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Should Reversal of Criminal Conviction Because of Insufficient Evidence, Under the New Criminal Rules, be with or without a New Trial? - Lambert v. State

SHOULD REVERSAL OF CRIMINAL CONVICTION BECAUSE OF INSUFFICIENT EVIDENCE, UNDER THE NEW CRIMINAL RULES, BE WITH OR WITHOUT A NEW TRIAL?*

Lambert v. State[1]

This case marks the first time since the adoption of the new Criminal Rules of Practice and Procedure[2] that the Court of Appeals has reversed a criminal conviction where the appeal was based upon an alleged insufficiency of the evidence legally to sustain the conviction.[3] Authority to review the sufficiency of the evidence was based upon Rule 7 (c) of the new rules of criminal practice and procedure which relates to non-jury trials and provides that "Upon appeal the Court of Appeals may review upon both the law and the evidence to determine whether in law the evidence is sufficient to sustain the conviction, but the verdict of the trial court shall not be set aside on the evidence unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses."[4]

Appellants Lambert, Carr, Salfner and Alder were tried jointly by the Circuit Court for Baltimore County, sitting without a jury, on charges of violating the gambling laws. The charges were contained in two informations, one alleging that appellants had engaged in bookmaking on October 25, 1949, and the other alleging that appellants had engaged in the same activities on October 26, 1949. All the

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* See Editorial Supplement to this casenote, immediately following it.

[1] 75 A. 2d 327 (Md., 1950).

[2] Promulgated by the Court of Appeals on December 6th, 1949. Amended on February 15, 1951.

[3] See editorial, *Criminal Procedure Reform Achieved in Maryland*, 11 Md. L. Rev. 319-324 (1950). For a discussion of the law in Maryland before the adoption of the new rules, see note, *Difficulty of Obtaining Appellate Rulings on Substantive Criminal Law — Corroboration of Accomplices*, 1 Md. L. Rev. 175 (1937).

[4] Effective January 1st, 1950.

testimony offered at the trial was by witnesses for the prosecution. Officers, who had been sent to observe the premises at 5912 Liberty Road where the bookmaking allegedly had been carried on by appellants testified that they had seen Lambert entering the premises sometime after 11:30 every weekday morning for a week prior to October 26. He was sometimes alone and on other occasions with another man who was not identified. The officers did not see anyone enter 5912 Liberty Road on the two Sundays in October in which they had observed the premises.

Two telephone numbers, one of which was unpublished, were listed, in names other than those of the appellants, for 5912 Liberty Road. Another phone listed for 5908 Liberty Road had connections, not made by the telephone company, leading to the basement of 5912. On October 25, the day before the premises were raided, one of the officers called the published telephone number listed for 5912 Liberty Road. After receiving several busy signals, he dialed the unpublished number and asked for "Froggy." Someone answering to that name came to the phone and the officer stated, "This is Lawrence." "Froggy" asked, "Where did you get this number from?" The officer replied that the other line was busy, and "Froggy" stated that he did not take any bets on that telephone. The officer then called the number listed for 5908 Liberty Road. The same man's voice answered and said he was "Froggy." The officer said "This is Lawrence again." When the officer attempted to make a bet, "Froggy" became suspicious, saying that the caller's voice did not sound like Lawrence. "Froggy" thereupon told his caller to "Go to hell with that bet" and hung up.

Having obtained a search warrant,[5] the officers on the afternoon of the 26th went to the premises, a two-story frame dwelling. The officers knocked on the back door and receiving no answer, they broke the glass and entered into the first floor. Finding no one on that floor or on the second, they attempted to enter the cellar, but were blocked by a reinforced door, which they were unable to dislodge. They therefore went out to the rear of the premises and attempted to enter through the basement door, which was

[5] The defendants attacked the validity of the search warrant on several grounds. The Court of Appeals sustained the Trial Court's denial of defendants' motion to quash holding that the defendants had no standing to complain as they were not shown to have had any lawful right to be on the premises.

also reinforced. As they did so, they noticed small pieces of paper coming out of the chimney.

