

ABRAHAM E. ROGERS, et al., Petitioners/ Appellants, *v.* **HIS HONOR NAPOLEON B. THORPE,** Assigned Circuit Judge, Fifth Judicial Circuit, May Term, A. D. 1983, and **REPUBLIC OF LIBERIA,** Respondents/Appellees.

APPEAL FROM THE CIRCUIT COURT, FIFTH JUDICIAL CIRCUIT, GRAND CAPE MOUNT COUNTY.

Heard: April 30, 1984. Decided: May 11, 1984.

1. The writ of certiorari seeks to review and correct the acts of inferior tribunals, and to achieve this end, the Justice granting the writ is empowered to direct such order to the inferior tribunal as may be necessary to carry out the ends of substantial justice. The order of the Justice shall supercede any and all act or ruling of the inferior tribunal as though no such rulings had ever been made. It erases what is erroneous and substitutes in its place that which is correct to ensure substantial justice in the cause.

2. 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 empaneled 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.

3. It has been held that the causes which create the necessity must fall under one of three categories, namely: (1) where the court is compelled by law to be adjourned before the jury can agree on a verdict; (2) where the prisoner by his own misconduct places it out of the power of the jury to investigate his case correctly, thereby obtaining an unfair advantage of the State, or is himself, by the visitation of Providence prevented from being able to attend his trial; (3) where there is no possibility for the jury to agree on, and return, a verdict.

4. The manifest necessity permitting the discharge of a jury without involving double jeopardy may result from various circumstances such as the illness, disability, or death of a juror, accused, judge, or

The appellants were indicted for murder. When the case was called for trial, the State filed a motion to dismiss the indictment with reservation. The presiding judge heard and denied the motion. He then ordered the defendants arraigned, indictment read, and the defendants' plea of "not guilty" obtained. A jury was accordingly selected, sworn and empaneled to try the issues so joined between the parties. But before witnesses were qualified, the prosecuting officers sought a writ of certiorari. The alternative writ was issued by the Chambers Justice and the trial was halted. Upon hearing of the petition, the Chambers Justice granted the peremptory writ of certiorari. The defendants excepted and announced an appeal to the full bench, but subsequently abandoned the appeal. As a result, the trial court was ordered to resume jurisdiction and give effect to the ruling of the Chambers Justice. The trial judge thereupon disbanded the jury and discharged the defendants.

The defendants were subsequently reindicted for the crime of murder. At the call of the case for retrial, the defendants moved the court to dismiss the case on the ground of double jeopardy. When the trial judge denied the motion, the defendants applied to the Chambers Justice for a writ of certiorari. Upon an adverse ruling by the Chambers Justice, the defendants appealed to the full bench. The Supreme Court affirmed the ruling of the Chambers Justice holding that the trial judge correctly and legally denied the defendants' motion to discharge because of double jeopardy.

Julia A. Gibson and *Charles Dunbar* appeared for the defendants/appellants. *Momolu Kiawu and John Gibson* for the Republic of Liberia, plaintiff/appellee.

MR. CHIEF JUSTICE GBALAZEH delivered the opinion of the Court.

Defendants/appellants herein were indicted for the heinous crime of murder in the Fifth Judicial Circuit, Grand Cape Mount County and, pursuant to a motion for change of venue; the case was transferred to the First Judicial Circuit, Montserrado County. When the case was called for trial during the February Term 1983, the State filed a motion to dismiss the indictment with reservation followed by a strong resistance from the defense. The presiding Judge, His Honor Harper Soe Bailey, heard and denied the motion over the prosecution's objections.

Notwithstanding the exceptions, the trial judge ordered the defendants arraigned, the indictment read, and obtained the defendants' plea of "not guilty." A jury was accordingly selected, sworn and

abandoned. Consequently, a mandate was ordered sent down to that effect and in obedience thereto, His Honour Harper Soe Bailey disbanded the jury and entered the following ruling:

“Reverting to the finding entered by the Chambers Justice, his Honour Frank W. Smith, in the Certiorari proceedings, dated 10th of March, A. D. 1983, he has mandated us to resume jurisdiction and set aside our previous ruling which denied prosecution’s motion for the dismissal of the indictment. The Court in executing the said mandate, do hereby dismiss the indictment for the crime of murder laid against the defendants Abraham E. Rogers, B.E. Pettiquoi, John Kpakima, Siah Pettiquoi and Morris Komag filed in this court on the 21st day of June, 1982.

