Maryland Law Review

Volume 12 | Issue 1 Article 5

Still Further on Appeals by the State in Criminal Cases - Robb v. State State v. Adams

John S. Strahorn Jr.

Casenotes

STILL FURTHER ON APPEALS BY THE STATE IN CRIMINAL CASES

Robb v. State[1]
State v. Adams[2]

By JOHN S. STRAHORN, JR.*

In *Robb v. State* the defendant was charged with manslaughter by motor vehicle and was tried therefor and acquitted by a trial magistrate for Prince George's County. The State, within the required ten days, entered an appeal from the magistrate's acquittal to the Circuit Court for Prince George's County. The defendant there filed a plea of jeopardy, and thus objected to being tried again. The State demurred to this plea, and the demurrer was sustained. The Circuit Court then tried the defendant and found a verdict and entered a judgment of guilty. The defendant entered this appeal to the Court of Appeals which held: Appeal dismissed. The statute[3] permitting the State to appeal from an unsatisfactory decision of a trial magistrate, and to have a defendant retried in the trial court is valid, and from such trial there is no further appeal to the Court of Appeals, except to test the jurisdiction of the lower court. The Circuit Court had jurisdiction under the statute to try the defendant for the crime on appeal from the acquittal by the trial magistrate, and so the further appeal by him to the Court of Appeals had to be dismissed.

In *State v. Adams* there were several indictments against defendant in the Criminal Court of Baltimore City, for violations of the gambling laws, where the entire evidence against him consisted of possession of articles which had been seized from him at the time of his arrest and under a questionable search warrant. He challenged the validity of the warrant, and contended that the evidence had been

* Professor of Law, University of Maryland, and Faculty Editor of the REVIEW.

[1] 190 Md. 641, 60 A. 2d 211 (1948).

[2] 76 A. 2d 575 (Md. 1950). See also State v. Barshack, 80 A. 2d 32 (Md. 1951), dismissing an appeal under the same circumstances as in State v. Adams.

[3] Md. Code Supp. (1947), Art. 52, Secs. 13, 13A. As pointed out below, *infra*, ns. 26-29, this statute is applicable only to the counties of the State outside of Baltimore City and special legislation carries out the parallel idea of concurrent jurisdiction for Baltimore City.

obtained by unlawful search and seizure, and therefore was not usable against him under the provisions of the Bouse Act.[4] He filed a pre-trial motion to dismiss the case because of this unlawful search and seizure, but the trial court ignored the motion and required him to plead, whereupon he pleaded not guilty, and elected a trial without a jury. The court received all the evidence in question subject to exception, and overruled the pre-trial motion, but, at the conclusion of the testimony, held the arrest, search and seizure illegal, granted the defendant's motion to strike out all the evidence that had been admitted in the case, and then rendered a verdict of not guilty. From judgments on the verdict the State appealed to the Court of Appeals, which held: Appeal dismissed. The State has no right to appeal, lacking statutory authorization not yet provided, from a verdict and judgment of acquittal in a criminal case tried in the Circuit or Criminal Court, with or without a jury.

As the title of this note would indicate, this is the third time that the REVIEW has treated the problem of appeals by the State in criminal cases in Maryland. This is because the question is an important, and still unsettled, one in the Maryland law. Furthermore, on two other occasions, the REVIEW has published notes on related matters that bear on the question of appeals by the State.

It will be noted that the two principal cases now under consideration are both concerned with appeals by the State, and also involve the basic problem of the double jeopardy prohibition, which is an important consideration in any treatment of the practical problem of such appeals. The former case applies, and both cases recognize the idea that, in Maryland law, the prohibition against double jeopardy is not constitutional, i.e., that there is nothing in the Maryland Constitution to prohibit it, and that the Federal Constitutional ban is inapplicable. Indeed, the only Maryland ban against double jeopardy is the common law rule to that effect.[5] As a consequence the former case holds that the Legislature has the power to relax the ban, and thus authorize a procedure which would otherwise come within any constitutional ban against double jeopardy.

[4] Md. Code Supp. (1947), Art. 35, Sec. 5.

[5] See *infra*, n. 6, 4 Md. L. Rev. 303, 309, n. 19 (1940), calling attention to the REVIEW'S editorial-typographical error which had mistakenly ascribed a double jeopardy clause to the Maryland Constitution in *infra*, n. 15, 3 Md. L. Rev. 184, 185 (1939), and also calling attention to a similar error in the Court of Appeals decision in Friend v. State, 175 Md. 352, 356, 2 A. 2d 430, 432 (1938).

This it has done in the provision for appeal by the State from acquittals in magistrate's courts, the appeal being taken to the County Circuit Court. But it has not yet done so beyond the limited common law scope of appeal by the State, for trials in the Circuit or Criminal Courts.

The two previous treatments in the REVIEW of the question of appeals by the State both involved variations of the situation in *State v. Adams*. In all of the three cases the State was trying to correct an alleged error by the trial court, whose striking out of all of its tangible evidence (because obtained under questionable circumstances of search and seizure) thereby made an acquittal of the defendant inevitable for lack of evidence. The common problem of the earlier cases and the *Adams* case is: What can the State do to get an appellate ruling on the propriety of the trial court's action in depriving it of the use of the very evidence it must have in order to obtain a conviction?