When the officers finally broke into the basement, the four appellants were observed sitting around a table playing cards. The officers opened an oil burner and removed some charred pieces of paper, which were later found by the Federal Bureau of Investigation to contain notations of bets on races. The two telephones listed for 5912 Liberty Road were concealed between the plyboard and the inner wall, but the phone listed for 5908 was visible, and all around a table were telephone plugs which were connected to it. The officers also found an adding machine and about two dozen pencils on the premises.

With this evidence before it, the trial court returned verdicts of guilty against all appellants on both informations. In reviewing the sufficiency of the evidence under the authority of Rule 7 (c),[6] the Court of Appeals emphasized that the rule "was not intended, and will not be construed, to permit us to reverse judgments merely because our conclusion on the record is different from that of the trial judge. It is only intended to prevent manifest error."[7]

After reviewing the evidence, the Court of Appeals affirmed the conviction of all the appellants for engaging in bookmaking on October 26th. The Court also affirmed the conviction of appellant Lambert for the same offense on the 25th, pointing out that, although Lambert had not actually been seen entering the premises on that date, he had been observed entering the premises every weekday for a week prior to the 25th. Moreover, the officer who talked to someone there on the 25th testified that he had talked to Lambert. A fortiori, the man identified over the phone as "Froggy" was in fact Lambert.

As to Appellants Carr, Salfner, and Alder, however, the Court could find no evidence in the record to connect these appellants with the premises on the 25th. They were never identified as having been at or near the premises at any time before the 26th. The evidence was therefore held to have been insufficient to sustain the conviction of the three appellants for the offense charged on the 25th, and the judgment of the lower court finding them guilty on that date was revsrsed.

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[6] *Supra*, n. 4.

[7] *Supra*, n. 1, 332. In accord, see Edwards v. State, 81 A. 2d 631, 639 (Md., 1951), and opinion on motion for reargument, 83 A. 2d 578 (1951); Lee v. State, 84 A. 2d 63 (Md., 1951); Shelton v. State, 84 A. 2d 76 (Md., 1951); and Diggins v. State, 84 A. 2d 845 (Md., 1951).

In so reversing the convictions of three of the four appellants upon one of the informations, the Court reversed *without granting new trials.* There is no explanation in the opinion for this decision. Because the determination whether or not to grant a new trial when reversing a criminal conviction for insufficient evidence is a novel one in Maryland criminal procedure, it might be well to briefly survey the prevailing practices in other jurisdictions which have long since had some form of appellate review of the sufficiency of the evidence in criminal cases.[8]

While in England, the Court of Criminal Appeal has no power to order a new trial on reversal of a criminal conviction, in this country according to the almost universally prevailing practice, appellate courts do possess such power.[9] Most applicable statutes and Rules of Court either expressly leave the matter up to the discretion of the appellate tribunal or are so interpreted as to confer such discretion upon the court.[10] A search of the leading works on criminal law and procedure reveals that there has been a surprisingly small amount of discussion devoted by most writers to this subject. Perhaps this is in some measure attributable to the fact that in a large number of the cases, like in the *Lambert* case,[11] no reasons are assigned for the decision of the appellate court to grant or not to grant a new trial when reversing for insufficiency,[12] or if such reasons are assigned, they are not always clearly articulated.

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[8] No attempt has been made to make an individual state by state analysis. Rather, a brief survey of the generally prevailing practices throughout the country has been attempted, with particular emphasis upon the federal procedure, see *infra.*

[9] "The power to order a new trial on reversal is in line with the usual American practice. The Court of Criminal Appeal in England has no such power, however. The trial court cannot grant a new trial there either. In many cases where there is a reversal and remand for a second trial the defendant is never brought to trial. The power to order such a new trial seems necessary, however, to avoid the discharge of guilty defendants who were tried unfairly. But the whole administration of the criminal law ought to be improved so that no more than one trial is necessary. There is much to be said for the English view that to allow a second trial is to harass the defendant."
ORFIELD, CRIMINAL APPEALS IN AMERICA (1939), 278-279.

