SUPPLEMENT

A PREVIOUSLY UNREPORTED CONCURRING OPINION

IN THE

SUPREME COURT OF THE REPUBLIC OF LIBERIA.

REPUBLIC OF LIBERIA, Appellant, o. DAVID

DILLON, Appellee.

APPBAL FROM ORDBR IN CHAMBBRS ON APPLICATION FOR WRIT OF CERTIORARI TO TH E CIRCUIT COURT OF THB FIRST ,JUDICIAL CIRCUIT, MONTS ERRADO COUNTY.

Argued March 27-29, 1962. Decided June 1, 1962.

Reported in 15 L.L.R. 119 (1962) .

MR. USTICE PIERRE, concurring.

Rule i of the Code of Moral and Professional Ethics, states that every lawyer maintain toward the court a re- spectful attitude, for the purpose of preserving the su- preme importance of the judge’s judicial office. From time early in the history of this Supreme Court, counsel- lors have been known to be at their best in professional behavior and deportment when they appeared and ar- gued before this bar. It is, therefore, unfortunate that attention has got to be called f rom this bench to what ap- pears to be a new attitude on the part of some lawyers who have come before this highest court in the land re- cently. There was exemplification of this attitude in the October '9\*' Term, and it has been repeated in a

more striking manner in this March Term of Court.

In one of the most insulting addresses ever made before

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this bar in the history of this Court, the Solicitor General, counsellor J. Dossen Richards, the official prosecutor for the S tate, behaved in a manner so unbecoming and disre- spectful that it became necessary for the bar to denounce him and for the Court to demand an apology I rom him. For instance, never before has a counsellor practicing here been known to insolently walk out of court, because he disapproved of the record of the trial court being brought up for review in a certiorari hearing. That was what the learned Solicitor General did in this case before the Supreme Court, with the result that closing argument for the State was never made. A dangerous trait to find in any lawyer is impatience with the views and legal conten- tions of his adversary, and open resentment to positions taken by the court which might be contrary to his views. This is one of the surest evidences of conceit, and of over- estimation of one’s true value.

Before going into the record of this case, I think it is necessary for maintaining the respect which has been given this Court from earliest days of our Republic until very recently, that I leave some admonition with lawyers generally, and with State prosecutors particularly. As the highest judicial forum in the nation, this is the last bastion of defense of the rights of citizens and litigants. Here lawyers are required to lay aside their personal im- portance, to vindicate the rights of parties ; where the only regard is given the issues, not the persons because they are represented by some important official. There are some State Attorneys who feel that their position in government gives them a vantage point I rom which to ride over the rights and feelings of other citizens, includ- ing judges of courts ; there are those State prosecutors who regard themselves as masters riding saddles of im- portance, who seek only to subordinate the rights of others to their personal whims and notions. They seem to forget that they are only lawyers representing one side in a criminal case and not rulers of destiny, who forget

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they are not entitled to trial privileges not given to law- yers on the other side. It is as much the duty Of a com- petent and fair prosecutor to see that the defendant in a criminal case gets a judicial trial as it is the duty of the trial judge to see that equal treatment is meted out on both sides. “The primary duty of a lawyer engaged in public prosecution is not to convict, but to see that justice is done.” (Code of Moral Ethics, Rule 4.)

This case arises from a criminal prosecution, in which the defendant applied for the extraordinary writ of cer- tiorari to review what he felt were prejudicial rulings of the judge against his interest, a privilege he had every right to enjoy under the Constitution of this country. The Iacts of the case and the proceedings for the writ are set forth following.

According to the record brought up on certiorari, David Dillon was indicted for embezzlement in '9s°, and his case came up for trial before Judge Roderick Lewis in

February '9s9 The defendant filed a motion for change of venue, alleging local prejudice, and although the State did not resist the motion, but asked for time to

prepare and file such resistance, yet the judge on his own accord claimed the motion to be without legal merit and denied it, ordering the defendant arraigned. The de- fendant’s counsel then gave notice that he would apply for remedial process to review this act of the judge in denying his client right of venue. In the meantime, the accused was required to plead to the indictment. The indictment was read and he entered a plea of “not guilty.” The fi rst witness for the State took the stand and his pre- liminary examination was begun. The court then re- cessed.

