: The first exception to the rule is stated in 1 LCLR 17.4.1 captioned and stated as follows. When testimony of unnamed witnesses permitted. "The trial Court may permit witnesses not named in an original or amended list to testify when the names of the additional witnesses were not known and could not have been obtained by the prosecuting Attorney by the exercise of due diligence prior to the trial."

The prosecution in this case listed four names on the indictment as witnesses. There is no record of an amended list. The witness, Sister Evelina De Guglielmo, was not one of the listed witnesses. However, during the trial a request for continuance, so that she may appear to testify as a material witness, led to an abrupt ending of this trial. The question is whether the prospective witness could qualify under the exception. The answer is no. Sister Evelina De Guglielmo was not an unknown name whose testimony was triggered by allegations that arose or were made by any one of the listed witnesses while on the witness stand. She was named in the indictment in fact as the private prosecutrix. The ultimate question that now arises is whether the law requires that a private prosecutor named in an indictment also be listed as a witness before he or she can qualify to testify? We have stated earlier why it is necessary that witnesses against the Defendant be made known prior to trial and the reason is to give notice to the Defendant. By parity of that reasoning we hold that a private prosecutor need not be listed as a witness. The private prosecutor is already a witness against the Defendant. The private prosecutor is the victim in a criminal case in which the accused is alleged to have offended. In this case the indictment seeks to prosecute an alleged violation of law, that of theft of property belonging to the Catholic Secretariat represented by the authorities of that institution, one of whom is Sister Evelina De Geuglielnio, the Education Secretary of the Catholic Archdiocese of Monrovia and the other, Arch Bishop Michael K. Francis of the Catholic Diocese. The indictment stated that the Appellants and others also named in the indictment forged the signatures of the above named authorities of the Catholic Secretariat. In our opinion the naming of these persons whose signatures were allegedly forged is sufficient notice to the Defendants to prepare their defense to counter the forgery allegation and the alleged theft of property charges leveled against them in the indictment. It must be noted over and again, that the Republic of Liberia is the complainant always in a criminal case because whenever a crime is committed it is committed against the Republic whose law has been violated. In a proper case in

which the alleged offense affects private rights, the offended party in collaboration with the Republic presses charges against the offenders. We therefore hold that Sister Evelina De Guglielmo, being the private prosecutrix as indicated in the indictment, needed not to be listed as a witness in order to qualify as a witness. We also hold that a request for continuance to allow her time to return to the City of Monrovia and testify to the forgery of her signature is not only necessary but just in the determination of the case.

There is yet another exception to this rule found at section 17.4 "non application to rebuttal witnesses. "The requirements of paragraph 1 of this section shall not apply to rebuttal witnesses." Besides these two exceptions above quoted there is no other exception to the general rule which states that the prosecutions witnesses must be listed and that the list may be amended and served on the Defendant within 15 days prior to commencement of trial. These provisions of the statute are pursuant to Art. 1 section 7 of the 1986 constitution of Liberian which states that:

"No person shall be held to answer for a capital or infamous crime, except in cases of impeachment, cases arising in the army and navy, and petty offences, unless upon presentment by a grand jury; and every person criminally charged, shall have a right to be seasonably furnished with a copy of the charge, to be confronted with the witnesses against him to have compulsory process for obtaining witnesses in his favor; and to have a speedy, public and impartial trial by a jury of the vicinity. He shall not be compelled to furnish or give evidence against himself; and no person shall for the same offence, be twice put in jeopardy of life or limb." Emphasis ours.