[10] See state statutes listed on page 1305 of the Commentary to the AMERICAN LAW INSTITUTE, Model Code of Criminal Procedure (1930). Section 463 of the Model Code provides:
"When the judgment is reversed, the appellate court shall either order that the defendant be discharged from the cause or, if it thinks proper, grant a new trial."

[11] *Supra*, n. 1.

[12] The writer wishes to emphasize that the only ground for reversal treated within the scope of this note is that of insufficient evidence to sustain the verdict. Obviously, when an appellate court reverses on some other ground, such as faulty indictment, or erroneous admission of evidence introduced

Typical among the reasons assigned for a determination *not* to grant a new trial,[13] when, upon occasion the courts do assign their reasons, are that it did not appear that any more witnesses would be available for the state in a new trial,[14] because the state had apparently fully developed its case in the trial court,[15] because it appeared from the record that the state could not make a better case on retrial,[16] because the state had conceded on appeal that the preponderance of evidence was in the defendant's favor,[17] or because it would be "unjust" to subject the defendant to another trial after the evidence had been found insufficient to sustain a conviction in either of two previous trials.[18]

On the other hand, new trials *have* been granted[19] because the appellate tribunal thought that there was a possibility that upon a new trial further corroboration might be introduced when such corroboration was held to have been lacking at the first trial,[20] because "the justice of the case demands" that a new trial be granted,[21] because it was felt that the facts were capable of being more fully developed at a subsequent trial both by the state and by the defense,[22] or because of the inconclusive character of the evidence in the trial court.[23]

With standards as general as these, it is not surprising that differences in practice are to be found throughout the country. For example, it has been held in one jurisdiction that if there is not a scintilla of evidence in the record to incriminate the appellant, the court must reverse without a new trial,[24] while in another jurisdiction although the evidence "wholly failed" to connect the defendant with the crime, the court nevertheless upon reversal remanded for new trial "so that if the prosecutor has other evidence

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by the prosecution or exclusion of evidence introduced by the defense, different considerations apply in determining whether or not to grant a new trial than in the case where the reversal is solely on the ground of insufficiency of the evidence.

[13] See cases cited in 24 C. J. S., Criminal Law, Sec. 1950, especially n. 11, on p. 1115, and 17 C. J., Criminal Law, Sec. 3758, especially n. 45, on p. 370.

[14] People v. Buxton, 362 Ill. 157, 199 N. E. 102 (1935).

[15] Sutherland v. Commonwealth, 171 Va. 485, 198 S. E. 452 (1938).

[16] State v. DeMoss, 338 Mo. 719, 92 S. W. 2d 112 (1936).

[17] State v. Pennington, 28 N. M. 543, 215 P. 815 (1923).

[18] People v. Rubin, 366 Ill. 195, 7 N. E. 2d 890 (1937).

[19] See cases cited in 24 C. J. S., Criminal Law, Sec. 1950, especially n. 99, on p. 1125, and in 17 C. J., Criminal Law, Sec. 3759, especially n. 82, on p. 372.

[20] People v. Romano, 300 N. Y. S. 366, 253 App. Div. 724, *aff'd.* 277 N. Y. 619, 14 N. E. 2d 191 (1937).

[21] State v. Prinslow, 140 Wisc. 131, 121 N. W. 637 (1909).

[22] State v. Hicks, 326 Mo. 1056, 33 S. W. 2d 923 (1930).

[23] Stephens v. State, 140 Fla. 163, 191 So. 294 (1939).

