double JEOPARDY and perjury

By Michael Byrne QC

Michael Byrne QC prosecuted Mr Carroll's case for the DPP at trial and then on appeal, all the way to the High Court. Like Mr Vasta, he challenges the High Court's finding that the subsequent charge of perjury was an abuse of process. However, he also supports a change to double jeopardy to allow re-charging a defendant where a superior court is satisfied that sufficient new evidence exists.

In its decision in *The Queen v Carroll*,[1] the High Court held that the doctrine of double jeopardy prevented Carroll from being charged with perjury on evidence given at his trial for murder, when he gave evidence under oath that he did not kill the deceased, Deidre Kennedy.

Deidre Kennedy was 17 months old when she was abducted, sexually abused and murdered. She had been taken from her family's home and her body, which had been grotesquely dressed in clothing, was dumped on the roof of a toilet block in a nearby park.

Raymond Carroll was charged with her murder and stood trial in the Supreme Court. During the trial he conducted a positive defence, calling and giving evidence. Part of his testimony was the assertion that "I did not kill Deidre Kennedy."

The jury convicted him of murder. On appeal, the Court of Criminal Appeal quashed the conviction on the basis of insufficient evidence and entered a verdict of acquittal.[2]

Some years later, upon the basis of significantly different and stronger evidence,[3] Carroll was charged and tried for perjury committed at his murder trial, in that he swore that he did not kill Deidre Kennedy.

He was convicted by the jury of perjury.

Again, on appeal, the conviction was quashed and, ultimately, the High Court confirmed that, because of double jeopardy, the charge of perjury was an abuse of process.

DISCUSSION

The High Court having so decided, then the law in this area will not change, absent legislative intervention by the states.

However, the rule, its rationale and its place in modern Australian society are very much matters for appropriate and informed public discussion.

The importance and implications of the decision are not reduced by the fact that the alleged perjury concerned the very focus of the previous trial. Often in criminal trials the essential evidence given by an accused person is, "I did not do it."

Indeed, the real issue, in my view, is whether the processes of courts should be about justice rather than form.

In this context, it should be appreciated that the abuse of process identified in *The Queen v Carroll* is neither one that

was always part of the law of this country, nor one that has found favour in other comparable jurisdictions.[4]

On the former point, it is worth remembering that the two alleged offences were different, both as to time and place as well as their elements. That is to say, for example, one was a killing in Ipswich and the other was knowingly giving false testimony in the Supreme Court in Brisbane.

Hence, as long ago as 1866, Erle CJ[5] confidently stated that:

> 'the only pleas known to the law founded upon a former trial are pleas of a former conviction or a former acquittal for the *same offence*.' [emphasis added]

As comparatively recently as 1946, that titan of Australian jurisprudence, Dixon J (as he then was) said:[6]

> 'The rule against double jeopardy requires for its application not only an earlier proceeding in which the defendant was exposed to the risk of a valid conviction *for the same offence* as that alleged against him in the later proceedings but that the earlier proceeding should have resulted in his discharge or acquittal.' [emphasis added][7]

When it comes to concepts such as 'abuse of process', it should be firmly borne in mind that they are double-edged. That is to say, both citizens and the community have the right to be protected from such abuses, respectively, to themselves and to its institutions.

The resultant balancing exercise of such rights was explained by the Court of Appeal in New Zealand as follows:

> 'This is an issue on which the law must strike a balance between the interests of those previously acquitted and the interest of society in having all relevant evidence before the Court when someone is prosecuted for a crime. In this field that balance generally comes down in favour of the interests of society.'[8]

In Canada, all nine justices of the Supreme Court have held that there is no legal impediment to a charge of perjury following an acquittal on the substantive charge.[9] The joint judgment of five of the justices expressed the governing principles thus:

> 'Fraud is an extrinsic, collateral act; which vitiates the most solemn proceedings of Courts of Justice. Lord Cole says it voids all judicial acts, ecclesiastical or temporal.
>
> Fraud may be set up against an accused so as to deny him the benefit of issue estoppel.
>
> There are many forms of fraud that may be invoked, one of which, and I imagine the most common, is the allegation by the Crown of perjury committed by the Defendant... If the allegation is successfully established, then the accused cannot estop the Crown from inviting the judge to re-litigate the issue.'[10]

It is, with respect, difficult to argue with the logic and innate justice contained in those conclusions.

