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Difficulty of Obtaining Appellate Rulings on Substantive Criminal Law - Corroboration of Accomplices- Folb V. State

DIFFICULTY OF OBTAINING APPELLATE RULINGS ON SUBSTANTIVE CRIMINAL LAW—CORROBORATION OF ACCOMPLICES—*FOLB V. STATE*[1]

One of two defendants convicted by a judge without a jury of "operating a gaming table" appealed from the conviction alleging as grounds of error, first, that the "slot machines" in question were not sufficiently proven to constitute "gaming tables" under the statute, and, second, that the testimony of an accomplice was erroneously admitted without corroboration. *Held*: Conviction affirmed. The legal sufficiency of the evidence to prove that the slot machines were gaming tables may not be considered on appeal,

[1] 169 Md. 209, 181 Atl. 225 (*sub. nom.* Ruthenberg et al. v. State) (1935).

although if it could have been so considered the Court would have affirmed the trial court's conclusion that they did constitute gaming tables. While a person accused of crime should not be convicted on the uncorroborated testimony of an accomplice, yet the question of the sufficiency of the corroboration must be left to the jury or the trial court sitting as a jury. An objection that the corroboration is insufficient may be addressed to the trial court on motion for new trial but is not a ground of reversal on appeal.

The first point in the case illustrates a peculiar thing about the Maryland legal system, i. e., the difficulty of obtaining appellate rulings on points of substantive criminal law. In common law jurisdictions generally there are five ways in which an appellate court may be called on to enunciate the law concerning a specific problem of human guilt of crime. The first is in reviewing a trial court's action in ruling on a demurrer to the indictment. In the course of deciding whether an indictment is legally sufficient, the appellate court may have to announce specific rules concerning the interpretation of penal statutes or the application of criminal defences. This device applies in Maryland and is the one through which most of our scanty supply of appellate criminal law has been promulgated. However, as time passes, indictments become more and more stereotyped and prosecutors more astute, with the result that little appellate law comes through this route anymore.

The second is by ruling on the relevancy of evidence which is offered by the State and admitted or which is offered by the defence and excluded. In the course of ruling on the relevancy (as distinguished from the admissibility) of evidence the appellate courts are frequently required to enunciate doctrine of substantive law. Thus in *Spencer v. State,*[2] the Court, in the course of ruling on the propriety of the trial Court's excluding evidence offered by the traverser as to his mental condition, laid down the rule of law as to the "irresistible impulse" defense in Maryland and rejected that defense as part of our criminal law. Although this method of securing rulings exists in Maryland, yet it is one not very likely to be productive of much appellate law.

The third way is by ruling on the correctness of the instructions either given by the trial court to the jury concerning the substantive law of the case or refused to be given. Whenever a trial judge either instructs the jury by granting an instruction asked by the State or refuses one

[2] 69 Md. 28, 13 Atl. 809 (1888).

requested by the defense a potential ground of error exists in the common law system generally. In various other States the trial judge must grant prayers in criminal cases and the refusal of a proper one is as much error as the granting of an improper one. But in Maryland, because of our Constitutional provision[3] that the jury shall be the judges of the law, the Court of Appeals has ruled that the trial judge need not grant prayers unless he wishes to, in which event he must grant correct ones, and advise the jury that they are not bound by his instructions.[4] As a result of prayers not being compulsory in Maryland few trial judges do grant them. Whether this is because the average judge feels foolish in telling a jury the law and then telling them (as he must) that they need not follow it, or because he is jealous of his score of affirmances and reversals in the Court of Appeals and "plays safe" and avoids a reversal on a technicality by saying nothing, is a matter which cannot be determined. The fact is that the granting of prayers on the law in criminal cases is said to be rare. So it results that, in Maryland, this avenue of presenting questions of substantive criminal law to the Court of Appeals is usually not available.

The fourth way is one which is totally non-existent in Maryland. Whereas in various other States appeals may be taken on the ground that the evidence is legally insufficient to support the conviction, this may not be done in Maryland as the *Folb* case pointed out and as numerous earlier cases also have. In other States when a court either affirms or reverses on the point of the legal sufficiency of the evidence it has an opportunity to enunciate the points of substantive law which may be involved in the case. No such rulings are possible in Maryland, save by way of dictum, as happened in the *Folb* case.

The fifth way is one but little productive of appellate law. Occasionally in civil cases not involving as such the question of guilt or innocence of crime the solution of the legal issue may involve the court's stating some proposition of criminal law which happens to be involved.[5]

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[3] Md. Const., Art. XV, Sec. 5.

[4] For a recent and leading case on prayers in criminal cases in Maryland, see Vogel v. State, 163 Md. 267, 162 Atl. 706 (1932), which refers to many of the earlier Maryland cases in point.

[5] Such a case was Stansbury v. Luttrell, 152 Md. 553, 137 Atl. 339 (1927), where the Court of Appeals had occasion to discuss the substantive law of larceny in the course of ruling on the matter of reasonable and probable cause in an action for malicious prosecution.

