Supplemental Opinion on Denial of Rehearing
February 9, 1987

722 S.W.2d 869

1. CRIMINAL PROCEDURE — DOUBLE JEOPARDY — FAILURE OF STATE TO PRODUCE SUFFICIENT EVIDENCE AT FIRST TRIAL. — It would be double jeopardy to try an accused again after having failed to produce sufficient evidence at the first trial.

2. CRIMINAL LAW — INSUFFICIENCY OF THE STATE'S PROOF — DISMISSAL REQUIRED. — If, under our law, an accused must be acquitted if the state's case is based on the uncorroborated testimony of an accomplice, then that determination on appeal prohibits retrial just as it does when acquittal occurs at the trial; the reason for reversal is not "error" but insufficiency of the state's proof.
3. CONSTITUTIONAL LAW — DOUBLE JEOPARDY PROHIBITED. — The Double Jeopardy Clause of the Constitution forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding.

PER CURIAM. The appellee complains that we should remand this case rather than dismiss it. It is argued that we misinterpreted two United States Supreme Court decisions when, in *Pollard* v. *State*, 264 Ark. 753, 574 S.W.2d 656 (1978), we held we were required to dismiss when we found the state's evidence insufficient due to lack of corroboration of an accomplice.

[1] The appellee says that neither *Burks* v. *United States*, 437 U.S. 1 (1978), nor *Greene* v. *Massey*, 437 U.S. 19 (1978), was a case in which the insufficiency of the evidence resulted from failure to corroborate an accomplice's testimony. *Greene* v. *Massey, supra*, applied to the states the holding of *Burks* v. *United States, supra*, that it would be double jeopardy to try an accused again after having failed to produce sufficient evidence at the first trial. The appellee argues that the rule of those cases applies only when the state has failed to produce sufficient evidence to permit the jury to find guilt beyond a reasonable doubt. The extension of that argument is that the rule does not apply when the evidence of guilt is sufficient to pass a constitutional challenge but fails only because of a statutory requirement such as that found in Ark. Stat. Ann. § 43-2116 (1977) requiring corroboration of the testimony of an accomplice.

We might agree with the appellee's technical basis for saying the Supreme Court cases could be limited to their facts. However, that would ignore the reasoning expressed in *Burks* v. *United States, supra*. There the prosecution had failed to produce sufficient evidence of the sanity of the accused as it was required to do after insanity had been raised as a defense. The court of appeals reversed on that basis and remanded for a new trial. The Supreme Court reversed on the traditional distinction between error at trial which permits retrial and failure of the prosecution's evidence which requires dismissal. Writing for a unanimous Supreme Court (Mr. Justice Blackmun not participating) Mr. Chief Justice Burger pointed out that when reversal comes about

through error, ". . . the accused has a strong interest in obtaining a fair readjudication of his guilt free from error, just as society maintains a valid concern for insuring that the guilty are punished." 437 U.S. at 15. He continued:

> The same cannot be said when a defendant's conviction has been overturned due to a failure of proof at trial, in which case the prosecution cannot complain of prejudice, for it has been given one fair opportunity to offer whatever proof it could assemble. Moreover, such an appellate reversal means that the government's case was so lacking that it should not have even been *submitted* to the jury. Since we necessarily afford absolute finality to a jury's *verdict* of acquittal—no matter how erroneous its decision—it is difficult to conceive how society has any greater interest in retrying a defendant when, on review, it is decided as a matter of law that the jury could not properly have returned a verdict of guilty. [437 U.S. at 16, footnote omitted]

[2, 3] Thus it is clear to us that if the United States Supreme Court were reviewing the case before us now it would hold, as we now hold, that if under our law an accused must be acquitted if the state's case is based on the uncorroborated testimony of an accomplice, then that determination on appeal prohibits retrial just as it does when acquittal occurs at the trial. The reason for reversal is not "error" but insufficiency of the state's proof.

> The Double Jeopardy Clause forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding. This is central to the objective of the prohibition against successive trials. The Clause does not allow "the State . . . to make repeated attempts to convict an individual for an alleged offense," since "[t]he constitutional prohibition against 'double jeopardy' was designed to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense." *Green* v. *United States*, 355 U.S. 184, 187 (1957); see *Serfass* v. *United States*, 420 U.S. 377, 387-388 (1975); *United States* v. *Jorn*, 400 U.S. 470, 479 (1971). [437 U.S. at 11]

Rehearing denied.

HICKMAN and HAYS, JJ., concur.

GLAZE, J., not participating.