[24] Tool v. State, 21 Ala. App. 233, 107 So. 36 (1926).

he may feel justified in proceeding with another trial."[25] Some courts appear to favor the granting of a new trial after reversal except in the most extreme cases,[26] while others tend contrawise to grant new trials only when it is obvious from the record that a better case can be made by the state on retrial.[27] In at least one jurisdiction, the decision whether to grant a new trial is left to the discretion of the *trial* court instead of the appellate court.[28]

Even within the framework of the Federal judiciary, a marked diversity in procedure was, at least until recently, to be found.[29] In the Ninth Circuit, in the case of *Karn v. United States*,[30] it had been held that once a defendant in a criminal proceeding properly moved for a directed verdict, he acquired a "vested right" to acquittal, if the appellate court did, in fact, find that the motion should have been granted.[31] In reversing under such circumstances, it was held that the appellate court had no power to order a new trial. The Court reasoned thusly:

> "When the motion for a directed verdict was made, the trial judge, as a matter of law, should have instructed the jury to render a verdict of acquittal. The right of appellant to a verdict of acquittal *fully matured* when he made his motion. To remand the case with directions to grant new trial would, in our judgment, be a serious invasion of *rights which accrued to him* in the lower court and would strip away, without just cause, the real effectiveness of a reversal on appeal in cases of this kind."[32]

On the other hand cases in two other circuits had for various reasons held that upon reversal, the appellate court, at least in the case of trial by jury, had no course but to direct a new trial.[33]

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[25] State v. Rawson, 259 S. W. 421, 422 (Mo., 1924).

[26] State v. Phillips, 134 S. C. 226, 132 S. E. 610 (1926); State v. Klugh, 130 S. C. 160, 125 S. E. 922 (1924).

[27] Atkins v. State, 27 Ala. App. 212, 169 So. 330 (1936); Sutherland v. Commonwealth, *supra*, n. 15; State v. DeMoss, *supra*, n. 16.

[28] State v. Bates, 63 Idaho 119, 117 P. 2d 281 (1941).

[29] See Annotation, *Power of Federal Appellate Court to Grant New Trial Upon Reversal of Conviction*, in 94 L. Ed. 342.

[30] 158 F. 2d 568 (9th Cir., 1946).

[31] This has been termed a "novel idea" in note, *United States Court of Appeals May Reverse With Orders for New Trial Even Though Error Consisted in Refusal of District Court to Grant Motion for Judgment of Acquittal*, 38 Geo. L. J. 680 (1950).

[32] *Supra*, n. 30, 573. (Italics supplied.)

[33] Tatcher v. United States, 107 F. 2d 316 (3rd Cir., 1939); United States v. Ward, 168 F. 2d 226 (3rd Cir., 1948); Collenger v. United States, 50 F. 2d 345 (7th Cir., 1931).

This conflict has apparently been resolved in the recent case of *Bryan v. United States.*[34] In this the United States Court of Appeals for the Fifth Circuit had reversed a conviction for insufficient evidence and ordered a new trial[35] The defendant contended that Rule 29 (a) of the Federal Rules of Criminal Procedure[36] required that the court direct judgment of acquittal rather than grant a new trial. The Supreme Court held that the decision whether or not to grant a new trial was a matter for the discretion of the Courts of Appeals. Rule 29 (a) was held to have reference only to the conduct of the trial in the District Court, and therefore did not abrogate the authority of the appellate tribunals to grant a new trial under the applicable statute,[37] which provided that:

> "The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under circumstances."[38]

It seems to the writer that there is a good deal to be said for the practice prevailing in some jurisdictions of granting new trials only in the most extreme cases when reversing for insufficiency. It is true that there is no double jeopardy in the *constitutional* sense when a new trial is granted,[39] but it is also true that the defendant is once again subject to penal sanctions, although, had the trial court properly granted his request for a directed verdict, he would be immune from further prosecution. In other words, had the

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[34] 338 U. S. 552 (1950).

[35] 175 F. 2d 223 (5th Cir., 1949).

