CLARENCE G. W. WRIGHT, Petitioner, *v.* JEREMIAH J. Z. REEVES, Assigned Circuit Judge, Fifth Judicial Circuit, Grand Cape Mount County, and the Prosecuting Officials of the Ministry of Justice, Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT, FIFTH JUDICIAL CIRCUIT, GRAND CAPE MOUNT COUNTY.

Argued March 24, 1977. Decided April 29, 1977.

1. Certiorari is a proper remedy to obtain relief from error by a judge in denying a motion for discharge from prosecution of a petitioner, convicted on a criminal charge, and about to undergo a new trial on the same charge.
2. Certiorari will lie to review an intermediate order or interlocutory judgment of a lower court.
3. A trial judge commits error in *sua sponte* setting aside a verdict and ordering a new trial.
4. As a general rule, the doctrine of double jeopardy prevents an accused person who is put to trial before a jury from being tried again on the same charge, and this is so even though no verdict of guilt or innocence has been returned.
5. If discharge of a jury in a criminal case is grounded upon manifest necessity (a circumstance over which the court has no control) duly established through investigation by the court, a new trial may properly be ordered.
6. An order of the trial court granting a new trial in a criminal case upon the court's own motion places the defendant in double jeopardy in a jurisdiction where the court has no power to enter such an order or improperly exercises its power.
7. The principle that a judge may not review or modify or rescind any decision of a judge of concurrent jurisdiction is not applicable to a situation in which the issue decided by the second judge was not previously passed upon by his colleague.
8. An expression of thanks by a defendant to the court for *sua sponte* granting a new trial after a verdict of guilty is not so clear, unequivocal, and decisive an act as to constitute a waiver of his constitutional right against double jeopardy.

On a trial for murder, a verdict of guilty was returned against the defendant. Before he could except to the verdict, the judge *sua sponte* set aside the verdict as not in consonance with the judge's charge and the evidence, and granted a new trial. The State excepted to the ruling.

When the case was assigned for a new trial, the defendant moved for release and discharge on the principle of double jeopardy. On denial of the motion, defendant excepted to the ruling and applied for a writ of certiorari to the Justice in chambers, who forwarded it for decision by the bench *en banc.*

The Court held in answer to the challenge by the State that certiorari was the correct procedure to review the action of the judge who denied the motion for defendant's discharge. It further held that a new trial on the same charge would under the circumstances have violated defendant's right against double jeopardy. The writ of certiorari was granted and the defendant ordered released and discharged from further prosecution. *Petition granted.*

Joseph J. F. Chesson for petitioner. *Solicitor General Ephraim Smallwood* and *Jesse Banks* for respondents.

MR. JUSTICE HENRIES delivered the opinion of the Court.

Petitioner, defendant in the lower court, was indicted on the charge of murder by the grand jury of Montserrado County. Upon his request, a change of venue was granted from the First Judicial Circuit, Montserrado County, to the Fifth Judicial Circuit, Grand Cape Mount County, where a regular trial was held during the August 1976 Term, presided over by Judge James L. Brathwaite, Assigned Circuit Judge, and the jury returned a verdict of guilty against the petitioner. Before the jury was discharged and before petitioner could except to the verdict, the judge *sua sponte* ruled as follows: "The verdict of the empanelled jury as brought forward stating guilty of murder is not in consonance with the judge's charge and the evidence adduced at the trial. Conse-

quently, the verdict is hereby set aside and a new trial is ordered." The State excepted to the ruling, while counsel for petitioner thanked the judge for the ruling.

During the February 1977 Term of the Fifth Judicial Circuit, presided over by Judge Jeremiah J. Z. Reeves, Assigned Circuit Judge, when the case was assigned for a new trial, the petitioner filed a motion for release and discharge from further prosecution on the principle of double jeopardy. The motion was denied and petitioner excepted to the ruling and applied for a writ of certiorari to the chambers of our distinguished colleague, Mr. Justice Azango, who in turn forwarded the matter to the bench *en banc*.

The main contention in the petition for a writ of certiorari is that the trial judge erred when he denied the motion for release and discharge from further prosecution and ordered a new trial proceeded with in contravention of the Constitution and statute with respect to double jeopardy. The respondents contend that thanking the trial judge for ordering a new trial amounted to a waiver by the petitioner of his constitutional right not to be twice put in jeopardy, and therefore the petitioner is estopped from repudiating the action of the judge to which he had impliedly consented; that courts of concurrent jurisdiction have no power to interfere with the judgments and decrees of each other, and therefore Judge Reeves did not err in proceeding with the new trial in keeping with the ruling of Judge Brathwaite; that certiorari will not lie to review the errors of a judge committed during a former trial of the same case, since adequate remedy was available by regular appeal; and that certiorari will not lie to review a case which did not proceed to trial.