Because of the lack of appellate review over the sufficiency of the evidence and the rarity of granted instructions there are relatively few Maryland cases on points of substantive criminal law. Frequently it is impossible to give an answer to a question of the interpretation of a Maryland criminal statute or that as to which of two conflicting views concerning the common law of crimes Maryland would follow. If predictability as to the law is a desideratum then our system would seem to be deficient on the criminal side. To be sure, by the same token which deprives us of the normal quantity of appellate law, our system functions happily because there is less chance of a guilty criminal securing a reversal of his conviction on an abstruse technicality. The system has both its merits and demerits.

In the *Folb* case the Court of Appeals apparently felt that it was desirable to settle the question of whether slot machines constitute gaming tables under the statute. For lack of a more appropriate device they were forced to use that of a dictum. In view of the fact that the application of the gaming statute to slot machines is largely a matter of "jury law" anyhow, it is possible that the problem is now as well settled as by any other method. Juries probably would care little whether the court's statement were dictum or decision, assuming that they wished at all to follow the ruling of the Court of Appeals. But query, would it be reversible error for a prosecuting attorney, in a future case, to read the Court's dictum in the *Folb* case to the jury in an effort to convince them that the law was that slot machines are gaming tables? Would the fact that the opinion nowhere contains a description of the particular type of "slot machine" and its functioning preclude the State's Attorney from relying on the dictum in future cases in order to persuade the jury?

Given administrative and judicial co-operation, it is possible to secure appellate rulings on such dubious points of substantive criminal law. If it were desirable say, to find out whether a given type of slot machine constituted a gaming table, the State's Attorney, in drafting his indictment, could therein describe the operation of the machine with great particularity. Thus the question of the legality of the slot machine could be presented on demurrer to the indictment. Thus either on the State's appeal from the sustaining of the demurrer or on the traverser's appeal from its being overruled the Court of Appeals would have an opportunity to rule on the point. As matters stand, State's Attorneys tend to put as little in their indictments

as is required, in order that they may be demurrer-proof. This is commendable because it avoids reversals on technicalities. But if an appellate ruling is desirable on a minor point, one way of getting it is to invite demurrer by adding detail touching on the point.

The other way would be for the trial judge to give an advisory instruction unfavorable to the defendant and holding that the slot machine constituted a gaming table. Thus, assuming a jury conviction, the defendant could similarly appeal and the question would be squarely presented to the Court of Appeals. Normally trial judges tend to refrain from such instructions and either give none or ones about which there is no doubt. This too is normally commendable for avoiding technical reversals. But it would seem that an occasional technical reversal could well be risked to the end that the matter at stake could be settled by an appellate ruling.

The second point in the *Folb* case also involves the ramifications of our rule that the jury shall be judges of both the law and facts. Defendant claimed a reversal for alleged error in admitting the uncorroborated testimony of an accomplice. The general rule is that the traverser should not be convicted on the uncorroborated testimony of an accomplice. Theoretically, Maryland has the rule.[6] Practically it has not, except insofar as juries do as they ought or trial judges grant new trials because they follow the rule strictly. The rule is of no value in an appeal of a criminal case in Maryland.

This is because the rule differs from the other rules of evidence in the mechanical method of its application. Whereas most of the other rules function in terms of exclusion, so that error therein may be availed of on appeal (even in Maryland) the rule of corroboration of accomplices requires for its effectual application two procedural devices lacking in the Maryland criminal procedure. One is compulsory instructions to the jury. The other is appellate review of the sufficiency of the evidence.

The usual practice in other States in applying this rule of corroboration is for the trial judge to grant (as he elsewhere must) a prayer that the jury shall not convict on the uncorroborated testimony of an accomplice. Then if they do convict, the appellate court can review the question of

[6] For a good discussion of the rule in Maryland, see Luery v. State, 116 Md. 284, 292-5, 81 Atl. 685 (1911). Other Maryland cases in point are: Lanasa v. State, 109 Md. 602, 71 Atl. 1058 (1909); Garland v. State, 112 Md. 83, 75 Atl. 631 (1910); Meno v. State, 117 Md. 435, 83 Atl. 759 (1912); and Wolf v. State, 143 Md. 489, 122 Atl. 641 (1923).

whether there was any corroboration, although it is usually stated that the amount thereof is for the jury. But in Maryland the trial judge cannot be compelled to grant the prayer and the appellate court, as pointed out in the *Folb* case, cannot review the question of whether there was even any corroboration. As a result we practically do not have the rule, short of the jury's or the trial judge's willingness to enforce it.

In the *Folb* case the defendant apparently contended that the corroboration rule should also be enforced by *excluding* the evidence if it were not corroborated or (inferentially) by ordering the striking out of it if admitted on condition of later corroboration which did not materialize. But for the appellate court to have done that would have been for it to have gone into the sufficiency of the evidence, which it cannot do. So it rejected the defendant's contention along these lines.

Thus it is that in Maryland the only significance of the rule of corroboration is that the traverser's counsel can harangue the jury not to convict without corroboration and he can move the trial judge to grant a new trial if they seem to do so. But if both jury and trial judge turn him down that is the end of it. It is *possible* for a defendant to be convicted on the uncorroborated testimony of an accomplice because of our belief that the jurors, as the judges of the law, must have found legally sufficient corroboration.