

Republic of Liberia PETITIONER Versus His Honor **S. Geevon Smith**, Assigned Circuit Judge, First Judicial Circuit, Criminal Assizes "C" for Montserrado County, Liberia, **Lusine F. Kamara, Tugbeh N. Doe, Tapple E. Doe, Pyne Walo** and **Albert E.N. Quaye** RESPONDENTS

PETITION FOR A WRIT OF CERTIORARI

HEARD: MARCH 30, 2009 DECIDED: JULY 24, 2009

MR. JUSTICE KORKPOR DELIVERED THE OPINION OF THE COURT

During the November Term, A.D. 2007 of the First Judicial Circuit, Criminal Assizes "C" for Montserrado County, Messrs. Lusine F. Kamara, Tugbe N. Doe, Pyne Wallo, Albert E. N. Quaye and Tapple E. Doe, were indicted on the charge of economic sabotage. Trial commenced on May 19, 2008, and progressed until prosecution had produced four witnesses.

On June 23, 2008, the State made a submission to the trial court requesting an investigation into report the State said it received that the empanelled jurors had been directly or indirectly tampered with. In the submission, the State said *inter alia* that it had information that certain persons appeared on the grounds of the Temple of Justice bringing money from unknown individuals to the members of the jury; that the bailiff assigned to the jury had engaged in buying and supplying alcoholic beverages to the jury. The State further informed the trial court that it had received information that one of the jurors left the confines of the Temple of Justice on more than one occasion and was at large for more than one hour on each such occasion with no prior information to the authorities of the judiciary and no one knew where the juror went, for what purpose, and with whom he or she interacted. The State maintained that it was informed that persons unknown conducted these activities and others to be established during investigation. These allegations, according to the State, should claim the attention of the court for investigation and appropriate actions commensurate with the gravity of the offense.

The defense, in resisting the submission, firstly conceded the point of law that where there is an allegation of jury tampering, an investigation should be conducted. However, the defense said that the allegation must be of such nature to cause the court to believe that indeed an investigation is necessary. The defense further contended that the State which had heavy security presence in and around the premises of the jurors could not say that it had information without providing

specifics; that it was the State who, by the presence of uniform police officers and officers of the National Bureau of Investigation (NBI) constituted direct and indirect tampering with the jury; that the application was merely intended to tarnish the reputation of citizens who decided to leave their respective comforts to serve as jurors. The defense further contended that an investigation is not intended as a fishing expedition, it must be targeted as such and provide information which can be proved or disproved.

On the allegation of the jurors receiving alcoholic beverages, the defense said that while it had no reason to know this to be true, it, however, did not think that the jurors were barred from interaction among themselves; that the submission made by the State as is, had no validity and therefore citizens who decided to serve the State should not be exposed to public ridicule.

Concerning the allegation of one of the jurors leaving the confines of the Temple of Justice on more than one occasion and was at large for more than one hour on each occasion, the defense said that if the attending bailiffs allowed the juror to go then it must be stated when this happen; that to make such a submission without stating the date and time makes it vague and only constitute a dilatory tactic.

The trial judge heard argument on both sides and granted the motion made by the State for an investigation to be conducted.

In order to establish that jury tampering took place, the State produced two witnesses, Lloyd C. Wleh and Ceasar Forkay who are both officers from NBI.

Officer Lloyd C. Wleh testified that based on a tip-off they investigated the alleged jury tampering. He informed the court that they invited Mosata Moore, Bailiff assigned to the jury, Nathaniel Tobay alias Rajah Sumo, and other court officers to the NBI office for questioning; that during investigation Bailiff Mosata Moore admitted that one of the jurors was celebrating his birthday so he gave her money and she sent Nathaniel Tobay who bought beer and wine which she took to the jury room. He further said that Nathaniel Tobay admitted giving his cell phone to one of the jurors, whom he did not name, to make a call outside of the jury room. Officer Wleh said that Nathaniel Tobay informed him that he received \$500 from someone in the presence of Janet Kamara, cook for the jury, and he took the money to the jury room. He also said that Nathaniel Tobay admitted receiving two plastic bags, one containing clothes from the dry cleaners and the other plastic bag, the content not disclosed, which he took to the jury room.

