# REPUBLIC OF LIBERIA, Appellant, e. DAVID

DILLON, Appellee.

**APPEAL FROM ORDER IN CHAM** BERS **ON APPLICATION FOR** WRIT OF

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Argued b'farch 27-29, 1962. Decided June 1, 1962.

1. In a criminal trial, where the defendant moves for a change of venue on the ground of local prejudice, the trial court should hear evidence as to the ex- istence of such prejudice.
2. In a criminal trial, the court may order disbandment of the 3ury by reason of manifest necessity.
3. Where the manifest necessity for disbandment of a jury in a criminal case

consists of excuse of jurors for illness, the trial court must establish the existence of such necessity by investigation, including consideration of medical evidence as to the nature of such illness.

1. If disbandment of a jury in a criminal case is grounded upon manifest neces- sity duly established through investigation by the court, a new trial may properly be ordered.
2. No person can be twice put in jeopardy of conviction of the same offense. Const., Art. I, Sec. 7th.
3. In a criminal prosecution, where the trial court disbanded a jury which heard

testimony of witnesses for the State, and manifest necessity for such disband- ment was not duly established, the defendant cannot thereafter be tried for the same offense.

1. In a criminal prosecution, where the trial court ordered a new trial after

disbandment of a jury which heard testimony of witnesses for the State, the defendants failure to object to the disbandment of the jury will not be deemed consent or waiver of constitutional right as to double jeopardy.

# Appellee was indicted on charges of embezzlement, and placed on trial before a jury. The trial court dis- banded the jury, and ordered a new trial. On appellee’s application for certiorari, to the trial court on the ground that a new trial would violate appellee’s constitutional right as to double jeopardy, the Justice presiding in Chambers ordered certiorari granted, which *order* was *affirmed* by the full Court.

*Solicitor General J. Dossen Richards* for appellant.

*Lawrence H. Morgan* for appellee.

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MR. CHIEF JUSTICE WILSoN delivered the opinion of

# the Court.

Judge A. Lorenzo Weeks, presiding by assignment over the February, 1961, term of the Circuit Court of the First Judicial Circuit, Montserrado County, denied a motion by David Dillon for discharge without day from answer- ing a charge of embezzlement upon which he had been indicted and issue joined between him and the Republic of Liberia. The said defendant contended that jeopardy had attached following the commencement of the testi-

mony of the prosecution's first witness after a plea of Not Guilty had been entered. At that stage of the trial, the empanelled jury was disbanded because of the illness of three jurors and the death of a near relative of a fourth juror. Thereupon, Judge Weeks ordered a new trial.

Subsequently, on application of the present appellee, a writ of certiorari was sued out of the chambers of Mr. Justice Pierre, acting for Mr. Justice Harris, on a petition alleging irregular and illegal conduct of Judge Weeks in the disposition of the motion for discharge. The certiorari proceeding terminated in favor of petitioner. The respondents, now appellants before this Court en *banc,* appealed from the ruling of the Justice presiding in chambers. Before reviewing the ruling handed down on the application for certiorari, we will briefly sum- marize the background of the case.

Acting under authority of Rule IV, Part 9. Of the Revised Rules of this Court, the Circuit Court of the First Judicial Circuit, Montserrado County, on com-

mand of the Justice presiding in Chambers, sent up to this Court a full and complete copy of the record of the proceedings in the embezzlement case out of which the certiorari proceeding arose.

As disclosed by said record, appellee was indicted for embezzlement. On February 23, 939. when the case came up for trial, he was arraigned before a panel of i

jurors, and a plea of Not Guilty was entered by him. The plea of the defendant-appellee was, in keeping with law and practice, made known to the empanelled jury. Thereupon, the trial was commenced and two of the State’s witnesses were qualified. The first witness was the late Charles Gyude B ryant, then collector of customs for the Port of Monrovia. He took the stand, and after preliminary questioning of this witness, the trial was recessed to be resumed at 2 P.M. of the same day. Appel- lant’s arraignment being complete, jeopardy attached. Consequently, except for reasons legally supported or circumstances justifying it under existing rules and prac- tice of our courts, the empanelled jury could not properly be disbanded until a verdict was reached.

According to the records forwarded to this Court from the court below, a juror named Jessenah Storke asked to be excused from the panel because of the death of a very near relative, and stated that, because of her state of mind, she could not center her mind in sober deliberation on the testimony of the witnesses in the case. Subse- quently, another juror, Cecelia Askie, claimed to be ill of stomach trouble; and still another juror, Rachel Morris, also claimed to be ill, expressed her desire for medical treatment, and requested to be excused from the panel. Prior to these requests for excuses from the panel, a juror, James Webb, had already been excused from the panel by the trial judge on a claim of illness and death in his family.