Taking first the peripheral issues of whether certiorari will lie, we are of the opinion that it will lie because firstly we have been called upon to review the alleged error committed by Judge Reeves when he denied the

petitioner's motion for release and discharge from further prosecution, and not any error committed by Judge Brathwaite during the former trial. This is also evidenced by the fact that Judge Reeves and not Judge Brathwaite is party to these proceedings.

Certiorari will also lie because secondly, according to the Civil Procedure Law, Rev. Code 1:16.21, one of the purposes of the writ of certiorari is "to review an intermediate order or interlocutory judgment of a court." The ruling denying the motion for release and discharge was made after the case out of which these proceedings grew had been called and the petitioner, then defendant, had filed the motion. The judge denied the motion and ordered that the trial be proceeded with. The case was pending before the court when the application for certiorari was made. It is clear that this was an interlocutory order or ruling as contemplated by the statute. The statute does not provide that certiorari can only be brought after trial has commenced. The necessary requirement is that the case must be pending before the court. Rev. Code 1:16.23(1)(a).

The respondents seem to be relying on *Johns* v. *Morris,* 13 LLR 101 (1957), in which it was held that certiorari will not lie "to review records which do not exist, and in a case which had never commenced." The circumstances in that case are different from those in the instant case. In that case the petitioner, who had been indicted for embezzlement, filed several motions for continuance after the case had been called. When the case was finally assigned for hearing after denial of another motion for continuance, the defendant applied for certiorari asking that the records in the case be reviewed and that alleged errors that had been committed be corrected. Obviously, aside from the assignment of the case for hearing, the case had not commenced. In the instant case, not only had the case been called, but a motion had been ruled upon, and the records in the case are before us. In ad-

dition, the relevant portion of the records of the former trial are also before us in order for us to determine whether the plea of double jeopardy can be sustained. It is clear, therefore, that the two cases are not analogous.

Furthermore, in *Republic* v. *Dillon,* 15 LLR 119 (1962), certiorari was also applied for and granted after the trial judge had denied a motion for discharge from answering a charge of embezzlement upon which the petitioner had been indicted and issue joined between him and the State. This shows that the case need not necessarily go any further than it had already gone for certiorari to lie, and that a regular appeal is not the exclusive means by which the plea of double jeopardy can be reviewed by this Court.

In passing, we would like to turn our attention briefly to the judge's order for a new trial on the ground that the jury's verdict was not "in consonance" with his charge and the evidence adduced at the trial. We would like to confine ourselves to the question of whether it was proper for the judge to *sua sponte* order a new trial. The relevant statute is section 22.1 of the Criminal Procedure Law, Rev. Code, Title 2, and it reads thus:

"§ *22.1. Motion for new trial.*

"*1. Power to grant.* When a verdict has been rendered against the defendant, the court on motion of the defendant may grant a new trial on any of the grounds specified in paragraph 2 of this section. When the defendant has been found guilty by the court, a motion for new trial may be granted only on the ground of newly discovered evidence.

"*2. Grounds.* The following constitute grounds for granting a new trial: (a) that the jurors decided the verdict by lot or by any other means than a fair expression of opinion on the part of all the jurors; (b) that the jury received evidence out of court other than that resulting from a view of the premises; (c) that a juror has been guilty of misconduct; (d) that

the prosecuting attorney has been guilty of misconduct; (e) that the verdict is contrary to the weight of the evidence; (f) that the court erred in the decision of any matter of law arising during the course of the trial; (g) that the court misdirected the jury on a matter of law or refused to give a proper instruction which was requested by the defendant; (h) that new and material evidence has been discovered which if introduced at the trial would probably have changed the verdict or finding of the court and which the defendant could not with reasonable diligence have discovered and produced upon the trial; (i) that for any cause not due to his own fault the defendant has not received a fair and impartial trial."

According to the statute just quoted, the court may not *sua sponte* order a new trial, but it may do so on motion of the defendant. Moreover, the ground that the verdict is not in harmony with the charge is not one of the statutory grounds for granting a new trial. It is clear therefore that the judge in the former trial did commit a grave error when he of his own motion set aside the verdict and ordered a new trial. Although the effect of such an act might not have been intended, it certainly turned out to be prejudicial to both parties, and thus tended to arouse suspicion of partiality on part of the trial judge. We have often held that every litigant, including the State in criminal cases, is entitled to nothing less than the cold neutrality of an impartial judge. *Ware* v. *Republic,* 5 LLR 50 (1935); *Howard* v. *Dennis,* 5 LLR 375 (1937). In *Republic* v. *Weafuah,* 16 LLR 122, 127 (1964), Mr. Justice Pierre, speaking for this Court, said: "The proper exercise of judicial discretion in criminal trial should, in fairness to the rights of the accused and for the safety of society, be exemplified by acts of the court, the impartiality of which might be readily admitted by both sides. Only by such acts of a court could justice appear to be done, or could justice be

seen to have been done to both sides." It is as much an error for the court to *sua sponte* order a new trial after a verdict has been rendered, as it is error for the court to render judgment immediately after a verdict is returned without allowing some time—no matter how short—for the defendant to enjoy his right to file a motion for new trial.