Officer Ceasar Forkay testified that Nathaniel Tobay admitted that Bailiff Mosata Moore gave him money to buy liquor which he took to her and she in turn took the liquor to the jury room. He confirmed the issue of the two plastic bags and further confirmed that Nathaniel Tobay admitted giving his cell phone to one of the jurors to communicate with an unknown person on the outside.

After the testimony of the two officers of the NBI tending to establish jury tampering, the trial judge made ruling. The judge ruled that while it was true that the acts complained of by the State took place, there was no intent on the part of the court officers to tamper with and or influence the jurors in any manner or form. The judge said that the court had taken note and will do everything to avoid the repetition of any act that would raise suspicion of jury tampering. The judge found that liquor was bought and carried to the jury room by the bailiff assigned to them, but said that the State security inspected the liquor before it was taken to the jurors. The trial judge concluded that the testimonies presented by the State did not clearly show proof of the allegations of jury tampering.

The State, being dissatisfied with the ruling of the trial judge, excepted thereto and filed a petition for certiorari before our colleague, Her Honor Jamesetta Howard-Wolokolie, then presiding in Chambers. The petition prayed for the issuance of the alternative writ of certiorari, and after hearing to grant the peremptory writ of certiorari to correct the ruling made by the co-respondent Judge, S. Geevon Smith.

We quote counts 1, 2, 3, 4, 5, 6, 7, 8, and the prayer of the petition:

"1. Petitioner Republic of Liberia is plaintiff in a case of Economic Sabotage filed against Messrs. Lusine F. Kamara, Tugbe N. Doe, Pyne Wallo, Albert E. N. Quaye and Tapple E. Doe as defendants now being tried in the First Judicial Circuit Assizes "C" presided over by the respondent judge."

"2. That during the course of the trial on Monday, June 22, 2008, the prosecuting attorney made submission to the court to the effect that there was information of acts of the jury tampering involving officers of court and some unknown persons."

"3. Further to count two above, the prosecution requested the court to conduct an open investigation to determine the truth or falsehood of the allegations which consisted of (a) one juror receiving clothes from the dry cleaners from an unknown source; (b) the bailiff assigned to attend the jurors bought and supplied alcoholic

beverages for the jurors; (c) one juror using a cell phone in the jury room to communicate with some unknown person on the outside; (d) the assigned Bailiff to the jurors leaving the premises of the Temple of Justice without permission thereby leaving the jurors unattended; (e) one juror receiving money from an unknown source on the outside."

"4. That the defense resisted the prosecution's submission and the judge overruled said resistance to allow the prosecution to prove its allegations. Accordingly, the prosecution produced two witnesses, whose testimonies were never impeached since the defense waived cross-examination. The purpose of the testimonies of prosecution's two witnesses was to establish the basis or probable cause for a full investigation to be conducted by the judge in open court, and hence the testimonies of prosecution's two witnesses on the stand did not constitute an investigation of the allegation of jury tampering."

"5. Petitioner/Prosecution complains and says that notwithstanding that the information reported by the prosecution was corroborated and remained unimpeached, and even though the judge found those statements to be true, yet the judge neglected, failed and refused to conduct an investigation to identify which juror was involved in the receiving of clothes from the dry cleaning, which juror made the outside call on the cell phone, to whom the call was made and the purpose of the call, the source of the funding for the alcoholic beverages for the jurors, and the reason for the bailiff leaving the Temple of Justice premises."

"6. Prosecution complains that the trial judge stated in his ruling that all the allegations made by the prosecution are found to be true but nevertheless they did not amount to jury tampering. In the respondent judge's ruling, he claimed to have conducted an investigation of the allegations of jury tampering, but failed to state when, where and how the investigation was conducted. Even assuming, that such investigation was conducted, it was cursory at best, and was conducted without the presence of the parties, especially the prosecution who brought to the court said complaint, and requested an open investigation, which request was granted by the judge on Monday, June 23, 2008."