The ruling of the trial judge on these requests for ex- cuses from the panel, provoked controversies which, be- cause of their constitutional implications, require this Court to decide how and under what circumstances a defendant once placed in jeopardy may claim a right of discharge after a jury has failed to arrive at a verdict before disbandment. We have the following record of the trial judge’s ruling:

“In view of the statutes controlling the ***status quo***

of an emp anelled petty jury whose members are usually composed of twelve and vested with authority to submit a verdict ; and in contemplation of the Act of Legislature providing for three alternates to substi- tute for any one of the twelve who might, during the trial, become otherwise incapacitated, it is obvious, on the record, that four jurors have requested the court to be excused from the panel because of physical dis- abilities. Eleven jurors are incompetent to pass upon the issues thus joined between plaintiff and defendant; for the law requires twelve. I n view of the request of these four jurors, and ju ryman Hawa Sarnee, an alternate, having been previously substituted to fil1 a vacancy of a regular juror, the court finds it necessary to disband the jury and award a new trial in the instant case to the May, '9f9› term.”

We have failed to come across any such record of a

judicial inquiry into the illness of those jurors as would afford the opportunity of deciding whether there was an abuse in the exercise of the discretion of the trial judge. During argument before this Court, the Solici tor Gen- eral, on whose motion this ap peal I rom the ruling of Mr. Justice Pierre in Chambers was taken to the full bench, was asked to state whether the trial judge had conformed to the customary jud ici a1 process, and whether any in- vestigation into the statements of the jurors who had complained of being ill and therefore unable to continue on the trial panel, had been undertaken by the trial judge. The Solicitor General replied that it had been long the practice for a judge, on being informed by a juror of his illness and inability to continue on a panel, to replace him by another. The Solicitor General was reminded that, in instances where a juror is not on a panel, and an excuse is prayed for because of illness, the judge may forego the process of judicial investigation, excuse the juror even from attending upon the session of court, and make replacement by a tal esman, without affecting in

the least the interest of any party. But where the excuse of a juror or jurors could paralyse a trial and subject a party to injury and loss, and where an absolute and urgent necessity has not arisen justifying the disbandment of a jury before a verdict is arrived at, the said practice would seem to put in question an abuse of discretion.

The Solicitor General conceded that the law does, in some cases, require the judge to hold an investigation into the excuses of jurors who claim to be ill and unable to continue on the panel. But the Solicitor General con- tended that, in the instant case, since the defendant was in court at the time of the ruling of the judge disbanding the jury, and did not object or except to the trial judge’s I ailure to investigate the defendant’s inaction must be taken as acquiescence and waiver of his right to raise the issue. In support of this argument, the Solicitor General quoted a holding of this Court:

“Without an exception an objection, no matter what its intrinsic merit, is lost.” *Richards v. Golem an, $*

L.L.R. 6 ( 93s) , Syllabus .

## Buttressing this position, the Solicitor General also

quoted the following passage from a unanimous opinion of the United States Supreme Court, delivered by Mr. Justice Story:

“We are of opinion that the Iacts constitute no legal bar to a future trial. The prisoner has not been con- victed or acquitted, and may again be put upon his defence. We think, that in all cases of this nature, the law has invested courts of justice with the authority to discharge a jury from giving any verdict, when- ever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated. They are to exercise a sound discretion on the subject; and it is impossible to define all the circumstances, which would render it proper to inter- fere. To be sure, the power ought to be used with

the greatest caution, under urgent circumstances, and for very plain and obvious causes ; and in capital cases especially, courts shou Id be extremely careful how they interfere with any of the chances of life, in favor of the prisoner. But, after all, they have the right to order the discharge ; and the security which the public have for the faith fu1, sound and conscientious exercise of this discretion, rests, in this, as in other cases, upon the responsibility of the judges, under their oaths of office.” *United States* v. *Peres,* 22 U.S. (q Wheat.) 3yq, 6 L.Ed. i63 ( 1 24) .

In the above quotation, the Solicitor General laid emphasis on the words: “the ends of pu blic justice would otherwise be defeated....”—this, of course, where mani- fest necessity exists for the disband ment of a jury.

We must conclude that the principal contention on which appellant rests its case is that appellee’s silence and failure to object or except to the ru ling of the trial judge in excusing four jurors, which left him with no alternative but to abandon the remaining eleven, was tantamount to consent to said disbandment.