When the case was resumed after the recess, the follow- ing record is shown :

“Court resumes business. Trial case resumed. Par- ties present, panel full. At this stage the jury made request of the court as follows: Juryman Jessena

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Storke asked to (be) excused from the panel because of the death of a very near relative, and to be just to both sides, her mind now being very perturbed, she feels that she would be unable to give adequate atten- tion in the matter in the trial. Following this, juror Cecelia Ask ie requests to be excused by the court be- cause of illness, stomach trouble. J uryman Rachel Morris also expressed her incapability to continue on the panel owing to illness, and wished to obtain f rom the court a certificate for medical treatment. *Prior to th ese an noun cem ents in ry man Ham es tab b had also b een excused* /rom the § nneJ *u pon a p plicatio ii p redicated o n illness and death.”* ( Minutes for Feb.

°3. 9'i9 ) [Emphasis ours.]

There are three significant things about this record ; they are: ( i ) the striking coincidence of four jurors out of fifteen becoming incapacitated between the court’s re- cess in the morning and resumption of business there- after ; (2) the necessity for the judge to have excused a juror during the recess hour because of alleged illness and

death in his f amily ; ( 3 ) t he unusual decision of the judge to excuse three jurors at one time because of alleged ill- ness, without investigation or medical proof, when he

must have known that excusing them would reduce the jury to a number insufficient to try the case, having al- ready excused one juror during the recess hour. But there are two equally striking revelations in this record ; the first is that although one of the jurors asked for med- ical treatment, which is usual in such cases, this re- quest does not seem to have been granted. The second is that although the judge himself had occasioned the in- sufficiency, he disbanded the panel for that reason and ordered a new trial. I have referred to the law later in this opinion.

I would like to state from experience as a former cir- cuit judge, that it is usual and common practice that whenever a juror complains of illness, whether or not it

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occasions an insufficient number of jurors, the court always sends him to the nearest doctor’s office for treatment at Government expense. As far as I know that practice still persists in the courts of Liberia. In cases where such procedure leaves an insufficient number of jurors, it is customary to suspend the trial until the juror’s re- turn. It is only when his disability extends beyond that term of court that the judge is justified in dismissing the jury. That is the jury practice known to the courts of Liberia and I shall cite the law to support it later in this opinion.

Because of the foregoing development, the judge en- tered a ruling.

“Realizing the statutes controlling the practice of twelve jurors, and in contemplation of the Act of Leg- islature providing a number of three alternates to sub- stitute for any one of the twelve who might during the trial fall sick or become otherwise incapacitated, it is obvious on record that four jurors have requested the court to be excused because of physical disabilities. Eleven persons are incompetent to pass upon the **issues** thus joined between plaintiff and defendant, for the law provides the number twelve. The requests of the four jurors being tangible and juryman Howa Sarnoe, an alternate having been previously substituted to fill a vacancy of a regular juror, the court finds it neces- sary to disband the jury and award a new trial in the instant case to the May Term, '9'i9-”

At this stage the defendant’s lawyer moved to strike the

case from the docket, on the ground that to arraign the defendant again on the same indictment would be putting him in jeopardy twice for the same offense. The State opposed the motion, and was heard before Judge Weeks when he presided over the Criminal Assizes of the First Judicial Circuit, in February 1961. Judge Weeks de- nied the motion and ordered the defendant arraigned again before another jury.

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Another point on which the judge ruled when he de- nied the motion to dismiss was a point raised and brought to the attention of the court by the defendant’s counsel at the resumption of the case before ) udge Weeks. Coun- sellor Morgan alleged that whereas the minutes for Feb- ruary =3. 939. showed that the parties were present when

the case was resumed after the recess, this was not true,

since he and his client were both absent when the court resumed after recess and the jury was disbanded. He asked that the minutes be corrected accordingly. I took the view in my ruling in chambers, and still feel, that the judge did not err in denying a request to correct min utes made two years before such request. I said in the ruling,

which is the subject of this appeal, that it would be setting , a dangerous precedent for the Supreme Court to start disregarding the record made in trials of the subordinate courts on the bare assertion of counsel. That is still my opinion.