[36] *"Motion For Judgment of Acquittal.* Motions for directed verdict are abolished and motions for judgment of acquittal shall be used in their place. The court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses. If a defendant's motion for judgment of acquittal at the close of the evidence offered by the government is not granted, the defendant may offer evidence without having reserved the right."

[37] 28 U. S. C. A., Sec. 2106.

[38] Black and Reed, JJ., in a separate opinion in the Bryan case, *supra*, n. 34, 560, took the position that Rule 29(a) required the Appellate Court, upon reversal, to remand to the district court, the latter having discretion to either dismiss or order a new trial.

[39] Trono v. United States, 199 U. S. 521 (1905); Francis v. Resweber, 329 U. S. 459 (1947).

trial court done its job properly (as the appellate court now says it should have done) the defendant would be free and not subject to retrial.

A second reason for the desirability of adopting a policy of reluctance in granting new trials when reversing a criminal conviction for insufficient evidence lies in the desideratum of having as few second or third prosecutions for the same offense as possible. Procedural reforms in criminal law in recent years have constantly sought to attain final disposition of the trial at the earliest possible stage in the proceedings.[40] The growing practice of granting judgments N. O. V. is a leading example. The administration of justice can best be served in the great majority of cases by limiting the proceedings to a single trial and a single appeal.

Moreover, it seems unfair, as some courts have apparently held, to rest the decision whether or not to remand or to dismiss with the prosecutor. Even though the prosecutor may feel that he will be able to muster more evidence at a retrial, the appellate court should not allow the prosecutor's wishes to be the controlling consideration. It should be remembered that the accused under our conceptions of justice and fair play was entitled to a final and speedy determination of his guilt or innocence, and the prosecutor should have introduced all available evidence at the first trial. To the general policy of not granting new trials except in the most extreme cases, there is one important qualification. That is the situation where the appellate court, in reversing for insufficiency, is in effect setting forth a new rule of law. Thus in the guise of passing upon the sufficiency of the evidence to sustain the conviction, the court may in fact be asked to determine a rule of law upon which there was substantial disagreement at the lower level. In such a case, it would appear to be perfectly proper for the appellate court to consider whether or not the prosecution can produce more evidence at a subsequent trial. If it believes that the prosecution can produce such additional evidence, and there are no special circumstances making it unjust to subject the defendant to further prosecution, a new trial should be granted.

Under the new Rules of Criminal Practice and Procedure, the Court of Appeals will be faced with many novel situations which can only be worked out on a case to case basis. Not the least of these is the determination whether

[40] See ORFIELD, *loc. cit.*, *supra*, n. 9.

or not to grant a new trial when reversing a criminal conviction for insufficient evidence. The writer feels that the ends of justice can best be served in most instances by refusing to remand for a new trial except in the most extreme cases. In the interest of developing a uniform policy, the Court should always attempt to clearly articulate its reasons for granting or refusing to grant a new trial. In the face of wide diversity in procedures in other jurisdictions, it would be well for the Court of Appeals to give serious consideration to this problem.

Editorial Supplement to Lambert v. State

Since the above casenote was written the Court of Appeals has decided two cases which have some bearing on the subject. The first of these was *Wright v. State*.[41] This case involved an indictment for bigamy, charging that defendant married B in 1947, and while still legally married to her, had married C in 1948. Defendant produced a marriage certificate showing he was married to A in Florida in 1941, and there was no evidence to show this marriage had been terminated. The lower court refused to advise an acquittal, but submitted the case to the jury, with advisory instructions, which returned a verdict of guilty. The Court of Appeals reversed and granted a new trial, holding that the proof of the Florida marriage, without proof of its termination, was a good defense. The Court of Appeals pointed out that the case below was tried on November 30th, 1950, at a time when an instruction to the jury as to legal insufficiency of evidence could be advisory merely.[42] The Court concluded that the evidence was not legally sufficient to convict, and that the trial judge should have so instructed the jury. The case does not seem to be of much help, as it is uncertain from the opinion whether the Court of Appeals, having found that the evidence was insufficient, granted the new trial because that was its only course, in light of the fact that such an instruction could have been advisory merely at the time the case was tried below. It is noteworthy that the opinion gives no other reason for awarding a new trial.