"7. Petitioner further complains and says that the judge ruled denying prosecution's request for the court's investigation and the prosecution excepted thereto and requested court for a postponement until the next day to produce its next witnesses, but the judge was prejudicial and bias against the State, when in his ruling granting petitioner's request for postponement, he interjected that the reasons given by the

prosecution for postponement were 'false and misleading' and intended to manipulate the court to engage in delay tactics. Petitioner's submit that such inflammatory statement against the petitioners in the presence of the trial jury was clearly prejudicial and in violation of the judicial canon that the judge maintains cool neutrality during trial."

"8. Petitioner also complains and says that the respondent [Judge] committed serious reversible error when he declared in his ruling that the fact that jurors are sequestered does not mean that they are prisoners, and further that even though the court found the allegations to be true yet, they did not show any intent on part of the court officers to carry out acts of jury tampering or influencing the jurors."

"WHEREFORE, and in view of the foregoing legal and factual reasons, the petitioner most respectfully prays Your Honour to grant this Petition, issue the Writ of Certiorari, reverse the ruling of the judge, order him to investigate and identify which jurors are involved so as to have them ejected from the panel, disband the entire panel, same having been comprised by the breach of its sequestration, and the inflammatory remarks and prejudicial remarks of the respondent judge, and to grant unto petitioner any and further relief as would be just, legal and equitable."

On June 30, 2008, the Justice in Chambers ordered the alternative writ of certiorari issued.

On July 5, 2008, the respondents filed returns to the petition. We quote counts 1, 2, 3, 7, and 8 of the respondents' returns.

"1. Because as to the entire petition, co-respondents say that a petition for a writ of certiorari will not be granted where there is no showing that the judgment or order of the subordinate court or administrative tribunal is erroneous and manifestly prejudicial to the interests and rights of a petitioner. Corespondents submit that co-respondent Judge Smith denied their resistance sustained the submission of the petitioner and ordered an open investigation during which petitioner presented two witnesses. Consequently, the ruling of co-respondent Judge Smith was not against the petitioner and therefore certiorari will not lie."

"2. Also because as to the entire petition, co-respondents say that certiorari will not be granted to correct the action of a lower court judge if he has not issued an interlocutory ruling which is prejudicial to the rights of the petitioner. Co-respondents submit that one who alleges a fact must prove it; accordingly, the

petitioner qualified two witnesses who testified to an instrument marked by court "P/1" but said instrument was not submitted into evidence because the findings was that it was officers of the Ministry of National Security (petitioner's agent) who had money on the Temple of Justice grounds. Certainly, the trial judge cannot be required to find evidence for the other party and hence his ruling that jury tampering was not established is not and cannot be construed as being prejudicial to the petitioner. The petition as filed should be denied and co-respondent judge Smith be mandated to resume jurisdiction and proceed with the trial."

"3. And also because as to the entire petition, co-respondents say that the petition for a writ of certiorari will not be granted upon mere suggestion of either party that there is error in the records of the proceedings in the lower court, but a special cause must be shown to the court to which the petition is made based mostly upon the absence, excess, or usurpation of jurisdiction by the tribunal from which the proceedings were removed. Co-respondents maintain and contend that courts are not used to prove allegations made by another party. In the instant case, the state produced two witnesses and rested with the production of evidence so where is the error that was committed by the co-respondent Judge? The petition as filed should be ignored and denied and co-respondents so pray.

"7. And also because as to count 3 of the petition, co-respondents say that the co-respondent Judge conducted an investigation in fact the court questioned the witnesses of the prosecution/petitioner aimed at establishing the alleged tampering but the answers were all evasive. Your Honor is respectfully requested to take judicial notice of pages 7 & 10 respectively. Co-respondents say that the practice in our jurisdiction is that one who alleges a fact must prove same and the prosecution/petitioner was given the opportunity to do so. Again, Your Honour is respectfully requested to take judicial notice of the records in these proceedings, specifically as of June 23rd up to and including June 24th, 2008."

"8. And also because as to count 4 of the petition, co-respondents say that same constitute an admission to the effect that the co-respondent Judge did order an investigation a basis of which two witnesses were produced. To contend that the witnesses were not intended to prove the allegation but to establish "probable cause" is strange and unheard of in our practice. The petitioner having admitted that there was an investigation, the petition has no legal basis and therefore should be ignored and dismissed and co-respondents so pray."