The Judge having ref used to order the minutes cor- rected, he ruled the case to trial. It was at this stage that counsellor Morgan applied to chambers for a writ of cer- tiorari, alleging prejudicial rulings of the trial judge. Solicitor Ceneral Richards filed opposition for the State, appeared and argued. The record of the trial court was brought up for review, both sides submitted and a ruling was entered ordering the issuance of the peremptory writ of certiorari. Because this ruling has become the sub- ject of bitter and un usual resentment on the part of the Solicitor Ceneral, I have elected to file this concurring opinion, wherein I have quoted word for word from that portion of the ruling which formed the basis of my de- cision.

“Law writers are agreed that in order to establish former jeopardy the defendant must be able to show and convincingly, that the discharge of the jury at the previous trial had been done before they arrived at a verdict and that it was withoiit his consent. In WHAR-

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TON, Cnl MI NAL LAW, Vol. I, i ith ed., pp. s4 —49 are

stated the only six grounds upon which an impaneled

jury may be discharged without adversely a8ecting the defendant. ( i ) consent of the prisoner ; (2) ill- ness of (a) one of the jurors, (b) the prisoner, or (c)

the court ; (3 ) absence of a juryman ; (4) impossib il- ity of the jurors agreeing on a verdict ; ($) some un- toward accident that renders a verdict impossible ;

and (6) extreme and overwhelming physical or legal necessity.

“According to Wharton, consent of the accused is of primary importance in such cases. Others agree that the discharge of a competent jury before rendering verdict without defendant’s consent, express or im- plied, or without sufficient cause, operates as an ac- quittal.

*“* 'But as soon as a jury has been impaneled and sworn jeopardy attaches, and a dismissal of the case, when not authorized by law and without the consent of the defendant, after the jury has been sworn and the trial actually commenced is equivalent to an acquittal of the charge and will constitute former jeopardy on a subsequent trial on the same charge.’ 8 R.C.L. 139.

“It does not appear to me that there is further need

to debate the point of whether or not consent of the defendant was necessary before the judge undertook to disband the jury. It would seem, therefore, that this position of the State’s resistance to the motion to dismiss is without merit. I have no hesitancy, there- fore, in overruling it. This brings us to the next point of importance. What does the law regard as manifest necessity in such cases, which would have warranted a discharge of the jury before verdict 7 As we have quoted hereinabove, illness of a juror would be proper cause. In fact, it is held to be one of the causes by which the rights of the accused could not be prejudiced. In this cause three of the

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jurors claimed to have been sick, and for this reason the judge excused them from the panel.

“ ‘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 is discharged on account of sickness, summon another juror in the place of the one so dis- charged and commence the trial anew ; or that the court may discharge the entire jury, and then subse- quently impanel another jury to try the case. A 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 rever- sible error for th e court o f its own motio n, or from m ere re ports un ze ri fied by a ffdazits, or unsu p ported*

*by oaths adm iniste red in o p en court, and in the pres- ence o f the accused, to determine that there exists be- cause o f su ch etch ness, an unano idab le n ecessit y that the remain ing )urors sho uld be discharged witho ut verdict, and th e re cord must affrmatizel y show the existence o f the facts which induced the discharge o f*

*the jury.’* 8 R.C.L. •s^. › . [Emphasis supplied.]

“This supports a view I had expressed earlier in

this ruling. Why couldn’t the judge have recessed the case until some time later in the Term, when ac- cording medical care for the sick members of the panels But since he was so bent on disbanding the jury, why couldn’t he have satisfied himself beyond their mere verbal assertion of illness before proceed- ing to discharge them 7

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“Counsel for the State has contended that because it was within the judge’s discretion to have disbanded the jury, the accused is without right to claim second jeopardy. I cannot bring myself to agree with him. The discretion of a trial judge, insofar as it affects the trial of a criminal case, should not be exercised in a manner which would make it infringe upon the con- stitutional rights of the defendant. There are limits to a judge’s discretion, beyond which his conduct of the trial of a case could become a mockery of justice. In criminal trials judges should conduct their hear- ings in a manner that would discourage further com- mission of crime, and at the same time, afford both sides fair and impartial treatment. I have not been able to rid my mind of the lurking impression that the plaintiB in embezzlement was not fairly treated by the judge’s discharge of the jury, after the defendant had pleaded to the indictment, and before they could arrive at a verdict. The principles controlling sec- ond jeopardy are so elementary that I cannot imagine that an experienced judge would not know under what circumstances they would apply.