In *State v. Mariana*[6] the defendant was charged with gambling, and the principal evidence against him consisted of exhibits which had been obtained from him under questionable circumstances of search and seizure, thereby giving him a possible objection to their use under the Bouse Act. He filed a pre-trial motion to suppress the articles in evidence at the forthcoming trial, the motion was granted over the objection of the State, which then went to trial, and the State being without evidence, the defendant was acquitted. The State then appealed on the ground that the pre-trial motion should not have been received and ruled on. The Court of Appeals reversed and ordered a new trial,[7] pointing out that a previous case[8] had decided that the use of a pre-trial motion to suppress was not the Maryland way of implementing an objection to illegally obtained evidence, but that objection to the evidence at the trial was proper.

The defendant-appellee in the *Mariana* case did not move to dismiss the appeal, so that while the Court actually

---

[6] 174 Md. 85, 197 A. 620 (1938), noted in *Appeals By the State In Criminal Cases*, 4 Md. L. Rev. 303 (1940). This casenote was unsigned, as was the second one, *infra*, n. 10. Both were written by Charles C. Atwater, Esq., now of the Baltimore City Bar, then of the Student Editorial Board of the REVIEW.

[7] The REVIEW is not informed whether a new trial was ever held in the Mariana case, although it is probable that none was held under the circumstances.

[8] Sugarman v. State, 173 Md. 52, 195 A. 2d 324 (1937), noted in *Admissibility of Evidence Obtained By Unlawful Search and Seizure*, 2 Md. L. Rev. 147 (1938). The REVIEW's casenote did not give particular attention to the problem of the procedure, but rather was concerned with the substantive aspect of the Bouse Act, as the title would indicate.

entertained an appeal by the State after a judgment of acquittal, the case, as it turns out, does not stand as a precedent tolerating such appeals, because of the absence of such motion to dismiss raising the point of the propriety of the State's appeal. In fact, the Court in the *Adams* case now being noted, distinguished the *Mariana* case for this reason, and distinguished it for another reason in the *Rosen* case next to be treated.

In the REVIEW's note[9] of the *Mariana* case, much of the law of appeals by the State in criminal cases was discussed, and it is not proposed to repeat that discussion here. The reader is referred to the previous treatment of *State v. Mariana* for the basic law of Maryland as to appeals by the State from acquittals in criminal cases tried in the Circuit or Criminal Courts. Rather, this note purports to go into the peculiar problems raised by the two cases under discussion, with some speculation as to certain possible future developments that are suggested by their novel aspects, coupled with other interim developments in the field.

In the second treatment in the REVIEW of the problem, the later case of *State v. Rosen*[10] was more briefly discussed. That case was much like the *Mariana* case, except that instead of a motion to suppress evidence filed before trial, it involved a motion to quash a search warrant (the legality of which was necessary to make the evidence admissible). This motion was filed after trial, and in fact the search and seizure warrant had not been applied for until after the trial had started and the defendants had elected to be tried together before a court without a jury. The trial court quashed the search warrant, and the State having informed the court that it was powerless to proceed, the parties were then found not guilty, and the State appealed. The Court of Appeals dismissed the appeal on proper motion so to do, and held that there was no right in the State to appeal from a judgment of acquittal.

The State, in the *Rosen* case, relied on *State v. Mariana*, but the Court distinguished it, not so much on the ground that there had been no motion to dismiss in the *Mariana* case, as on the ground that the *Mariana* case had involved an error as to something not sustained by statute or prece-

[9] *Supra*, n. 6. See also for an exhaustive treatment of the general law of appeals by the State, ORFIELD, CRIMINAL APPEALS IN AMERICA (1939) 55-76. Detailed references will be made in later footnotes herein to Mr. Orfield's excellent treatment of the general law of the matter and of the theoretical considerations that apply in this field.

[10] 181 Md. 167, 28 A. 2d 829 (1942), noted in *Further On Appeals By the State in Criminal Cases*, 7 Md. L. Rev. 364 (1943).

dent in the State, to wit: the granting of a pre-trial motion to suppress evidence, instead of excluding the evidence when offered during the routine trial of the case. In noting the *Rosen* case, the REVIEW was critical[11] of the Court's basing its decision on that ground, and it is well that in the *Adams* case now under discussion, the Court has accepted the sounder ground of failure to make an objection on the ground of the incapacity of the State to take an appeal. In fact, in the *Adams* case, the Court points out:[12]

> "There was no motion to dismiss the appeal, and the right to appeal was not mentioned in the opinion. What was done in the *Mariana* case cannot operate to overrule *sub silentio* what was decided in the long line of prior cases; still less can it stand against subsequent decisions." (then citing the *Rosen* case and the still later *Lingner* case,[13] which will be discussed below).

The other two previous treatments of the field in the REVIEW have both involved the details of double jeopardy, and the first one is particularly relevant in connection with the *Robb* case under discussion now. This discussion involved the United States Supreme Court case of *Palko v. Connecticut*,[14] in which the Supreme Court held that nothing in the Federal Constitution forbade the State of Connecticut to provide for an appeal by the State from an acquittal or unsatisfactory conviction in the trial court, after a trial on the merits. It was held that the Federal Bill of Rights, including the double jeopardy clause, is inapplicable to a state action, so that if the state has no inhibition of its own against double jeopardy, it is permissible for it to provide for that which would be double jeopardy under the Federal ban, if the latter were applicable.