Although differently reasoned, the same conclusions emerge from superior courts in the US.[11]

In *Stayton v Commonwealth of Virginia,*[12] the Supreme Court of Virginia held:

> 'Perjury strikes at the very heart of the administration of justice and holds the courts up to contempt when they allow the perjurer to go unpunished. The policy of the law demands that judicial proceedings shall be fair and free from fraud, that witnesses be encouraged to tell the truth, and that they be punished when they do not.'

In *People v Niles:*[13]

> 'Justice cannot be administered through a system of courts unless there can be some assurance that the finding of the court is based upon testimony truthfully given. Any rule which tends to encourage the giving of false testimony threatens the peaceable and commendable settlement of controversies by the courts. The general proposition that one can escape punishment for perjury because he succeeded in inducing a jury to credit his false testimony is supported neither by authority nor by reason. If he could, then it follows that the law encourages parties – particularly defendants in criminal cases – to perjure themselves. We must declare that the law is guilty of no such folly.'

In *People v Houseman,*[14] the Court cited with approval the following passage from *Jay v State:*[15]

> '... it is obvious that while public policy on the one hand demands an end of litigation, and hence puts forward the doctrine of *res judicata*, yet, on the other, it is manifest that every interest of public policy demands that perjury be not shielded by artificial refinements and narrow technicalities, for perjury strikes at the very administration of the law and holds the courts up to contempt if they allow the perjurer to go unwhipt of justice. In other words, while public policy on the one hand creates the doctrine of *res judicata*, >>

Is the community ... content ... to give precedence to finality of litigation over ultimate justice?

it also, on the other, requires that perjurers be brought to trial. It would be a monstrous doctrine to hold that a person could go into a court of justice and by perjured testimony secure an acquittal, and because acquitted he could not be tried for his perjury; this would be putting a premium upon perjury and allowing a scoundrel to take advantage of his own wrong. Public policy does not guarantee immunity to criminals, and that is just what we are asked to do in extending the doctrine of *res judicata* to perjury.'

The potential to uncover the injustices of wrongly obtained acquittals for offences through perjury will undoubtedly be magnified by the development of forensic tools such as DNA profiling.

The issue may then be seen as one of fundamental policy involving law and order. Is the community and, implicitly, are the governments representing the community, content for policy in this area to give precedence to finality of litigation, over ultimate justice?

CONCLUSION

A real issue in this public discussion, as with others involving perceived rights, is of the consideration of the safeguards available to prevent prosecution authorities vexatiously pursuing those acquitted by juries.

It is suggested that, as far as telephone intercepts, for example, the courts are the appropriate adjudicator as to whether a fresh prosecution for perjury should proceed.

In Canada, the courts require new evidence of some significance that was not available by the exercise of reasonable diligence at the time of the first trial.

A similar, but more far-reaching, approach is proposed in England, where the Director of Public Prosecutions determines that it is in the public interest, in light of new evidence, to apply to the High Court for the earlier acquittal to be quashed and the High Court, on the basis of the evidence, agrees.

Such checks and balances are already part of our justice system. Their extension and application to cases of perjury following acquittals is far from a novel step. ■

Notes: **1** *The Queen v Carroll* (2002) 213 CLR 635. **2** Under the Criminal Code (Qld)' if an appeal is allowed, the court must either enter a verdict of acquittal (s668E(20) or order a new trial (s669). **3** *Carroll* (2000) 115 A Crim R 164. **4** As Gleeson CJ and Hayne J recognised in *Carroll* (2002) 213 CLR 635 at 645: 'The trend of authority in other common law jurisdictions may appear to favour the conclusion that a prosecution for perjury may proceed where the perjury alleged is that in a previous criminal trial the accused swore that he or she was not guilty of the offence then charged against him or her.' **5** *R v Winsor* (1866) 10 Cox CC 327 at 329. **6** *Broome v Commonwealth* (1946) 63 CLR 583 at 599. **7** See analysis by McHugh J in *Carroll* (supra) at 673. **8** *R v Degnan* [2001]1 NZLR 280 at 291. **9** *Gardic v The Queen* [1985] 1 SCR 810. **10** *Ibid*, paras 40, 41 and 42. **11** It should be noted, however, that there is considerable conflict among US decisions and some states, such as Hawaii, have legislated to prevent subsequent prosecutions for perjury. See Hawaii Statute HRS 710-1066. **12** 195 Va. 371. **13** 300 Ill.458. **14** 44 Cal. App. (2d) 619. **15** 15 Ala. App. 255.

Michael Byrne QC *is in private practice in Brisbane and appeared for the DPP in R v Carroll at the trial, in the Court of Appeal and in the High Court.* **PHONE** *(07) 3210 1787*
EMAIL *byrneqc@qldbar.asn.au*