We have held in this opinion that the private prosecutrix was made known to the Defendants prior to the commencement of the trial. A request for continuance for her appearance cannot therefore be classified as an addition to the prosecution's list of witnesses. We must however state here that we frown on the prosecution's unpreparedness to proceed with the trial on grounds that its material witness, the private prosecutrix was out of the City of Monrovia. In our mind, the foundation of the prosecution's case was to first establish that the signature on the two checks was not that of the private prosecutrix. In the chain of evidence, establishing that fact or premise was necessary in order to proceed further and obtain a conviction, for, how else could the prosecution proceed to establish a prima facie case in the absence of a finding that the checks, in whatever amounts, were forged? **hi** a criminal prosecution, as is true of any evidence-gathering process, it makes good sense and logic to lay a proper foundation on which to develop and present convincing evidence. The idea of presenting evidence in a disorganized manner does not speak well of a lawyer's

mastery of his art. We hold that having the private prosecutrix in one part of the country while her case is been heard in another part, and the said prosecutor, requesting for continuance of the case in order to have the private prosecutrix return to the seat of the hearing is not only unprofessional, but also contemptuous to the court before which the case is being heard, except for good cause shown for the absence. During the trial, the prosecution argued that it exercised due diligence to have the material witness, the private prosecutrix, appear. When questioned by the bench to define due diligence and how it was applied, the answer was evasive and therefore unconvincing. We are therefore of the opinion that the prosecution did not exert due diligence and did not give any compelling reason why his client was away during the trial. The granting of a motion for continuance is left to the discretion of the Trial Judge, meaning the Judge may or may not grant the motion for continuance. Under our Criminal Procedure Law, 1 LCLR section 1.6(4) Continuances, states that "where otherwise prescribed by law, the court in which an action is pending may grant a continuance of proceeding in a proper case upon such terms as may be just". We interpret this provision to mean that if the request for continuance is just, then the Judge by refusing same has abused his discretion. We list herein few of the reasons that ought to be considered to be just: proven illness of the witness, absence from the bailiwick of Liberia when the case is assigned and it is impossible to return in time for the hearing, bereavement due to the death of a close family member such the spouse, child parent, or sibling during the trial. None of these conditions were presented to the Judge as reasons for the nonattendance of the private prosecutrix. The prosecution only stated that she was out of the city of Monrovia where the trial was been conducted. But failed to state whether she was away when the assignment was issued, and that the notice to attend on the hearing was short and that the time constraint prevented her from appearing on the day of the hearing. Although the statutory provision with respect to absence is ground for continuance, it says absence from Liberia and not just any absence. The private prosecutrix in this case was in Gbarnga, Bong County, as alleged. In these days of relative peace, in the absence of hostilities, a diligent attempt to bring someone from Gbarnga to Monrovia would take less than four hours. It is not sufficient to merely state that counsel has employed due diligence to secure the attendance of a witness. Proof that due diligence was employed would be required. There was no proof of any diligent effort to have the witness appear on the terms of the court, only on her own terms that is, she would return to Monrovia on June 1, 2005, and not on the hearing date. We must again emphasize that lawyers have an obligation especially those in prosecutory positions to avoid any actions that tend to delay the speedy trial guaranteed to the accused under Art. 1.7 of the Constitution of Liberia. The prosecution having failed or neglected to show proof of the employment of due diligence to secure the

testimony which proof could have necessitated the granting of a motion for continuance, we hold that the judge by denying the motion for continuance did not err per se. Pursuant to 1 LCLR Section 21.5. (a) Adjournment of trial to obtain witnesses. However, we are of opinion that the court should have granted the continuance not because of the grounds noted, or not noted, but only because it would have been reasonable to do so. Green and Witherspoon vs. Clark et al, 1 LLR 171,175 (1952). It was very necessary that the forgery allegation be proved so that justice could be done, and the way to that end would have been to have the testimony of the private prosecutrix. We have no doubt about the materiality, relevancy and competency of the testimony of the private prosecutrix. 1 LCLR 21.5 (b). The judge should have realized without the point been rubbed in by the prosecutor, that the private prosecutor's testimony in a case such as the one under review would be the most material, relevant and competent testimony to determine whether or not forgery was committed. In this case we hold therefore that the judge should have exercised the sound discretion accorded him in the premises and allotted a few extra days' postponement in order to obtain the relevant, material, and competent testimony so that at the end of the trial even he the judge, could say he had conducted a fair and just trial. We must state here that the speedy trial guaranteed under the constitution is no license or excuse for a Judge to hastily dispose of a matter if by doing so would be prejudicial to the interest of parties such as was done in this case. The corporation of IBN vs. Pearson and Sirleaf, 31 LLR 72, 75 (1983). The judgeship is an honorable position. One who occupies it must behave honorably. Anger or rash diminishes honor in both ways, the one who shows anger and the one against whom it is directed. Being not temperamental is therefore one of the hallmarks of an honorable Judge.