In that case, under local procedure, the State had appealed from a second degree murder conviction, alleging prejudicial error in excluding evidence, and obtained a reversal and a new trial, at which the defendant was convicted of first degree murder and sentenced to be executed. On appeal to the Supreme Court, this was affirmed, and this ruling is the basis for the underlying theme of this discus-

---

[11] *Ibid*, 7 Md. L. Rev. 364, 365-6.
[12] 76 A. 2d 575, 579 (1950).
[13] State v. Lingner, 183 Md. 158, 36 A. 2d 674 (1944).
[14] 302 U. S. 319 (1937), noted in *Extent to Which Rights Secured by the First Eight Amendments to the Federal Constitution Are Protected Against State Action by the Fourteenth Amendment*, 2 Md. L. Rev. 174 (1938). See also ORFIELD, *op. cit., supra*, n. 9, 58.

sion, that double jeopardy is not a constitutional matter. The Federal constitution presents no obstacle, and there is no Maryland constitutional provision, so that there is but a common law idea subject to being changed by appropriate legislation, as has been done in the *Robb* case situation, but has not yet been done in the *Adams* case situation.

In the other case which the REVIEW has noted, that of *Crawford v. State*,[15] a mere internal detail of the idea of double jeopardy was involved. The defendant shot and wounded a child and, while the child still languished, the defendant was tried and acquitted by a magistrate of the assault with intent to kill. When the child later died the defendant was then tried for the homicide, was convicted, and the conviction was affirmed in the face of his plea of double jeopardy. The Court did not squarely decide whether it was double jeopardy to try him a second time for the more serious offense which later accrued, but rather put it on the narrow ground that there was no jurisdiction in the particular magistrate to try the lesser offense as he did,[16] so that the acquittal was without jurisdictional foundation and presented no problem of jeopardy. Thus, no square ruling on the details of double jeopardy in that peculiar assault and homicide situation was obtained, and this case has little bearing on the present discussion of appeals by the State, although it does share the theme of double jeopardy.

Turning now to the two cases under discussion, it would seem that their common theme is that while there is no Maryland constitutional objection to appeals by the State in criminal cases, even from verdicts and judgments of acquittal after trial on the merits, this right is still restricted. Thus, as the law now stands, the right of the State to appeal in Maryland is limited to the statutory provisions therefor, or its basic common law privilege, which latter obtains only if there was no trial on the merits. Under the latter situation, the State is limited to appealing, in effect, only from rulings of the trial court which prevent it from going to trial on the merits at all. The situation in the *Robb* case seems to provide the only vestige of an appeal as such from an

---

[15] 174 Md. 175, 197 A. 866 (1938), noted in *Effect of Acquittal for Assault on Trial for Murder When Victim Subsequently Dies*, 3 Md. L. Rev. 184 (1939).

[16] This was on the ground that the particular charge before the magistrate was for assault with intent to kill, whereas the magistrates of Baltimore City may only try for simple assault under Baltimore City Charter (1938), Section 724, now Baltimore City Charter (1949), Section 410.

actual acquittal, and that is limited to appeals from County magistrates to courts of record, so that there is as yet no provision for State appeals from criminal trials in courts of record to the Court of Appeals of Maryland.

The common law scope of appeal[17] seems to be limited to such rulings as (1) the granting of a defendant's pre-trial motion[18] in the nature of a demurrer to the indictment, whereby no trial is held unless the ruling be reversed on appeal and the case remanded; or (2) the granting of the defendant's motion[19] in the nature of a plea in abatement after evidence has been heard on the motion or plea. It was pointed out in the *Lingner* case[20] that there can be no appeal if, after the State's demurrer to the defendant's plea in abatement is overruled, the State refuses to traverse the plea and goes to trial on the merits. There cannot then be an appeal from the overruling of the demurrer to the pleas in abatement.[21]

The point of this case seems to be that a ruling favorable to the defendant on the traverse of the plea (now contest of the motion) would be tantamount to sustaining a demurrer to the indictment (now granting such a motion) and would preclude the State from going to trial and would entitle the State to appeal for having been denied the right to go to trial. Thus it is apparent that, lacking further legislation, the State has no appeal from any adverse ruling made at a trial on the merits, although it leads to an acquittal, perhaps unjustly. And, of course, it has always been true that all errors of trial judges, adverse to the State, committed in the course of a trial, whether by letting in erroneous defense evidence, or keeping out valid state's evidence, or granting defense prayers which state bad law, or rejecting state prayers which state good law, and the like, go unredressed by any right of appeal on the State's part.

The *Robb* case has certain interesting implications. The statute allowing the State to appeal from an acquittal by a trial magistrate, equally with the defendant's appealing from a conviction, is the so-called "concurrent jurisdiction"

---

[17] On this, see ORFIELD, *op. cit.*, *supra*, n. 9, 61.
[18] Criminal Rules of Practice and Procedure (1950), Rule 3.
[19] *Ibid.*
[20] State v. Lingner, 183 Md. 158, 36 A. 2d 674 (1944), *supra*, n. 13.
[21] Under the new rules, *supra*, n. 18, there would be no such demurrer, but merely a contest of the defendant's motion in the nature of a plea in abatement.

statute,[22] whereby, lacking more specific or local laws[23] for certain crimes, crimes of medium gravity[24] may be tried either in the magistrate's court or in the Circuit Court, depending on the wishes of the parties. Under this statute, when a defendant is brought to a magistrate, charged with a non-penitentiary misdemeanor, he may elect to be tried by the magistrate or he may "pray a jury trial" which means he will be tried in a court of record by the more dignified procedure there available. Likewise, the State may pray a jury trial equally with the defense, and this privilege parallels the equal privilege of the State to appeal from an acquittal, as the defendant may appeal from a conviction, which is the principal point in the *Robb* case. The statute for the Counties is mutual in both respects, with reference to either party insisting on a trial at the higher level in the first instance, and with respect to either party appealing from an unsatisfactory result where both were agreeable to have the first trial in the magistrate's court. Certainly, now that the Court has ruled in favor of appeal by the State from an actual trial and acquittal by the magistrate, there can be no doubt about the less questionable privilege of the State to insist on having the first trial in the jury type court, equally with that of the defendant to insist upon it in his favor.

