

Justice in Jeopardy

By Andrea Drobnik, Russell Kennedy

"The law knows, and we all know, that some fresh material may be found, which perhaps might lead to a different result, but, in the interest of peace, certainty and security, it prevents further inquiry. It is said that in doing this, the law is preferring justice to truth" – Lord Wilberforce in *The Amphyll Peerage* [1977] AC 547 at 569

The principle of double jeopardy has been described as "a golden rule, of great antiquity."¹ It is enshrined in Article 14(7) of the UN International Covenant on Civil and Political Rights and has been given a strong affirmation by the High Court of Australia.² But advances in DNA evidence and forensic science are putting this long-established principle to the test and, on 11 April this year, Australia's Attorney-General agreed to a national review of the double jeopardy principle.

Now Australia must decide how it will balance justice and truth.

What is double jeopardy?

Double jeopardy is the principle that a person should only be placed "in jeopardy" for the same alleged criminal act once. The pleas of *autrefois convict* (a former conviction) and *autrefois acquit* (a former acquittal) are common law applications of this principle, supplemented by the inherent power of the court to prevent abuse of its process.³

Why all the controversy?

In Australia, the controversy was sparked by *Carroll's case*.⁴ Despite his sworn evidence to the contrary, Raymond Carroll was found guilty of the murder of 17-month old Dierdre Kennedy. The Queensland Court of Criminal Appeal subsequently quashed his conviction.⁵

Over thirteen years later, advances in forensic science strengthened the case against Carroll, and he was charged and convicted of perjury. The case was appealed to the High Court on the issue of double jeopardy.⁶

Proceedings that effectively controvert an earlier verdict, by seeking to re-litigate an issue determined in the earlier proceedings, can constitute an abuse of process.⁷ Gleeson CJ and Hayne J held that, although the elements of murder and perjury were quite different, the issue in both trials was the same: Did Carroll kill Dierdre Kennedy? So the Court stayed the proceedings as an abuse of process.

In Queensland, Dierdre's mother led a community campaign to overturn the double jeopardy principle.⁸ In New South Wales,

Premier Bob Carr strongly advocated for reform to double jeopardy, in an election campaign that centered on law and order issues.⁹ Prime Minister John Howard has said he would back changes to allow for retrials in "exceptional circumstances."¹⁰

UK reforms

In the United Kingdom, reconsideration of double jeopardy was prompted by the racially motivated murder of Stephen Lawrence and the botched police investigation that followed.¹¹ The Criminal Justice Bill 2002 (UK) proposes to allow an acquittal to be quashed and one retrial held in the following circumstances:

- The conviction is for homicide or an offence carrying a maximum penalty of life in prison.
- The Director of Public Prosecutions consents to the re-investigation of the defendant.
- Compelling fresh evidence emerges that could not reasonably have been available at the first trial.
- There is compelling new evidence of guilt and it is in the interests of justice to quash the acquittal and order a retrial.

Why shouldn't there be an exception to the double jeopardy principle?

DNA evidence is open to abuse

Ian Barker QC has commented that DNA evidence is "a lethal weapon in the hands of unscrupulous police officers."¹² The ability of an accused to explain newly identified DNA evidence also diminishes over time, because memories fade and the opportunity to gather counter-evidence is reduced.

Increased distress at trial

The United Kingdom Law Reform Commission ("UK Commission") viewed the double jeopardy principle as safeguarding against the distress to participants of the trial process. But personal distress is not considered a sufficient reason to halt re-trials ordered by the Court of Appeal or where there is a hung jury.¹³

Less thorough investigation

Gaudron and Gummow JJ in *Carroll's case* expressed a concern that an exception for fresh evidence "whether substantial or otherwise, removes an encouragement to thorough investigation in the first instance."¹⁴ However, such an impact would be small given the community and political pressures on police and prosecutors to fully investigate and obtain convictions for serious crimes.¹⁵

Increased risk of wrongful convictions

The UK Commission also considered that the possibility of wrongful convictions resulting from an exception to double jeopardy could be increased, either because of statistical probability or because the defendant will run out of resources. However, this risk would be minimised by limiting the exception to one re-trial.¹⁶

Lack of finality

Double jeopardy is not only concerned with fairness in the individual case, but also with concepts of limited government and the liberty of the subject.¹⁷ Although Victorian Attorney-General Mr Robert Halls supports the review, he has commented that, "to abolish the rule of double jeopardy will mean that a person accused of a crime will be perpetually be considered criminal even if acquitted."¹⁸

Conclusion

The UK reforms would not have allowed a retrial in *Carroll's case* because there was no fresh evidence.¹⁹ It is also important to note that the Queensland Court of Appeal also quashed Carroll's conviction because the evidence against him was lacking in cogency and weight.

Given that the arguments in favour of abrogating double jeopardy are mainly theoretical, one may ask the question - is there really a need to jeopardise a legal principle that has served to balance the power of the State as prosecutor and the individual as accused so well for centuries?

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¹ Murphy J dissenting in *Davern v Messel* (1984) 155 CLR 21 at 62.

² *The Queen v Carroll* [2002] HCA 55 (5 December 2002).

³ "Two edges of double jeopardy reform" (February 2003) *Law Society Bulletin*, p 4.

⁴ Note 2.

⁵ *Carroll* (1985) 19 A Crim R 410.

⁶ Note 2, para 6.

⁷ Hall, S. "Truth v justice: reconsidering the rule against double jeopardy", (April 2003) *Brief*, p 8.

⁸ Shiel, F. "Double jeopardy rule faces review", (12 April 2003), *The Age*, p 14.

⁹ Parkinson, C. "Double jeopardy reform: the new evidence exception for acquittals" (2003), (unreported), p 11. This article is expected to be published in *University of New South Wales Law Journal* (December 2003) Vol 26(3).

¹⁰ Note 5, p 14.

¹¹ Note 6, p 4.

¹² Williams, D. "Trial and Trial Again?" (24 February 2003), *Time*, p 55.

¹³ Note 9, p 8.

¹⁴ Note 2, para 113.

¹⁵ Note 6, p 7.

¹⁶ Note 6, p 15.

¹⁷ Note 4, p 8.

¹⁸ Note 5, p 14.

¹⁹ Note 6, p 5.