The said defendants, as of today’s date, are discharged from further prosecution for the crime of murder. The clerk of court is hereby commanded to prepare a release discharging the above named defendants from further detention at the Central Prison or elsewhere, and place same in the hands of the sheriff for execution.

AND IT IS HEREBY ORDERED/ADJUDGED.

Given under my hand and Seal of Court, this 18th Day of March, A. D. 1983.

H. Soe Bailey

CIRCUIT JUDGE, PRESIDING BY ASSIGNMENT

Following the dismissal of the indictment and the discharge of the defendants, they were re-indicted for the crime of murder. At the call of the case for retrial in the Fifth Judicial Circuit, the defendants moved the court to dismiss the action, contending that they had previously been arraigned, they had entered a plea of “not guilty” to an indictment charging them with the crime of murder, and a trial jury, which was later disbanded at the instance of the State, was selected, sworn, and empaneled to try issues thus joined between defendants and the State. Defendants further contended that since Judge Bailey rendered a judicial decision to discharge them from further prosecution for the crime of murder, they cannot, under the doctrine of double jeopardy, be called upon to plead for the second time and be tried for the same offense of which they have been judicially discharged. The State on the other hand filed returns in which she raised the doctrine of "manifest necessity," under which the jury was disbanded, and strongly contended that the dismissal of the indictment did not bar further

hence the principle of “manifest necessity” was applicable. The petitioners, now appellants, being dissatisfied with the ruling of Judge Thorpe, filed a petition with this Court for a writ of certiorari which was subsequently heard and denied by His Honour Frank W. Smith, Justice presiding in Chambers at the time. He held that double jeopardy did not attach because the disbanding of the jury was in compliance with the mandate from the appellate court which the trial court had no choice but to obey. This, he said, amounted to a manifest necessity.

From this ruling of the Chambers Justice, appellants appealed to the full bench for a final review. The issues presented for our consideration are:

1. What are the functions and scope of the writ of certiorari?
2. Whether or not the circumstances under which defendants were arraigned and the jury selected, sworn and empaneled and thereafter disbanded, constitute double jeopardy and therefore bars the State from further prosecution of defendants/appellants?
3. Whether or not the principle of manifest necessity would apply under the prevailing circumstances for which the jury was disbanded and,
4. Whether or not Judge Bailey in executing the mandate of the Supreme Court did render a judicial judgment which puts finality to the murder case?

The authority to issue certiorari is found in the statutes. It 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.” For reliance, see *Emidon Limited and Hall v. Liberia Cold Stores. Inc.*, 20 LLR 487 (1971); and Civil Procedure Law, Rev. Code 1:16.21(1). “If the issue is determined in favor of the petitioner, the Justice who issued the writ should direct such order to the court, judge, administrator, or administrative board or agency below as may be necessary to carry out the ends of substantial justice. If it is decided against the petitioner, the writ shall be dismissed, and the original action shall continue in the court, board, or agency before which it was pending.” Civil Procedure Law, Rev. Code 1:16.23(6).

the writ is directed obeys its directives in toto.

In the case under review, the prosecution properly moved on a writ of certiorari to have the records in the lower court reviewed and, if possible, corrected while the matter was still pending. The Chambers Justice found that the trial judge was in error when he denied the prosecution's motion to dismiss the indictment with reservation and, accordingly, ordered the said judge to set aside all rulings made by him, beginning with the denial of the prosecution's motion to dismiss the indictment, the reading of the indictment to the defendants, the arbitrary obtaining of their plea of "not guilty", and the empaneling of the jury as though no such rulings were ever made. In other words, Judge Bailey was ordered to start the proceedings all anew.