It might be remarked that the Maryland practice here recognized, of both allowing the State to appeal from a magistrate's acquittal, and to pray a jury trial equally with the defendant, reflects an attitude found throughout the

[22] Md. Code Supp. (1947), Art. 52, Secs. 13, 13A, *supra*, n. 3, for the counties, exclusive of Baltimore City. The comparable, although not similar, Baltimore City provision is found in Baltimore City Charter (1949), Sections 410-411, *supra*, n. 16.

[23] Prior to 1943, various local and special laws had their own peculiar provisions for concurrent jurisdiction of magistrates, praying jury trials, and for appeals from trials by magistrates, which, even in the Counties, were at variance with Md. Code Supp. (1947), Art. 52, Sec. 13, *ibid.* By amendment of that year, Md. Laws 1943, Ch. 487, it was provided that the provisions of Section 13 should apply to all criminal trials before a magistrate in the counties (except motor vehicle cases) whether enacted before or after, unless the law specifically exempted the practice by reference. Query, does this go so far as to apply to magistrate's trials under city ordinances which do not provide appeals, and does it thus repeal the rule of the case of Norwood v. Wiseman, 141 Md. 696, 119 A. 688 (1922), involving the non-appealability from magistrate's decisions under ordinances of the Town of Westernport.

[24] As pointed out below, the County statute, Md. Code Supp. (1947), Art. 52, Secs. 13, 13A, makes the test in terms of non-penitentiary misdemeanors not otherwise provided for, to determine the scope of the concurrent jurisdiction. Thus felonies and misdemeanors that carry penitentiary sentences do not come within the scope of the concurrent jurisdiction in the counties. In the City the statute allows concurrent jurisdiction only for a small group of enumerated petty offenses.

country in the decisions of other states, based on the rationale that the public has an interest in serious criminal cases being tried by a jury in the first instance. Thus, some states have a rule[25] that there cannot even be a waiver of trial by jury in cases where the defendant is entitled to demand it.

We are accustomed, here in Maryland, to rather free waiver of jury trials, as witness both the concurrent jurisdiction statute, and our practice of allowing waiver of jury trial in courts where juries are available. However, it may be that the local practice of allowing the State to pray a jury or to appeal to a jury type of court from a magistrate's acquittal somewhat reflects this public interest in having a jury trial where that would subdue dissatisfaction with criminal justice. Or, it may merely be an interest in having the case tried, with or without a jury, in a type of court where a jury is available.

It should be noted that there is an essential difference between the statute[26] dealt with in the *Robb* case which applies only in the counties, and the different, local statute[27] for Baltimore City. While both statutes recognize the idea of concurrent jurisdiction, with the implications set out above, yet the one applicable to the counties has the provision under discussion, for the appeal by the State from a magistrate's acquittal, while the one for Baltimore City apparently does not have such a provision. Both have the mutual provision for a prayer for a jury trial either by the State or the defense.

This difference may be explained in terms of the relatively limited scope of the Baltimore City concurrent jurisdiction statute. It does not apply to as many crimes of medium gravity as does the one for the counties, involved in the *Robb* case. The particular crimes which do come within the Baltimore City concurrent jurisdiction statute are specially enumerated.[28] This is to be explained by the fact that the Criminal Court of Baltimore City is in continuous session throughout the whole year, so that there is not the same need for conferring trial jurisdiction (with

---

[25] Oppenheim, *Waiver of Trial by Jury in Criminal Cases*, 25 Mich. L. Rev. 695, 707, *et seq.* (1927).

[26] Md. Code Supp. (1947), Art. 52, Secs. 13, 13A.

[27] Baltimore City Charter (1949), Secs. 410, 411, formerly Baltimore City Charter (1938), Secs. 724, 725.

[28] *Ibid.* The petty larceny statute, Md. Code Supp. (1947), Art. 27, Sec. 388, which provides concurrent jurisdiction in theft cases under Twenty-five Dollars, was amended by Md. Laws 1941, Ch. 630, to include Baltimore City within its provisions, and it is now State-wide.

consent of the parties) on the lower magistrate's courts, inasmuch as a prompt trial may be obtained in a court of record in the City. Thus, there is not the danger of the accused being held in jail or under bail for a considerable period of time awaiting the next session of the local criminal court, as would be the case in the counties, where the Circuit Courts meet infrequently. This is commonly understood to be the reason why the Baltimore City concurrent jurisdiction statute is not as broad in scope as that for the counties, and why a special rule should obtain for Baltimore City. Thus, because only crimes of really petty significance are triable by the magistrate's courts in Baltimore City, there may not be as much reason for allowing the State to appeal from a (perhaps unjust) acquittal by a city magistrate as in the case of a simliar acquittal by a county magistrate, who has more extensive jurisdiction (with consent) of medium type criminal offenses.