The second issue for our determination is whether the Judge erred by, sua sponte, awarding an acquittal without either side resting evidence on the ground that the prosecution's evidence was insufficient to sustain a conviction. Although the law requires that when the prosecutions evidence is insufficient on which to convict an accused, a judgment of acquittal should be awarded, the law is succinctly stated as to how the Court should arrive at the decision to grant an acquittal. We shall state that provision of the law below: Motion for judgment of acquittal LCLR P. 493 "The Court on motion of defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses. If a defendant's motion for judgment of acquittal at the close of the evidence offered by the Republic is not granted, the defendant may offer evidence without having reserved the right." Emphasis ours.

In the case at bar the judge demanded that the prosecution rest its case or else he would have the defense proceed to present. its side of the case. But then, having lost his temper, did not even allow the Defense to make a motion for acquittal or present its side of the case. He instead awarded an acquittal. The statute says that the Judge may sua sponte award an acquittal but only after the party or parties have rested evidence. The award of acquittal having been prematurely made same cannot be confirmed by this Court. It is therefore denied.

The third issue is whether the Judge was in error when after awarding a judgment of acquittal, he ordered the jury to retire to their room of deliberation and return a directed verdict of acquittal. In the opinion of this Court, His Honour Logan Broderick proceeded contrary to law and the practice in this jurisdiction. The provision of law governing the retirement of jury is that after the parties have rested evidence, and the Judge has read his instruction or charge, the jury retires to their room of deliberation to consider their verdict. The Court shall then appoint a foreman or the jurors may select one of their members. The verdict they return must be unanimous, guilty or not guilty. It is read in open Court. Criminal Procedure Law Rev. Section 20.1 1 (1) (2) (3). in the case at bar, there was no resting of evidence by either party, no charge to the jury, no foreman appointed or selected, only an order to the jury to retire and return with a guilty verdict. The Judge having prematurely awarded a judgment, of acquittal it was an error to send the jury to deliberate and return a directed verdict. The jury's refusal to return a verdict was reasonable and just. Jurors are fact finders. They cannot return a verdict in a case that is still under probe, on the rash orders of an angry Judge. The prosecution's evidence could not legally be said to be insufficient when the production of said evidence had not been completed and the case not submitted.

We now come to the fourth issue whether the judge erred by handing down judgment even though the jury failed or refused to return a verdict. Our answer is yes. The Judge ordered the jury to return from its room of deliberation with a verdict of acquittal. But when they came forth from their room of deliberation they presented a blank verdict sheet, meaning there was no verdict. Normally in our practice a return of no verdict means there can be no judgment either of guilty or not guilty. It means the Judge must award a retrial of the case. Judge Broderick saw it differently. He therefore pronounced a sentence of not guilty and discharged the Defendants without day. We are left pondering whether these series of blunders were due to loss of judicial temperament, unfamiliarity with the procedure, or absence of

the calm neutrality judges are called upon to exercise when they sit in judgment. Only the learned Judge can explain his repulsive behavior.

In view of all the blunders the Judge made in conducting this case, we are of the opinion that the appeal of the Republic should be and same is hereby granted. The judgment of acquittal having been prematurely rendered by the Judge, same is reversed. The case is therefore remanded to the Trial Court for retrial according to law. The Clerk of this Court is hereby ordered to send a mandate to the Court below to resume jurisdiction over this theft of property case and proceed accordingly. AND IT IS HEREBY SO ORDERED

Judgment reversed, case remanded.