“In view of the foregoing, the petition is hereby granted. The Clerk of this Court is ordered to send a mandate to the court below informing the judge therein assigned that the ruling denying the motion to dismiss the cause of embezzlement is reversed.”

In the lengthy brief filed and argued by the learned Solicitor General, there are five questions asked. They are the bases of the State’s position.

1. May a jury, though duly impaneled and issue joined, be disbanded before arriving at a verdicts

z. And if so, under what circumstances7

1. Would illness of jurors, or death of a near rel- ative of one of them, constitute a manifest and urgent necessity such as would justify the disbanding of the jurys

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1. Where the records or minutes of court proceed- ings show that the parties were present at the time the jury was disbanded, does it not raise a presumption of the presence of the defendant?

3. Is the consent of the defendant indispensably necessary to the disbanding of the **jury?**

The first two of these questions would seem to travel together, so I shall handle them jointly. My answer to the **first is** “Yes.” A **jury** which has been sworn may un- der certain conditions, be discharged without affecting the rights of the defendant. Those conditions were not apparent in the case before us. For whereas illness of a juror is a justified cause, the law condemns discharge of a jury on this ground without verification of illness by af- fidavit, medical certificate, or oath to such effect, admin- istered in open court and in the presence of the accused. We know this did not take place in this case. This would seem to take care of the first two questions of the Solicitor General.

Although illness and death of a very near relative of a juror is not among the six grounds mentioned above as reasons for justifiable discharge of a **jury,** yet I would hold that in the discretion of the judge he might excuse a juror on this ground, provided it was done in open court, beiore the defendant, and with his approval. These con- ditions were not met in this case, and this answers the Solicitor General’s third question.

According to the record in this case the consent of the defendant was never sought and, in Iact, the Solicitor General has heatedly contended that his consent was not necessary. My disagreement is supported by the cita- tions made hereinabove.

**Trial** of the case never reached the stage where it could have been submitted to the jury for decision, so the ques- tion of impossibility of the jury to agree, as a suitable ground for discharge, has to be eliminated in this case.

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Since I have already agreed that the judge did not err in denying the request of the defendant to correct minutes of the court proceedings on the bare assertion of counsel, there is no necessity to answer his fourth question. The fifth has also been taken care of throughout this opinion.

The Solicitor General has contended that the alleged illness of three jurors, and the alleged illness and death of a near relative of another, have together amounted to “manifest and urgent necessity,” and as such the judge was within the proper bounds of discretion when he dis- charged the panel without reference to the defendant and without acquitting him of the charge of embezzlement. I respectfully contend and insist, that no discretion of a trial judge in a criminal case is so vast and unlimited that its exercise can legally ignore the fundamental rights of a party placed on trial before him. The Constitution of Liberia protects every litigant placed on trial for crime from being subjected to more than one trial for the same offense (Article I, Section 7th) .

In a case decided by the United States Supreme Court

in June i 961, wherein the Justices voted five to four on the question of jeopardy, Mr. Justice Douglas speaking for himself in the dissenting opinion, in which Chief Justice and ) ustices Black and Brennan concurred, said: “ . There are occasions where a second trial may

be had, although the jury which was impaneled for the first trial was discharged without reaching a ver- dict and without the defendant’s consent. ”

Gor/ v. *U.S.* 3\*7 U.S. 2$4.