As between the Baltimore City special provision and the general one for the counties, there is also another interesting distinction. In the City, as has been decided by the Court of Appeals,[29] the cases where either party prays a jury trial in the first instance must clear through the grand jury, which must then indict in order to lay the foundation for the first trial in the Criminal Court. On the other hand, because of the different wording of the general statute for the counties, when a jury trial is prayed, the trial in the Circuit Court is held on the warrant or information filed before the magistrate, and it is not necessary for the grand jury to indict in the meanwhile in order for this first trial to be had. One can only speculate as to whether this distinction is an historical accident or is also to be explained in terms of Baltimore City's Criminal Court being in continuous session.[30]

Another aspect of the *Robb* case situation concerns the possibility of a further appeal to the Court of Appeals after an acquittal by the magistrate is appealed to the court of record and a conviction is there obtained. The traditional rule is that upon conviction by a magistrate, and an appeal taken to the Circuit or Criminal Court, the case is concluded by the decision there, and that there may not be a

---

[29] Callan v. State, 156 Md. 459, 463, 144 A. 350 (1929).

[30] An interesting detail of the provision for the counties, Md. Code Supp. (1947), Art. 52, Secs. 13, 13A, is that there may be an appeal by the defendant, after a conviction by a trial magistrate, even where he pleaded guilty before the magistrate, as well as where he was convicted on a plea of not guilty.

second, further appeal to the Court of Appeals, save on questions of jurisdiction, or constitutionality.[31] This rule has long since been accepted in the case of a conviction by a magistrate, followed by a second conviction or affirmance by the Circuit or Criminal Court. But now that the *Robb* case reminds us that the State can appeal from an acquittal, the question seems to arise, would it not be fair then to let the defendant appeal to the Court of Appeals from his *first* conviction, which may occur in the Circuit Court of one of the Counties.

Of course, it might be argued that a defendant, anxious to preserve his right to go to the Court of Appeals from such a conviction, should pray a jury trial in the first instance, and thus stand his first trial in the County Circuit Court. This would entitle him to take the case to the Court of Appeals on the first appeal in the matter, and so his election to stand trial in the magistrate's court could then be regarded as an assumption of the risk that the State would appeal from an acquittal, thus precluding him from a further appeal to the higher tribunal. Of course, it would take legislation to provide for such a second appeal in this unusual situation of the *Robb* case. The *Robb* case itself raised the point by dismissing the attempted appeal, pointing out that it could be entertained only for purposes of testing the jurisdiction of the Circuit Court, and that the Circuit Court did have jurisdiction to try the appeal in the case.

Related to the above problem of a further appeal to the Court of Appeals (after a magistrate's trial has been appealed to the Circuit Court) is the following: Can there be an appeal to the Court of Appeals (by the defendant) from a conviction found by the Circuit or Criminal Court on a trial there held, following a prayer for a jury trial in a case originally initiated before a magistrate. Until recently there was some doubt whether there could be such an appeal (as clearly was so in cases initiated by indictment, or cases beyond the concurrent jurisdiction). However, by an amendment to the statute for the Counties,[32] and a decision of the Court of Appeals as to the City procedure, in the *Brack* case,[33] it is now clear that there may

---

[31] The Robb case, the first one now being noted, accepts this rule, and extends it to denial of a further appeal from a first conviction found on the State's appeal from a magistrate's acquittal.

[32] Md. Code Supp. (1947), Art. 52, Sec. 13A, as it was amended by Md. Laws 1945, Ch. 845.

[33] Brack v. State, 187 Md. 542, 51 A. 2d 173 (1947).

be such a first appeal from a first trial (either on the warrant or information in the Counties, or after interim grand jury indictment in the City), when a case within the concurrent jurisdiction is initiated before a magistrate and a jury trial is prayed. It would be unfortunate were it otherwise, for then the accident of initiating the case before the magistrate or in the grand jury would determine the right to appeal exactly the same type of case.

One further point is suggested by the *Robb* case, to wit: Is it desirable to propose legislation for extending the State's right of appeal from a magistrate's acquittal, to include an appeal from an acquittal by a Circuit or Criminal Court to the Court of Appeals of Maryland?[34] If appeal from a magistrate's acquittal to the Circuit Court is desirable, why not the further step? This would involve adopting the Connecticut practice, which we have seen sanctioned in *Palko v. Connecticut.* It may be that a distinction can be recognized, and that while it is desirable to have appeals from magistrate's acquittals, it is not as desirable to have appeals from acquittals by courts of record in first trials there held, for the reason that it is more likely that a trial magistrate, being less learned in the law, may arrive at an improper and unjust acquittal. Because of this, society may be more prejudiced by acquittals by trial magistrates than by acquittals by courts of record, where the procedure is more certain and the training of the judge is better. Distinguish, of course, the problem of appeals from acquittals as merely a moot matter, to be discussed below in another connection, as the present discussion is concerned with a definitive appeal that would result in a new trial and possible later conviction. Distinguish also the point to be discussed below, of appeals from directed verdicts, where the State does not have an opportunity to take the case to the jury, or from post-trial rulings tantamount thereto.

The *Adams* case poses the specific problem of what can the State do when the trial court's ruling completely deprives it of its entire available evidence to obtain a conviction, so that it might as well never have instituted any action. This problem is involved in common with the earlier *Mariana* and *Rosen* cases. Of course, the trial court's possible erroneous rejection of the entire body of tangible evidence that the State has mustered to obtain a conviction

[34] On the desirability of allowing appeal from an acquittal by a court of record, after a trial on the merits, see ORFIELD, *op. cit., supra*, n. 9, 69.

is but another instance of the trial court's committing errors on points of evidence to the State's disfavor, such as by excluding proper State evidence, or admitting improper defense evidence. The question of evidence obtained by search and seizure is but an aspect of the overall problem of the State's being relatively impotent when the trial court commits an error to its disfavor in the routine trial of the case.