As to the issue of the plea of double jeopardy, Article I, Section 7th, of the Constitution of Liberia declares that "no person shall for the same offense be twice put in jeopardy of life or limb." The Criminal Procedure Law, Rev. Code, Title 2, also provides as follows:

> "§ *3.1. Cases in which and time when jeopardy attaches.* 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 empanelled 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.
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> "§ *3.2. Effect on further prosecutions of an acquittal or other discharge on the merits, and of a conviction.* When a defendant is acquitted or otherwise discharged on the merits upon an indictment or other charge, or is convicted thereon for any offense, or during trial the prosecution thereof is improperly terminated, he cannot thereafter be indicted or otherwise charged and tried in the following cases: (a) for the same offense or any degree thereof; (b) for an attempt to commit the offense so charged or any degree thereof; (c) for any offense based on any act set forth in the

indictment or other charge, or arising from any practice, transaction, or episode set forth therein, including any act comprising a part thereof, or two or more such connected together or constituting parts of a common scheme or plan."

The constitutional prohibition against double jeopardy was designed to protect an individual against the inconveniences of repeated prosecutions for the same crime, which would tend to curtail his liberty and freedom. *Wood* v. *Republic,* 1 LLR 445 (1905). The underlying idea for this protection according to *Green* v. *U.S.,* 335 U.S. 184, 187, 78 S.Ct. 221, 223 (1957), is "that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty."

The common law rule and the constitutional provisions against a second jeopardy apply only to a second prosecution for the same act and crime both in law and fact on which the first prosecution was based.

It is not even essential that a verdict of guilty or innocence be returned for an accused to have once been placed in jeopardy so as to bar a second trial on the same charge. An accused is placed in jeopardy once he is put to trial before a jury, so that if the jury is discharged without his consent he cannot be tried again. This prevents a prosecutor or judge from subjecting a defendant to a second prosecution by discontinuing the trial when it appears that the jury might not convict.

In the case at bar the question of identity of the offense does not arise, since the petitioner was about to be tried again on the same indictment which was the basis of the first trial.

There is also no doubt that the petitioner was found

guilty by the jury, but the respondents argued that unless a verdict is accompanied by a judgment, there is no conviction. According to one authority, "the word 'conviction' has two meanings; its ordinary or popular meaning, which refers to a finding of guilt by plea or verdict, and its legal or technical meaning, which refers to the final judgment entered on plea or verdict of guilty. In some legal contexts, the word may appear in its popular sense, though in others the strict sense is used and verdict or plea of guilty is not a conviction until a judgment has been entered. . . . On the other hand, when the word 'conviction' is used in connection with the successive steps in a criminal case, the reference is to the verdict." 21 AM. JUR. 2d, *Criminal Law,* § 618 (1965). We are inclined toward the literal meaning, but, as a matter of fact, the question of whether there was a conviction is of no import in these proceedings because as stated *supra* it is not necessary that a verdict be returned for an accused to be placed in jeopardy.

What really concerns us is the premature termination of the proceedings in the former trial. Instead of allowing the case to run its course, the trial judge *sua sponte* awarded a new trial after the jury had returned a verdict of guilty. We have already declared that the judge erred when he acted of his own notion, because the statute does not give him the authority to do so. However, the double jeopardy statute quoted *supra* permits termination of the trial by the court because of manifest necessity. In that event such termination does not bar subsequent prosecution. Manifest necessity, to put it simply, relates to circumstances over which the court has no control, for example, illness of jurors, of the judge, of the defendant or of any person whose presence and participation is indispensable to a fair and impartial trial; expiration of the term; inability of a jury to agree; and separation of the jury. *Wood* v. *Republic,* 1 LLR 445, 449 (1905); *Republic* v. *Dillon,* 15 LLR 119 (1962). If discharge

of a jury in a criminal case is grounded upon manifest necessity duly established through investigation by the court, a new trial may properly be ordered. In the instant case, the reasons given by the judge for ordering a new trial do not fall into the category of manifest necessity, and hence it was error for him to award a new trial.

The effect of his ordering a new trial is that it enabled the petitioner to invoke the plea of double jeopardy at the second trial. An order of the trial court granting a new trial in a criminal case upon its own motion places the defendant in double jeopardy in a jurisdiction where the court has no power to enter such an order or improperly exercise its power. 21 AM. JUR. 2d, *Criminal Law,* § 179 (1965).

Having held that the petitioner was placed in double jeopardy by the granting of a new trial, we will now traverse the respondents' contention that the petitioner waived his immunity from a second prosecution when he thanked the court after the new trial was awarded.