Another contention advanced by appellant was that, since the only point raised by appellee in his petition for discharge was that his absence I rom court when the jury was disbanded entitled him to discharge—a contention which was not favorably considered by the Justice pre- siding in chambers—appellee’s petition shou Id have been denied without bringing into the proceedings questions which were not raised by the parties. By this, we under- stand appellant to refer to appellee’s assertion that he was not in court when the jury was disbanded, whereas the record showed the contrary. Appellee’s counsel, how- ever, contended that the record on this point was in- correctly made ; but because he had lost the opportunity to move for the correction of this error, having belatedly observed it, the Justice presiding in Chambers could not but give preference to the record and confirm the ruling

## of judge Weeks who had denied appellee’s request for correction of the record, it having been made out of time. The alleged incorrectness of the record as to the presence of the defendant at the time when the trial court discharged four jurors and disbanded the remaining eleven should, in our opinion, have been thoroughly investigated when this point was belatedly raised. We are obliged, however, to give the benefit of the doubt on this point to appellant because of what the record states. But as shown *in/ra,* appellee's claim of right to discharge did not rest solely on his presence in court at the time of

the disbandment of the jury.

Counsel to r appellee, resisting the points raised by appellant, contended that appellee was entitled to be discharged, and not to be compelled to stand a second trial, which would be prejudicial to his interest and an inf ringement of his rights under the Constitution of Liberia. With regard to appellee's alleged Iailure to object to an illegal discharge of the jury before arriving at a verdict, counsel for appellee quoted the following: “There is some authority to sustain the proposition

that where a defendant Iails to object to the discharge of the jury he will be deemed to have waived his right; but the better rule is that the silence of a defendant on trial for crime, or his Iailure to object or protect *[sic}* against an illegal discharge of the jury befo re verdict, does not constitute a consent to such discharge, o r a waiver of the constitutional inhibition against a second jeopardy for the same offense.” 8

R.C.L. *i $ $ t3rim Anal has* § i 43.

## Appellee’s counsel also contended that, although the

sickness of jurors is a ground for discharging a jury before arriving at a verdict, there must exist a manifest necessity fo r such discharge ; and such a necessity is not shown by a mere declaration of a juror who is likely to recover within a reasonable time so as to permit the trial to go on. Appellee's counsel argued that, in the present case, no

judicial investigation was had into the claimed illness of said jurors ; nor was it shown, as a result of any investiga- tion, that said jurors were sick to such an extent that their recovery was not possible within a reasonable time, so as to permit the trial to go on. In support of this argument, he submitted the following quotation :

“Any sickness or other physical disqualification of a juror which unfits him for the performance of his duties constitutes a manifest necessity for discharging the jury ; but it must be shown that the illness is such that the juror is not likely to recover within a reason- able time so as to permit the trial to go on. It is sometimes provided by statute that the court may, where a juror in the place of the one so discharged and commence the trial anew ; or that the court may discharge the entire jury, and then or subsequently impanel another jury to try the case. The court cannot arbitrarily determine such a question, but the incapacity of the juror and the necessity for discharge are to be heard and determined by judicial methods. This apprehends a judicial finding. It is a step in the progress of his trial, and an important one, so far as defendant’s rights are concerned; and it is re- versible error for the court, of its own motion, or from mere reports unverified by affidavits, or unsupported by oaths administered in open court, and in the absence of the accused, to determine that there exists, because of such sickness, an unavoidable necessity that the re- maining jurors should be discharged without verdict, and the record must affirmatively show the existence of the Iacts which induced the discharge of the jury.” 8 R.C.L. i 36- uy *Griminol Low* § i46.

From the principles stated in the above quotation of authority, appellee’s counsel contended that, regardless of whether defendant was in court, a mere claim of illness of a juror would be insufficient for a discharge from the panel until after a judicial investigation, or until it was

## established by a medical certificate or a testimony of qualified medical doctor that the condition of the juror was such that he or she could not continue to sit on the panel.

In resistance to the contention of appellant that consent of the defendant is unnecessary to a discharge of a jury before arriving at a verdict, appellee’s counsel quoted the following:

“A discharge of the jury, without verdict, in case of manifest necessity therefor does not afford the basis of a plea of former jeopardy, but a discharge without consent of accused and for a legally insufficient reason is equivalent to an acquittal and may be pleaded in bar of further prosecution.” i 2 C.J.S. 9 ^'•'^° °

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On the question of whether silence is not objecting to the discharge of jurors constitutes a waiver of constitu- tional right, a ppellee’s counsel relied upon the following quotations of authorities:

“A defendant cannot plead former jeopardy where the jury before which he was first on trial was dis- charged on his motion or with his consent. The silence of the accused does not constitute a consent or a waiver of his constitutional right.” 12 CYC. 27\*

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# We will now address ourselves to reconciling, if pos- sible, the opposing arguments summarized *su pra;* but before doing so, let us examine the reasoning by which the Justice presiding in Chambers arrived at his conclusion reversing the ruling made by Judge Weeks denying the petition for appellee’s discharge. The Chambers Justice said:

“I t was because His Honor, Judge Weeks, denied the motion to dismiss, and ruled the case to be tried again in the February term, this year, that the de- fendant in embezzlement petitioned for a writ of certiorari, claiming this ruling to be prejudicial to his

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interest, and contrary to law, and an infringement of his constitutional rights in that it sought to put him a second time in jeopardy. From what we have re- viewed herein, and in keeping with the law controlling which I h ave cited and quoted above, it is my con- sidered opinion that the motion to dismiss should have been granted on the plea of double jeopardy raised therein. I therefore feel that the respondent judge’s ruling denying the same is prejudicial to the constitu- tional rights of the petitioner, since according to the record of the trial, the judge deliberately and il- legally destroyed the sufficiency of the panel to try the case, which left him no other course but to dis- band the jury. This, in my opinion, amounted to an acqui ttal of the defendant.”

At the very inception of the trial, a motion for change of venue because of local prejudice was denied by the trial judge on the ground that such prejudice was never established. There is nothing in the record to show that the non-existence of local prejudice was established, or that the appellee was required by the trial court to show to what extent, and in wh at manner, local prejudice against him actually existed. We must, therefore, con- clude that the f ailure of the trial judge to show that local prejudice did not exist, before deciding that it did not exist, was prejudicial to the interests of appellee, errone- ous and therefore reversible error. But as this is not a subject of review by this Court, we will pass on to the issue of double jeopardy.

I t is generally held, and in this we agree, that if a manifest necessity arises, such as illness of jurors, of the judge, or of any person whose presence and participation is ind ispensable to a Iair and impartial trial, the dis- bandment of the jury and award of a new trial does not ord inarily prejudice the right of the defendant.

Manifest necessity, in our opinion, exists where it has been judici ally established that the jurors seeking excuse

would be unable to recover from illness within the term time period, so as to enable the trial to continue ; and this could only be determined by a certificate of a qualified medical doctor. In the present case, this was not re- quired by the trial judge, nor was a medical examination had ; hence the existence of manifest necessity was deter- mined arbitrarily.

As shown by the record, after disbanding the jury, the trial judge continued the session for 33 days. Who can now say that the four jurors whom the judge excused, thereby reducing the panel to a deficiency of one, could have not recovered within that period of time, and thus have become available for continued service—if, indeed, they were actually ill at all. The judge’s premature and insufficiently considered extension of excuse to the jurors may thus be considered an error of similar nature to the prior act of the same judge in denying appellee the in- herent right of change of venue for local prejudice by declaring that local prejudice did not exist, without ascertaining whether or not it actually existed.

There is another phase of this matter. The record shows that, at the time of recessing the court after the arraignment of the defendant-appellee, and after the first prosecution witness had commenced testifying, none of the four jurors who were later excused had indicated to the court any illness or other claim for excuse—nor does the record show that, after the resumption of court, two hours after the recess, any of the four jurors made their excuses in open court, which would have afforded an opportunity to appellee to object, or at least to suggest that the trial judge investigate or demand medical certifi- cates showing the extent of each juror’s illness.

Appellant was not wrong in contending that illness of jurors can constitute sufficient ground for disbandment of a jury and award of new trial without prejudice to the defendant. But this is so only when manifest necessity has been duly established by investigation, including

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taking of medical evidence as to the existence and extent of such illness. Where no such investigation has been conducted, no manifest necessity for disbandment of the jury can have been established ; and in such case, a new trial would place the defendant in double jeopardy.

With respec t to appellant’s contention that appellee’s failure to object to the ruling of the trial court disbanding the jury constituted a waiver of right to raise the constitu- tional issue of double jeopardy, we adhere to the settled common law rule summarized at 12 CYC. 271-27 2 Crimt-

*nal Law,* quoted supra, that, in such a situation, the mere

silence of the accused does not amount to a waiver of his

constitu tional right.

Coming to appellant’s contention that this Court shou ld not have opened the record to consider points not specifi- cally raised in appellee’s petition, we refer to Rule IV, Part 3. ° f the Revised Rules of this Court, which au- thorizes the original record to be brought up when errors

of the trial judge are complained of in remedi a1 pro- ceedings. Without looking into the record it wou ld have been utterly impossible for this court to determine whether arbitrary conduct on the part of the trial judge were supported by the record. Opening the record was there- fore an inescapable incident of the adjudication of this case.

We wou ld here remark that the inhibition of our Con- stitution against subjecting a defendant to a second trial for the same offense demands the exercise of discretion by the trial court. In the instant case, the interest and rights of the defendant have been prejudiced, and his acquittal is justly due. The ruling of the Justice presid- ing in Chambers is therefore affi rmed, and the defendant- a ppellee is hereby ordered discharged as though a verdict of acquittal had been entered in his Iavor. And it is so ordered.

*Order affirm ed.*