On July 9, 2008, the Chambers Justice, Her Honor Jamesetta Howard Wolokolie,

handed down ruling in which she granted the petition for certiorari and ordered the trial court to disband the jury and award a new trial. The respondents have appealed from the ruling of the Chambers Justice to the full bench of this Court for our review.

We will consider the following issues in deciding this case:

1. Whether the facts and circumstances in this case show that sequestration was breached and the empanelled jury was tampered with.
2. Whether an open investigation which is required by law when an allegation of jury tampering is made was conducted.
3. Whether the trial judge, during the course of trial, made statement(s) that were inflammatory.
4. Whether double jeopardy would attach in this case.
5. Whether certiorari will lie.

Concerning the first issue, whether the facts and circumstances in this show that sequestration was breached and the empanelled jury was tampered with, we answer in the affirmative.

To sequester, in legal parlance with reference to jury, is to "segregate or isolate" people selected as jurors to hear evidence in a case and bring a verdict.

22.8,1 LCLR, Civil Procedure Law, which is also applicable in criminal proceedings provides:

"All regular jurors comprising a jury shall be kept together from the time it is sworn until it renders a verdict and is discharged; and the alternate jurors shall be kept with the jury until they are discharged as provided in section 22.2 provided that when a mixed jury is not engaged in hearing evidence or in deliberation, a room shall be provided for the female jurors separate from that for the male jurors. No juror, either regular or alternate, shall communicate with any person other than the constable or bailiff sworn to attend them..." [Emphasis supplied].

The purpose of sequestering jurors is to protect them from outside influence and

interference while hearing a case in which they are to bring verdict. The objective is to prevent any opportunity for misconduct by jurors or suspicion of improper influence upon them.

One of the allegations made by the State is that alcoholic beverages were bought and taken to the jurors. Bailiff Mosata Moore is said to have given statement to the effect that one of the jurors, wanting to celebrate his birthday, gave her money and she in turn sent Nathaniel Tobay, also known as Raja Sumo, to buy beer and wine which the Bailiff took to the jurors' room. This allegation was never denied.

It is not proper for the jurors to be furnished with, or indulge in the use of alcohol during the trial, as such misconduct has the propensity to vitiate the verdict and thereby render them incapable of forming a sound and intelligent opinion or decision. 23A C.J.S. Use of Intoxicants

The jury room is intended as a place for serious deliberation and reflection on matter on which the jurors sit. It is not a party ground for merry making where alcoholic beverages are consumed. To turn a jury room into a place for birthday celebration with attending jubilations, in our view, amounts to a serious breach of sequestration. Alcoholic beverage, as an intoxicant, may render jurors delusional and therefore incapable of forming a sound and intelligent opinion or decision.

The other allegation is that a juror used cell phone belonging to a court officer to communicate with unknown person(s) on the outside. Again, this allegation was not denied. § 22.8, 1 LCLR, Civil Law cited above which is also applicable in criminal cases, provides in part: "... No juror, either regular or alternate shall communicate with any person other than the constable or bailiffs sworn to attend them..." Now, who the juror in question communicated with and what the communication was about no one knows. But what is certain is that such conduct creates doubt about improper influence upon the particular juror or even the entire panel; for it could very well be that that juror was a conduit for undue influence on other jurors.

The jury system is founded on the proposition that jurors in their deliberation of a case should be separated from, and uninfluenced by the outside; that there should be no communication with the jury except under direction of the court and in its presence, and they should have no communication with outsiders from the beginning of the trial to the rendition of their verdict. Such communication with the outsiders may constitute juror misconduct, breach of sequestration or vitiate the verdict. 23A C.J.S. Communication of Jurors with Outsiders.

Another allegation is that money was carried to one of the jurors from an unknown source. Nathaniel Tobay, a security officer assigned to the jurors is said to have received \$500.00 from someone whose name was not disclosed, which he took to one of the jurors. The records do not indicate the source of the money, which juror it was taken to, nor its intended purpose. But it cannot be denied that this act certainly creates suspicion of improper influence upon the juror or the entire panel of jury.