Thus, because of the frequence of the problem and the severe impact on the State's case, it may be, as witness the three Maryland appeals in the matter, that the problem deserves a positive correction, either by rule of court or legislation, and thought should be given to the desirability of changing the rule.

The problem arises under the Bouse Act,[35] the Maryland statutory version of the idea that the evidence obtained by illegal search and seizure is therefore inadmissible in misdemeanor cases, and its application has been quite extensive in gambling, conspiracy, and similar cases. This statute accepts the federal rule of the *Weeks* case,[36] with the procedural difference that in the federal practice a pre-trial motion to suppress the questionable evidence is the way of raising the question, while in the State practice a routine objection to the offer of the evidence at the trial is the manner of handling it. That is the crux of the problem now under discussion, which has culminated in the *Adams* case, and the Federal practice may offer a possible solution of the dilemma of the *Adams* and earlier cases about appeals by the State, from the trial court's possibly erroneous deprivation of the State of all of its evidence by ruling in favor of the defense contention that it had been illegally seized. Thus an acceptance, either by rule of court or legislation, of the Federal practice of using pretrial motions to resolve the question of whether the evidence was seized by illegal search and seizure and is proper to be used at the later trial, in lieu of our present practice of ruling on the matter only in the course of the trial on the merits as on any other offer of evidence by the State, when objected to by the defense, might solve the difficulty.

To implement this idea, it would have to be provided, *inter alia*, that the State would have to give advance notice to the defense of its intention to use any tangible exhibits that might have been obtained improperly, so that the

[35] Md. Code Supp. (1947), Art. 35, Sec. 5.
[36] Weeks v. U. S., 232 U. S. 383 (1914).

defense would have the opportunity to make such a pre-trial motion. Of course, even that would not be entirely necessary for it could be made optional for the State to give such notice in order to call for a pre-trial motion, or else run the risk of not being able to appeal from an adverse ruling when it offers the evidence at the trial itself without such advance warning.

Furthermore, such a procedure would imply a rule that if the trial court grants the defendant's pre-trial motion and suppresses all of the State's evidence, then the State could submit to something in the nature of an involuntary *non pros* or a dismissal of the prosecution, so that there would be no trial on the merits. Further, provision should then be made for an appeal from such judgment, based on the alleged error in the trial court's having granted the motion to suppress, followed by dismissal, and thus there could be an appeal by the State from what would be, in effect, not letting the case go to trial, and the present rule of no appeal by the State from an acquittal after trial on the merits would still be preserved.

This would seem to be a plausible solution of the problem, inasmuch as it would set the matter up so that the alleged error in granting the motion to suppress the evidence would have the same effect as the granting of a motion in the nature of a demurrer to an indictment, or the granting of a motion in the nature of a plea in abatement, both of which, under the present practice do prevent the State from going to trial at all and entitle it to an appeal from such a drastic ruling. As has been pointed out before in the REVIEW, and contended for by the State in certain of its appeals, the substantial effect of suppressing all of the State's evidence by a ruling under the Bouse Act is to keep it from going to trial at all. It has been seriously argued even under the present practice that the State should be allowed an appeal from such an adverse ruling which, while it may be made in the course of a trial, has the ultimate impact of not letting them have a chance to win at all. So it is that some such practice as suggested above might resolve the dilemma and, without going further in the direction of novel appeal by the State, still would solve the ever-recurring problem of questionable rulings by trial courts under the Bouse Act at a reasonable level.

If it be desirable to adopt some such pre-trial practice as outlined above, how should it be done, by rule of court under the rule-making power, or by legislation? Language

of the Court of Appeals in the *Adams* case[37] suggests that only the latter is possible, but it must be remembered, rule-making under the Constitutional sanction is a species of legislation, and also that the Court was speaking of the permitting of an appeal from an acquittal in a trial on the merits.

Providing for that might be thought a too-extensive use of the rule-making power, in that "extending the scope of appeal" is more a legislative than a judicial function. But, would it be as much so merely to provide another pre-trial procedure, consistent with present ideas as to the "scope of appeal" from existent pre-trial rulings that also frustrate the trial being held at all? Even conceding that it is not proper, short of legislative enactment, to go as far as the Connecticut practice, yet it would seem plausible to use the rule-making power to change from exclusion at trial to pre-trial motion and dismissal as a way of solving the *Adams* case and kindred problems.

The whole discussion of appeals by the State to test routine errors committed by the trial court against it in the course of the trial on the merits has to keep in mind the inevitable idea that prevails as long as the present procedure remains unchanged. This is that because the State is impotent to appeal from an acquittal after trial on the merits in a court of record, the trial judge's errors, even though they may be multitudinous, adverse to the State, go uncorrected, whether committed by excluding its proper evidence, or admitting the defendant's improper evidence, or by rejecting its proper prayers on the law, or accepting the defendant's improper ones.[38] This is inescapable, so long as we lack any more extensive system of appeal by the State from an acquittal in a criminal case tried in a court of record, as is now the situation. As a result, many trial judges tend to "lean over backwards" in favor of the defendant, thus insuring against reversal on appeal, and thus improving their "batting average" in the appellate

---

[37] In the Adams opinion, 76 A. 2d 575, 579, the Court mentioned, that while reference was made in argument to the Criminal Rules of Practice and Procedure (1950), the Attorney General did not contend that these rules authorized the particular appeal. Further, the Court cautioned: "If they did, it would be necessary for us to consider the distinction between power 'to regulate and revise the practice and procedure' and power to abridge, enlarge or modify substantive rights, and specifically power (or lack of power) of a court to enlarge or restrict the jurisdiction conferred by a statute." (Followed by citations.) Finally, the Court concluded: "If a broader right of review is necessary in the interest of criminal justice, it must be granted by the legislature."

