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FURTHER ON APPEALS BY THE STATE IN CRIMINAL CASES

*State v. Rosen*¹

Charles Rosen and others were indicted for selling bets on horse races and Meyer Seidel and another were indicted for conducting a lottery. The cases were consolidated and the defendants elected to be tried together before the court without a jury. Later a search and seizure warrant was applied for against all of the parties, and a judge of the Supreme Bench of Baltimore City found probable cause to exist and ordered the warrant to issue. Trial was commenced and one witness was placed upon the stand by the State. The defendants thereupon moved to quash the search and seizure warrant, and the court, after holding the matter *sub curia* for several days, quashed the warrant because as found by him it did not show probable cause. The State thereupon informed the court that they were powerless to proceed. The parties were found not guilty and the State appealed.

The Court of Appeals dismissed the appeal upon the ground that the defendants had once been acquitted and discharged upon a valid indictment, and therefore no right existed in the State to take an appeal.

The right of the State to appeal was commented upon in this REVIEW in a note² to the case of *State v. Mariana*.³ In the *Mariana* case the question of double jeopardy was never raised and was not commented upon at all by the Court of Appeals.⁴ The instant case is noted because the *Mariana* case was cited by the State as authority for appeal when the question of double jeopardy was involved.

The State also cited *State v. King*⁵ and the line of cases holding that the State may appeal from an adverse ruling upon a demurrer to the indictment or when the case is decided on the pleadings alone.⁶ The Court of Appeals distinguished these cases by saying, "The appellee had not been tried upon the indictment," and said of the *Mariana*

¹ 28 A. (2d) 829 (Md., 1942).

² *Appeals by the State in Criminal Cases* (1940) 4 Md. L. Rev. 303.

³ 174 Md. 85, 197 A. 620 (1938).

⁴ See *op. cit. supra*, n. 2, 308.

⁵ 124 Md. 491, 92 A. 1041 (1915).

⁶ *State v. Buchanan, et al.*, 5 H. & J. 317, 500, 9 Am. Dec. 534 (1821); *State v. McNally and Myers*, 55 Md. 559 (1880); *State v. Camper*, 91 Md. 672, 47 A. 1027 (1900); *State v. Tag*, 100 Md. 588, 60 A. 465 (1905); *State v. King*, 124 Md. 491, 92 A. 1041 (1915); *State v. Gregg*, 163 Md. 353, 163 A. 119 (1932); *State v. Scarborough*, 55 Md. 345 (1881).

case, ". . . in the latter case, there was no statute or precedent in Maryland approving the practice of suppressing evidence prior to the trial."⁷

In the instant case the State contended that there had been no trial upon the merits and that the appellees had not been placed in jeopardy, but the Court held that the appellees had been placed in jeopardy, stating as follows:

"But this we think is contrary to the fact, because the record definitely shows that before the court acted upon the motion to quash the warrant, Lt. Emerson was placed upon the witness stand by the State, who examined him and then there was offered the application for the warrant and the warrant in evidence. It would be novel indeed for the State to proceed thus with the trial of the case with the motion pending, for the burden was on the appellees and not upon the State to offer some facts to get rid of the warrant. We think, therefore, that it cannot be said that appellees were not in jeopardy and the appeals must be dismissed, because the trial had actually started when the ruling was made."⁸

The Court of Appeals thus held that a defendant has been placed in jeopardy once the trial has started, and a witness for the State has been placed upon the stand. This would seem to be in accord with general authority on the meaning of jeopardy⁹ and would be in line with earlier decisions of this Court.¹⁰ However, it is unfortunate that the Court did not make further comment upon the *Mariana* case, for if the defendants in the instant case had been placed in jeopardy and the State was barred from taking an appeal, it would seem that the defendant in the *Mariana* case had also been placed in jeopardy and the State should have been barred from taking an appeal in that case. The Court in commenting upon the *Mariana* case might well have distinguished it upon the basis that the right of the

⁷ 28 A. (2d) 829, 830.

⁸ 28 A. (2d) 829-830.

⁹ It is not the purpose of this note to go into the question of what constitutes jeopardy in Maryland. Some aspects of jeopardy were discussed in a note to *Crawford v. State*, 174 Md. 175, 197 A. 866 (1938), *Effect of Acquittal for Assault on Trial for Murder When Victim Subsequently Dies* (1939) 3 Md. L. Rev. 184.

¹⁰ *State v. Shields*, 49 Md. 301 (1878); *Bell v. State*, 57 Md. 108, 120 (1881); *Cochran v. State*, 119 Md. 539, 87 A. 400 (1913); *State v. King*, 124 Md. 491, 496, 92 A. 1041, 1043 (1915); and *Berkenfeld v. State*, 104 Md. 253, 65 A. 1 (1906).

appellee in that case to have the appeal dismissed had never been raised by the appellee, and the Court was not required to raise it upon its own motion. Unless some comment is made by the Court of Appeals upon the *Mariana* case it may well be seized upon by the State as it was in the instant case as authority for allowing the State to take an appeal after a verdict of not guilty has been entered.

The Court dismisses the *Mariana* case from consideration by stating that there was no statute or precedent in Maryland approving the lower court's action in suppressing evidence before trial, but in the *Mariana* case the State went to trial, which trial resulted in a verdict for the defendant and there seems to be very little doubt in view of the Court's decision in the instant case and of its prior decisions that it would have held the defendant had been placed in jeopardy in the *Mariana* case if the question had been presented. To remove the doubt and uncertainty created by the *Mariana* case the Court should have used the best basis for saying that it was not authority for permitting an appeal by the State; namely, that a case is only authority under the doctrine of *stare decisis* for what it specifically decides, and is not authority for any question which is not presented.

If appeal by the State is to be allowed whenever there is no statute or precedent in Maryland approving the lower court's action, then the State could appeal in any criminal case in which the lower court misinterpreted the law. There is also no statute or precedent allowing a *nisi prius* court to grant a motion for a directed verdict in criminal cases and if this should be done in some future case the State might well appeal, citing the *Mariana* case again as authority.¹¹

The Court's decision will be met with general approval, and it can be taken as established Maryland law on the basis of this decision that once the defendant has been placed in jeopardy and been acquitted and discharged upon a valid indictment, the State has no right to appeal. It is

¹¹ See, for a discussion of this point, *op. cit. supra*, n. 2, 310-311, wherein speculation is indulged concerning whether the State could appeal if a trial court granted a motion for directed verdict of not guilty in a criminal case in Maryland. A further query could be here stated. Suppose a trial court grants defendant's motion for directed verdict and the State does not attempt to appeal, but, rather, later attempts to re-try defendant on the same indictment. May defendant plead jeopardy, or will the action in the first trial be regarded as amounting merely to a mistrial, in view of the fact that Maryland law does not recognize the existence of a directed verdict of not guilty in a criminal case?

only unfortunate that the question of double jeopardy was not more thoroughly discussed in the opinion. It would seem that the *Mariana* case will probably fall within the class of cases including those of *State v. Williams*,¹² and *State v. Sutton*¹³ which, while not endangering the rights of defendants in criminal cases, still leave the law in a state of sufficient doubt that the defendant in some future case may again be forced to defend an appeal taken by the State.

¹² 5 Md. 82 (1853).

¹³ 4 Gill 494 (Md., 1846).