It was also stated that two plastic bags, one containing clothes from the dry cleaners and the other, content undisclosed, were taken to the Temple of Justice and received by Nathaniel Tobay, who took the bags to the jury room. We hold that these are not only allegations of serious breach of sequestration they spark of jury tampering. And where, as in the instant case, the allegations were well stated and not denied, they must be taken as true. § 9.8(3), 1LCLR Civil Procedure Law.

The second issue is whether an open investigation which is required by law when an allegation of jury tampering is made was conducted in this case. Our answer is such investigation was not conducted by the trial court.

As already stated, the misconducts enumerated above, do not only point to serious breach of sequestration, they also spark of jury tampering. This Court has consistently held that where an allegation of jury tampering is made, the trial court should stop all proceedings and conduct an open investigation to ascertain whether or not the allegation is true. And where a juror is found guilty of such misconduct, that juror is not only removed and ejected from the panel, but he must be punished commensurate with the gravity of the act. This shows the degree of seriousness the Supreme Court attaches to jury tampering.

We see in the records before us that when the State made the allegation that sequestration was breached and that the jury had been tampered with, the trial judge allowed witnesses from the State to take the stand and testify in support of the allegations. Officers Lloyd C. Wleh and Ceasar Forkay of the NBI testified to substantiate the allegations made by the State. They particularly mentioned the names of Mosata More, Bailiff, Nathaniel Tobay also known as Raja Sumo, Security Officer working with the jury, and Janet Kamara, Cook for the jury.

However, when the State requested the court to have Bailiff Mosata Moore take the stand in her own defense in respect of the allegation made against her, the trial court denied the request. This is what the court said:

"The request made by counsel for prosecution to bring Madam Moore to the stand, in the mind of the court, is irregular and would tend to violate the right to counsel by anyone who is accused of the commission of a crime. All that the prosecution does is to bring its own witnesses to prove the allegations and when it is necessary to put any of the accused on the stand the court should do that having informed them of their right to counsel. And therefore the request is hereby overruled. And so ordered."

The records do not show that it became "necessary" for the court to put any of the accused court officers on the stand. In our opinion, the court officers should have been investigated in open court to know whether they committed the acts the State complained of. This is the essence of the adversary system, the accused must face the accuser at an open tribunal of competent jurisdiction.

And there is no evidence, also, that the jurors, too, were investigated. We hold that the trial judge should have ensured that those persons who allegedly admitted taking things to the jurors identify who the individual jurors were; that these jurors confront their accusers and give their side of the story. The trial judge should have fully investigated the allegations to know who received money, from what source the money was received and the intended purpose; he should have inquired who the juror is that communicated with an unknown person, and a follow-up inquiry made to know who was communicated with and the nature of the communication. The trial judge should have also investigated to know who received the two plastic bags, especially the plastic bag with undisclosed content. In the face of all of these unanswered questions, it cannot be said that an open and full scale investigation was conducted by the trial judge with the purpose to ascertain the truth and administer appropriate penalty to the wrong doer. As it is, no one was investigated, and no one was penalized for these serious acts of breach of sequestration and jury tampering, even though the trial found that the acts were committed.

We address next, the issue, whether the trial judge, during the course of trial, made statement(s) that were inflammatory as claimed by the State.

Inflammatory statements are statements tending to cause strong feelings of anger, indignation, or other types of upset. Inflammatory statements tend to stir passions. Black's Law Dictionary, Eighth Edition

The State contended that the trial judge made inflammatory and prejudicial statements in open court in the hearing and presence of the jurors to the effect that

the "prosecution lawyers were engaging in conduct intended to manipulate the case and baffle the trial and further that the jurors were not to be treated as prisoners".

The contention of the State is supported by the records before us.

In ruling on the submission made by the State to have the court officers take the witness stand as found on Sheet Three, 37th Day's Jury Sitting, Tuesday, May 24, 2008, the trial judge said "...the spirit of exclusion from the public to avoid any influence on the matter for which the jurors are sequestered is not to be taken that said jurors must be treated as prisoners...".