[38] On this, see ORFIELD, *op. cit.*, *supra*, n. 9, 73.

court with respect to the number of times they are affirmed or reversed. So it is that many trial rulings are observed by interested lawyers and students in the trial of criminal cases which would probably be reversed, had they been made against the defendant instead of against the State.

In this connection, two things should be noted. One is that under the Maryland practice[39] it is permissible for the Court of Appeals to note exceptions by the State to the trial court's ruling where there has been a conviction, followed by an appeal by the defendant, who alone has such right after a trial on the merits. This rarely used provision allows the Court of Appeals also to notice the exceptions by the State to rulings adverse to it, primarily for the benefit of the trial court in a new trial, if one is to be had. So, to a limited extent, it may be possible to obtain such advisory rulings on the law where the State has suffered adverse rulings at the hand of the trial court, but this can only be so when the case led to conviction and the defendant himself takes the appeal. Otherwise, under present rules, the State could not take an appeal if an acquittal had resulted.

Further in this connection, a few American states[40] have the practice of allowing appeals by the State from an acquittal in a trial on the merits, but only as a moot matter to get the law straightened out for the future, and without power to get a new trial and possible conviction of the defendant, as is allowed in Connecticut. The State of Indiana[41] is typical of this compromise practice, whereby there may be a limited appeal by the State for the purpose only of getting an advisory ruling on the law for the future, but without power to get a retrial. It might be that it would be desirable for Maryland to adopt this compromise practice, if it is not thought desirable to go so far as the Connecticut practice of complete new trial with its possible conviction. This latter we have yet adopted only for magistrate's trials and acquittals, and have not yet adopted for Circuit or Criminal Court trials and acquittals, as pointed out above.

One final point of speculation is relevant in the light of recent developments in Maryland criminal procedure. By rule of court going into effect on January First, 1950,[42]

---

[39] Md. Code (1939), Art. 5, Sec. 86, as interpreted in State v. King, 124 Md. 491, 496, 92 A. 1041 (1915). See also, ORFIELD, *op. cit., supra*, n. 9, 64.

[40] See ORFIELD, *op. cit., supra*, n. 9, 65-68.

[41] State v. Robbins, 221 Ind. 125, 46 N. E. 2d 691 (1943).

[42] Criminal Rules of Practice and Procedure (1950), Rule 6(b). This is now Rule 5A, after the amendments of February 15, 1951, *infra*, n. 45.

strengthened by a Constitutional amendment[43] and covering legislation[44] in the Fall of 1950, and an amended rule of court promulgated in early 1951,[45] the Maryland criminal procedure has adopted for the first time in history the idea of a directed verdict of not guilty in criminal cases, where the trial court finds that the State has produced insufficient evidence to sustain a verdict of guilty. Prior to these developments there was no such thing as a directed verdict of not guilty and there was absolutely no appellate review of the sufficiency of the evidence to sustain a verdict. But these developments have radically changed that, so that today we do have the practice of granting a directed verdict of not guilty at the motion of the defendant, either at the close of the State's case, or at the close of the whole case as may be, so that if the court feels that the evidence is insufficient, the jury has no discretion in the matter under the amended rule, and the clerk enters a verdict of not guilty, upon which judgment of not guilty will follow.

The question now arises, and has not yet been solved, either by rule of court or by legislation: Should the State be allowed to appeal from the granting of such directed verdict of not guilty and thus get a ruling from the Court of Appeals as to whether the trial court was correct in finding a dearth of sufficient evidence to sustain a verdict?[46]

In some ways the problem is analogous to that of the *Adams* and earlier cases, for that by "taking the case away from the jury", the State has been frustrated somewhat in the same way as when it is deprived of using all of its available evidence. It was argued above that the latter is tantamount to not letting the case go to the jury at all.

While the practice of judgment N.O.V. in criminal cases has not yet been adopted either by rule or legislation, the problem would be the same if the N.O.V. practice is ever adopted in criminal cases. It would have the same implications on the point of criminal appeals: Should the State also be allowed to appeal from the granting of judgment of not guilty N.O.V., as from the granting of a directed verdict? It would be in effect akin to not letting them go to trial to

---

[43] Md. Laws 1949, Ch. 407, amending Md. Const. (1867), Art. 15, Sec. 5. Adopted at the November, 1950, election.

[44] Md. Laws 1949, Ch. 596, adding Md. Code Supp. (1947), Art. 27, Sec. 655A. This was provided to take effect upon the adoption of the Constitutional amendment, *supra*, n. 43.

[45] Criminal Rules of Practice and Procedure (amended February 15, 1951), Rule 5A.

[46] For speculation about this problem, in advance of Maryland's adopting the practice of directed verdicts in criminal cases, see *supra*, n. 6, 4 Md. L. Rev. 303, 310-11, and *supra*, n. 10, 7 Md. L. Rev. 364, 366.

the jury, and somewhat like not letting them go to trial at all.