“While the matter is said to be in the sound discre-

tion of the trial court, that discretion has some guide- lines—‘a trial can be discontinued when particular cir- cumstances manifest a necessity for so doing, and when failure to discontinue would defeat the ends of justice.’ To date these exceptions have been nar- rowly confined. Once a jury has been impaneled and

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sworn, jeopardy attaches and a subsequent prosecution is barred, if a mistri al is ordered—absent a showing of imperious necessity.” \*° . 37°\*-

“The prohibition is not against being twice pun-

ished; but against being twice put in jeopardy. It is designed to help equalize the position of government and the ind ividual, to discourage the abusive use of the awesome power of society. Once a trial starts jeopardy attaches. The prosecution must stand or fall on its performance at the trial.” \*° . 37a

“The policy of the B ill of Rights is to make rare in-

deed the occasions when the citizens can for the same offense be required to run the gauntlet twice. The risk of judicial arbitrariness rests where, in my view, the Constitution puts it—on the Government.” Zd.,

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Whereas illness of a juror is ground for discharge of a

jury the law has not left the establishment of the truthful- ness of such illness in the inexperienced and unprofes- sional hands of a layman, such as the judge of a court of law. It is, therefore, required that such illness be cer- tified by medical authority, and also upon an affidavit properly taken, and also in open court and in the presence of the accused.

“The illness of a juror which incapacitates him from performing his duty, either before or after the jury has retired, constitutes such necessity as to justify a discharge, and will not be equivalent to an acquittal.”

I z CYC. 2) I.

“But where the juror's statement as to his sickness is not made under oath and no medical evidence is heard on the question, a discharge is improper, and is a bar to a subsequent trial.” fiufo v. ***State,*** i q Ind. zp8.

The question of illness of a juror would now seem to have been settled by competent legal authority. I shall now pass to the illness and death of the relative of a juror, which the Solicitor General has claimed constituted man-

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ifest and urgent necessity and warranted the judge’s dis- charge of the jury.

What constitutes a “very near relative,” was never made known, nor the extent of the illness of such relative disclosed, nor the alleged death of the relative verified or substantiated, nor was information as to any of these con- ditions given to either of the parties before the juror was excused by the judge. Moreover, discharge of the juror was sought and granted during recess and in the absence of the parties and, therefore, without their knowledge and/or consent.

“ . Where, even with the consent of the accused, the separation of the jury is permitted before they re- tire, and on their reassemblage any of them are miss- ing, and the jury discharged for this reason, he (the defendant) may afterwards plead former jeopardy.”

12 CYC. 2/2.

In this case the jury might not have been reduced to only eleven, a number not sufficient to try the case, if the judge had not excused juror Wabb while the court was in re- cess. I nasmuc h as it was done in the absence of the de- fendant, and outside of court, he was within his rights to have pleaded double jeopardy on that account.

It is my firm opinion, and my understanding of the law controlling in double jeopardy, that unless some act of the defendant before a verdict had necessitated another trial, or the properly established illness of jurors had re- duced the panel to a number insufficient to arrive at a verdict, or illness or death of the judge, or some other un- toward accident, or uncontrollable physical incapacity had befallen either the judge, a juror or the prisoner, which made it impossible for the trial to have continued, the defendant, for any other reason, had every legal right to plead double jeopardy when the jury was dis- charged without his consent.

“A defendant cannot plead former jeopardy where the jury before which he was first on trial was dis-

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charged on his own motion or with his consent. The silence of the accused does not constitute a consent or a waiver of his constitutional right.” I2 CYC. 2y i,2.

This would seem to explode the theory sought to be im- pressed upon us by the Solicitor General, when he in- sisted that because the record showed the defendant to have been in court when the jury was disbanded, he there- by waived his right to plead double jeopardy, because he did not record objections to the discharge of the jury. The Iact that the defendant was present and kept silent is not necessarily an indication that he assented to the il- legal acts of the judge in excusing a juror during recess, and of excusing three more on the mere verbal assertion of illness, and in discharging the jury for these reasons. I would like to restate it as my personal opinion that Judge Lewis was in error to have excused jurors who had been charged with the fate of the defendant, without ref- erence to the accused, and under conditions which he can- not support by law or precedent. I also hold that Judge Weeks was still further in error not to have granted the motion to dismiss, upon the ground of double jeopardy stated therein, under the circumstances appearing in the record. Rulings in these respects were therefore preju- dicial to the rights of the defendant ; and in my opinion

the peremptory writ was correctly issued.