With respect to the second issue, that is whether under the circumstances double jeopardy will attach to bar the State from further prosecution of the defendants/appellants, it is important to refer to the statute on the point which reads thus:

"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 empaneled 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." Civil Procedure Law, Rev. Code 1:3.1.

In the instant case, the defendants/appellants were arraigned and they entered a plea of not guilty. A jury was thereafter selected, sworn and empaneled to try the issues, but the said jury was later disbanded and the defendants discharged from prosecution under the charge of murder. If the disbanding of the jury is found to be void of manifest necessity then double jeopardy will attach to bar further prosecution of the defendants, but if manifest necessity is shown, double jeopardy will not attach under the prevailing circumstances. Under normal circumstances what Judge Bailey did amounts to and warrant a plea of double jeopardy, and a motion for the dismissal of any subsequent indictment on the same charge would indeed follow. However, the prosecution strongly argued that

apply under the prevailing circumstances under which the jury was disbanded. That is to say, was the disbanding of the jury by Judge Bailey based upon manifest necessity as contended by the State? Our statute does not provide for what is referred to as a “manifest necessity”, but according to common law:

"It has been held that the causes which create the necessity must fall under one of three heads, namely: (1) where the court is compelled by law to be adjourned before the jury can agree on a verdict; (2) where the prisoner by his own misconduct places it out of the power of the jury to investigate his case correctly, thereby obtaining an unfair advantage of the state, or is himself, by the visitation of Providence prevented from being able to attend his trial; (3) where there is no possibility for the jury to agree on and return a verdict." 22 C. J. S., *Indictment*, § 259.

The same text elaborates further and states that “the manifest necessity permitting the discharge of a jury without involving double jeopardy may result from various circumstances such as the illness, disability, or death of juror, accused, judge, or counsel, or a member of his family, expiration of the term of court, defective indictment, and disqualification or misconduct of a juror.” *Ibid*.

In the instant case, the prosecution timely moved the court to dismiss the indictment with reservation to further prosecute the defendants in that there were defects in the indictment which was found by the grand jury of Grand Cape Mount County, the original venue of this case. The law writers hold the view that an accused is not in double jeopardy if the indictment is so defective that a verdict and judgment could not be sustained thereon and therefore, where the defendant is discharged for that reason without his consent, it is not an acquittal. 22 C. J. S., *Indictment*, § 259.

Judge Bailey erroneously denied the prosecution’s motion to dismiss a defective indictment and proceeded with the case over the exceptions of the prosecution. The Supreme Court having granted the petition for a writ of certiorari and ordered the trial court to grant the motion to dismiss the indictment, it was left up to the trial court to have kept the jury together and proceeded with the trial of the murder case.

The trial court in obedience to the Supreme Court’s mandate was compelled to comply by disbanding the jury. This constituted the manifest necessity for which double jeopardy will not lie in the instant

defendants/appellants discharged from further prosecution for the crime of murder, is the most egregious and erroneous ruling he made in the whole case. All the judge had to do was to set aside the ruling denying the prosecution's motion to dismiss the indictment and discharge the defendants from further answering under that particular indictment. The trial judge had no authority or discretion in executing the indictment with the prosecution's reservation. Any act of the trial judge beyond the mandate was therefore a legal nullity and cannot be countenanced by this Court. Consequently, the ruling of Judge Bailey discharging the defendants from further prosecution for the charge of murder is indeed void *ab initio* and of no legal effect, and hence double jeopardy will not attach, for he could not do so in the absence of the regular trial and a verdict of acquittal.

In view of all we have said and the laws cited, it is our considered opinion that His Honour Napoleon Thorpe correctly and legally denied the defendants' motion to discharge for double jeopardy. The ruling of the Chambers Justice, denying the petition for a writ of certiorari being sound in law, is therefore affirmed and confirmed and the alternative writ as issued is hereby quashed.

The Clerk of this Court is hereby ordered to send a mandate to the judge presiding in the court below to resume jurisdiction over the case and proceed to conduct a fair and impartial trial with the aid of a jury, and to render judgment in keeping with the evidence adduced and the law controlling. And it is so ordered.

Petition denied.