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[41] 81 A. 2d 602 (Md., 1951).

[42] *Ibid*, 605-6. The Court also pointed out that the constitutional amendment which changed this rule became effective December 1, 1950, and that the Court subsequently adopted Rule 5A, permitting the lower court to give a mandatory instruction of not guilty.

The second case was *Estep v. State,*[43] in which the Court of Appeals, for the first time, gives a reason for granting a new trial. In that case, by a 3 to 2 decision, they reversed a criminal conviction *with* a new trial. The case was tried below without a jury, and the majority opinion said the evidence was legally insufficient to sustain a conviction. Although there was proof that a pregnant woman had come to defendant to procure an abortion (for which she paid him $150.) and that he had given her "a shot in the arm", there was no evidence produced by the State as to what drug was used therefor. Another physician, to whom she went subsequently, testified that in his opinion, there was no drug one dose of which would produce such a result. The majority and minority opinions differed on the interpretation of this physican's testimony:

The majority opinion concluded:

> "Since, however, the sole reason for reversal is the insufficiency of evidence, and this may be supplied by the State, we think the appellant should not now be allowed to go free without giving an opportunity for its production. We will therefore remand the case for a new trial. Wright v. State, ... Md. ...., 81 A. 2d 602."

The Court of Appeals in this case seems to be laying down the rule that it will award a new trial, where it is apparent (from the record) that the State may be able to produce evidence sufficient to sustain a conviction. This appears to be along the lines of the cases cited in notes 20 and 22 of the casenote, although the majority opinion cited only *Wright v. State* on this point, and made no attempt to indicate an overall policy governing the awarding of new trials.

Thus, for non-jury cases we have the contrast of the *Lambert* and the *Estep* cases, the one without, the other with a new trial, explained only on the basis of the record's showing a possibility of mustering more evidence.

For jury cases we have hardly a hint, inasmuch as the *Wright* case was tried during the period of the original Criminal Rules when the directed verdict was only advisory, and the case still went to the jury, which might always disregard the instruction, even on a new trial with the instruction granted.

Perhaps now that the directed verdict is mandatory, the defendant is the more entitled to insist that the case is

[43] 86 A. 2d 470 (Md., 1951).

closed. This would indicate that the answer will be in jury cases the same as in non-jury, as indicated above, i.e., that it depends on whether it is apparent that more evidence could be produced.

In this connection it should be remembered that review of the sufficiency of the evidence means two different things, i.e., of the weight of the evidence to sustain guilt of what is conceded to be a crime as a matter of law; and also the criminality of the act charged and proved by admittedly weighty evidence. In the latter case, no new trial should be indicated, in either jury or non-jury cases.

One final point is, what happens when a defendant is convicted on two or more counts, where the trial court was right in refusing a directed verdict on one, and wrong in refusing as to the other? In the comparable problem of joint defendants, with the evidence insufficient as to one only, the *Lambert* case indicates a practice of reversing as to him, and affirming as to the rest. But, if there be an appearance of added evidence, would they order a new trial as to him?

A similar problem that may cause trouble is this: Under Maryland practice a single count for "murder" allows of three possible homicide convictions, first degree murder, second degree murder, and manslaughter. If there be sufficient evidence of second, but not of first, and the court refuses to direct against first and the jury convicts of that, what may the Court of Appeals do upon reversing the first degree conviction for insufficiency?

Some states have procedures allowing the court on appeal to reverse as to the improper higher count and substitute a lower count as to which the evidence is sufficient, but it probably would take a definite rule or statute to accomplish this in Maryland, unless the present rules about insufficiency can so be interpreted.