Then, as for directed verdicts and possible N.O.V. rulings, should the State also be allowed a novel appeal from the granting of a new trial or a motion in arrest of judgment?[47] Some states do permit this, as they likewise permit the State to appeal to the highest court from a reversal of a conviction by an intermediate appellate one.[48] This latter point is, of course, no problem in Maryland which has only one level of appellate court.

To the extent that a new trial follows the granting of a motion therefor or a motion in arrest, it might be said that there is less need for allowing the State an appeal, for that they are not as much frustrated as by a directed verdict or the granting of a verdict N.O.V. where that practice is used. These do terminate the prosecution and amount to jeopardy, where the granting of a new trial or a motion in arrest with the possibility of a new trial gives the State still a chance to obtain a conviction, and so the argument for the State's appeal is not so pressing.[49]

On these points the writer of this note takes no particular stand, as the purpose is merely to call attention to the problems, and to relate them to the problem of the *Adams* case. Just as in discussing the *Adams* case, it was suggested that depriving the State of all of its evidence at the trial itself, or before the trial as the case may be, is tantamount to not letting them go to trial at all as when a motion in the nature of a demurrer, or a motion in the nature of a plea in abatement is honored at the behest of the defendant, so, it could be argued that granting a motion for directed verdict is likewise tantamount to not letting them go to trial at all. There is the same policy argument that an appeal by the State should be allowed.

There again, the question is, which type of appeal should it be? Should it allow a complete reversal with new trial ordered, or should it merely be an appeal as a moot matter

---

[47] On this see ORFIELD, *op. cit., supra*, n. 9, 58, 64.

[48] See *ibid*, 68.

[49] With reference to appeals from acquittals in non-jury cases in courts of record, the problem is more difficult, for that it would be hard to distinguish between the trial judge's acquitting because he felt the evidence was insufficient to entitle him as a jury to consider the matter, and his acquitting because he felt that the balance of the evidence was in favor of acquittal. It may be that there is less reason for advocating an appeal by the State from an acquittal by a judge without a jury than from an acquittal in a jury case where there is a directed verdict, or a judgment N.O.V., or a new trial or motion in arrest of judgment granted.

for the advice of courts in future cases of the same nature, as was discussed above.[50]

On this and on other points of appeals by the State, it might be argued that, either in the *Adams* case situation, or in that of the directed verdict, a defendant who has asserted either the Bouse Act rule of illegal search and seizure, or the dearth of the State's evidence in order to keep from having his case heard by a jury, should run the risk of having to litigate in the Court of Appeals and then stand trial again. Should he not make a choice between asserting the Bouse Act and/or the dearth of the State's evidence, as a way of frustrating the prosecution without getting to the jury, or standing trial with them. If he makes his motion under the Bouse Act or for a directed verdict, perhaps he should be prepared to face a second trial if he wins too easily in the trial court, and the appellate court feels he should not have won there.

Particularly, under the Bouse Act, is that argument plausible, for that it would probably be safe to state that nine-tenths of the defendants who assert the Bouse Act, and move to exclude evidence obtained from them, are probably guilty, and are merely taking refuge behind an exclusionary statute that is of debatable evidential policy anyhow. Certainly, as to that group, there is no unfairness in forcing them to face the prospect of another trial after having to defend an appeal, or let it go by default, when the trial court has temporarily ruled in their favor incorrectly.

Thus there may be a certain parallel between the idea of appeal by the State from an adverse ruling on illegally obtained evidence, which is the crux of the matter in the *Adams* and earlier cases, and the speculation about possible future appeals by the State from the granting of directed verdicts in all criminal cases, under the newly promulgated rules of criminal procedure, which provide such procedure for the first time in Maryland legal history.

In conclusion, it might be pointed out that the basic idea of the ban on double jeopardy, be it constitutional or merely common law rule, as in Maryland, is to prevent administrative tyranny in harassing the individual unnecessarily under established rules of law. To the extent to which an established rule of law may provide in advance for two or more proceedings about the same thing, the individual is not harassed any more than he would be by a single procedure which entails the composite consequences of two

---

[50] *Supra*, ns. 40, 41.

separate ones. The essential protection is against individual whim and caprice in pursuing the citizen too often for the same thing.

But, is there anything wrong, within the framework of this policy, in allowing the State further to pursue the given single proceeding to correct possible errors committed at the behest of the individual himself who is asserting the protection against double jeopardy? When we think it through, if the defendant on trial himself makes a choice to assert a certain rule or a certain objection to the State proceeding against him, should he not run the risk that the trial judge who rules in the matter too readily finds in his favor, and run the further risk that the State will appeal to get that corrected so that justice may be done.

Essentially, an appeal by the State under orderly procedure is not double jeopardy, but is merely a continuance of the litigation, and a continuance made necessary because the one who claims the protection of the jeopardy rule has himself invoked the danger of further proceedings by making some objection to the State's way of proceeding in the lower trial. Perhaps the Supreme Court's acceptance of the outright complete appeal by the State under Connecticut practice, and the Maryland Court of Appeals indication that there is no constitutional objection, but that statutory authorization is merely required, both reflect this idea, that while preserving the essential theme of double jeopardy, an orderly appeal by the State to correct errors in favor of the defense is just as plausible as an appeal by the defense to correct errors in favor of the State. It remains to be seen whether by rule of court, or by legislation, further clarification of the local question of appeal by the State in criminal cases will be obtained.