Generally, a waiver is the voluntary and intentional relinquishment of a known right, claim, or privilege; and it operates to preclude a subsequent assertion of the right waived or any claim based thereon. A waiver, whether expressed or implied, must be intentional. It may be established by express statement or agreement, or by acts and conduct from which an intention to waive may reasonably be inferred, for example, a motion by the defendant to quash the indictment, or to set aside the verdict and grant a new trial, *Williams* v. *Republic,* 14 LLR 452 (1961), or where by appeal or writ of error he procures a reversal of the judgment rendered against him, *Greenwood* v. *Republic,* 8 LLR 263 (1944). But where an implied waiver is claimed, as in the instant case, caution must be exercised, for waiver will not be implied from doubtful acts. 28 AM. JUR. 2d, *Estoppel and Waiver,* §§ 154–159 (1966).

It has been stated that "to make out a case of implied

waiver of a legal right, there must be a clear, unequivocal, and decisive act of the party showing such a purpose or acts amounting to an estoppel on his part. An implied waiver may arise where a person has pursued such a course of conduct as to evidence an intention to waive a right, or where his conduct is inconsistent with any other intention than to waive it." 28 AM. JUR. 2d, *Estoppel and Waiver,* § 160 (1966).

A constitutional right may be waived, and this can be done by express consent, by failure to assert it at the proper time, or by conduct inconsistent with a purpose to insist upon it. Where a constitutional right is vested in a party and there is doubt as to whether he has waived it, such doubt as a rule is resolved in his favor. Indeed, every reasonable presumption will be indulged against the waiver of fundamental constitutional rights by one charged with crime. *Glasser* v. *United States,* 315 U.S. 60, 62 S.Ct. 457 (1942); 28 AM. JUR. 2d, *Estoppel and Waiver,* § 163 (1966); 21 AM. JUR. 2d, *Criminal Law,* § 219 (1965).

In the case at bar, the respondents on the one hand are claiming that by thanking the court for granting a new trial the accused impliedly waived his right against double jeopardy. The petitioner on the other hand contends that he was only being courteous when he thanked the judge. In view of the law cited *supra,* the contention of an implied waiver is untenable. The words "thank you," standing alone, are insufficient to indicate waiver of the petitioner's constitutional right. We do not find these words to be so clear, unequivocal, and decisive as to convey an intention to relinquish such an important constitutional right. In such an instance the doubt must be resolved in favor of the petitioner.

The final contention of the respondents is that Judge Reeves did not err when he denied the motion for discharge because to have granted the motion would have been an interference with the ruling of Judge Brathwaite.

At first blush this argument might seem plausible, but it falls apart when we consider the fact that the plea of double jeopardy was never raised or ruled upon in the first trial. It is true that the effect of granting the motion for discharge would have obviated the necessity for a new trial, but it could not be considered as an interference with a ruling of another court of concurrent jurisdiction since in actuality the other court had not passed upon the issue. *Bracewell* v. *Coleman,* 6 LLR 176 (1938). This is unlike the situation in *Republic* v. *Aggrey,* 13 LLR 469 (1960), where the defendant was indicted, tried, and acquitted by verdict of a jury upon accusations of having committed grand larceny. At the instance of the prosecuting attorney, the defendant was again placed on trial for the same offense. The defendant's motion for dismissal on the ground of double jeopardy was denied in a ruling by a judge of the circuit court. The ruling was reversed by another judge of the same court. On appeal it was held that the second circuit judge had no power to interfere with the ruling of the first circuit judge.

While it is a recognized and well-settled principle of law that one circuit judge cannot review and revise the action of another circuit judge, this principle is applicable only where a point or issue has already been passed upon by a circuit judge. *Gage* v. *Pratt,* 6 LLR 246, 254 (1938). Since Judge Brathwaite did not pass upon the issue of double jeopardy, it was error for Judge Reeves to deny the motion for discharge on the ground that he would be interfering with Judge Brathwaite's ruling awarding a new trial.

We would like to remark here that in sustaining the plea of double jeopardy, we have not decided upon the guilt or innocence of the accused. While the doctrine of double jeopardy was not designed to protect criminals, it must be applied even though the result might tend to frustrate punishment for a crime in a particular case.

The fact that the result of upholding the plea of double jeopardy will be that the accused will go without punishment for an offense for which he might have been found guilty does not alter his rights or change his position as to his right to plead former jeopardy. In the instant case, the constitutional rights of the petitioner have been unnecessarily prejudiced, and in accordance with the Constitution and other laws cited herein, the motion for release and discharge should have been granted on the plea of double jeopardy raised therein. The petition for the writ of certiorari is granted, and the defendant/petitioner is hereby ordered released and discharged from further prosecution. And it is so ordered.

Petition for writ of certiorari granted.