In ruling on a motion for continuance made by the State as found on Sheet 4, 37th Day's Jury Sitting, Tuesday, May 24, 2008, the judge said "This judge being an experienced practicing lawyer and being cognizant of some of the tactics by lawyers to manipulate and cast blame on the parties or on judges, say that such attitude would not be condoned and supported by this court...".

We hold that these statements, which were clearly directed to the State and made in open court in the presence and hearing of the trial jury, were quite inflammatory. The statements have the tendency to cause strong feelings of anger and indignation.

The next issue for our consideration is whether double jeopardy will attach in this case. We hold that double jeopardy will not attach.

§ 3.1, 1 LCLR, Criminal Procedure Law provides:

"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 complaint upon which he has been arraigned and to which he has pleaded, and a proper jury has been impaneled 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 offenses set forth in the indictment or complaint."

Manifest necessity is defined as "a sudden and overwhelming emergency, beyond the court's and parties' control, that makes conducting a trial or reaching a fair result impossible and that therefore authorizes the granting of a mistrial. The standard of manifest necessity must be met to preclude a defendant from successfully raising a

plea of double jeopardy." Black Law Dictionary, Eighth Edition.

What constitutes manifest necessity varies from case to case depending on the facts and circumstances. In the case before us two separate occurrences constitute manifest necessity. First, the conduct of the court officers and the jurors present a situation that threatens to frustrate justice and make it impossible for the court to reach a fair result. The situation was sudden and overwhelming and beyond the control of the parties. Second, and as we have concluded, the statements made by the trial judge were clearly inflammatory and prejudicial against the interest of the State. This, too, was a situation sudden and overwhelming beyond the control of the parties.

It has been held that:

"The misconduct or disqualification of one or more jurors of a character that threatens to frustrate justice will justify the court in discharging the jury, and a discharge under such circumstances will not sustain a subsequent plea of former jeopardy." 21 AM JUR 2d Section 347 Generally; Disqualification of Jurors

It is a well settled principle of common law accepted in our jurisdiction that:

"Where a trial judge makes prejudicial remarks within the hearing of the jury, he or she may order a mistrial, and under such circumstances, a subsequent prosecution of the defendant for the same offense will not violate the prohibition against double jeopardy. Where a trial judge concludes that events have occurred preventing him or her from acting in an unbiased manner and unprejudiced manner during the balance of the trial, it is appropriate to declare a mistrial, since it is imperative to have another judge conduct the trial..." 21 AM JUR 2d, § 346, Prejudicial Remarks or Conduct of Trial Judge.

In *McCauley v. Doe* — 22 LLR 310 (1973) this Court held:

"Any behavior of the jury, during and immediately after service, which can be regarded as prejudicial or reflecting prejudice against the losing party is a proper ground for a new trial."

In view of the authorities cited above, we hold that double jeopardy will not attach.

The last issue is whether the writ of certiorari will lie in this case. We hold that certiorari will lie.

Certiorari is a special proceeding to review and correct decisions of officials, boards or agencies acting in a judicial capacity or to review an intermediate order or interlocutory judgment of a court. § 16.21, 1 LCLR, Civil Procedure Law. The facts herein, show glaring evidences of breach in sequestration and jury tampering, but the trial court ruled otherwise.

Where the review of an intermediate or interlocutory judgment as in this case, shows that the decision of the trial judge is erroneous, certiorari will be granted.

WHEREFORE, the alternative Writ of Certiorari issued is confirmed and the peremptory writ of certiorari prayed for granted. The clerk of this court is ordered to send a mandate to the court below to resume jurisdiction over this case and conduct a trial de novo. It is so ordered.

Certiorari granted

COUNSELLORS THEOPHILUS C. GOULD, CHARLES ABDULLAI AND NYENATI TUAN OF KEMP & ASSOCIATES, WATCH CHAMBERS AND THE TUAN WREH FIRM APPEARED FOR APPELLANT/RESPONDENTS. COUNSELLORS TIAWON S. GONGLOE, SOLICITOR GENERAL, R.L.; M. WILKINS WRIGHT, OF THE WRIGHT, JANGABA AND ASSOCIATES LAW FIRM APPEARED FOR THE PETITIONER/APPELLEE.