

CROWN APPEALS AND DOUBLE JEOPARDY

The Honourable Justice Dean Mildren RFD

Introduction

1. Originally, neither the Crown nor the accused had a right to appeal against conviction or sentence. In England, judicial review of criminal trials was conducted by the Court of Crown Cases Reserved, but only if the Judge reserved a point of law. Alternatively, a convicted person could apply to the Court of King's Bench by Writ of Error. This was not a very useful procedure because it was both cumbersome and often gave no useful result. In any event, a motion for a new trial, which could be based upon misreception of evidence, misdirection by the judge or because the verdict was against the weight of the evidence, was limited to convictions for misdemeanours. All that could be done, if new facts came to light was to seek a pardon.
2. It was not until 1907 that the *Criminal Appeal Act 1907* was passed, which established the Court of Criminal Appeal in England and Wales with power to hear appeals against both conviction and by leave, against sentence. The Court of Crown Cases Reserved and the Writ of Error were both abolished.¹ There was no provision for appeals by the Crown

¹ See generally Holdsworth, *A History of Common Law*, vol 1, p 212-218.

whether against conviction or sentence, it having been established in the 17th century that there could be no new trial after an acquittal.²

3. The Australian states soon followed the English model and legislated to the permit appeals in criminal matters, by convicted persons only, to the Full Court. In the Northern Territory, the *Supreme Court Ordinance 1911* provided for appeals by leave against conviction and against sentence, initially to the Full Court of the Supreme Court of South Australia.³
4. In 1924, New South Wales became the first Australian jurisdiction to permit Crown appeals against sentence. At first it was used very sparingly. Up until 1967 it was said to have been used in that state no more than a dozen times in over 40 years.⁴ Tasmania also introduced such appeals in 1924, Queensland in 1939, Victoria in 1971, Western Australia in 1975, South Australia in 1980, and the Australian Capital Territory and the Northern Territory on the 1st of February 1977 upon the operation of the *Federal Court of Australia Act*.⁵
5. It was settled principle of the common law by the 17th century that the Crown could not appeal against acquittal,⁶ at least if the accused stood in danger of imprisonment, commonly known as the principle against double

² Holdsworth, fn 1 supra at 216. For a comprehensive review of the origin of the double jeopardy principle, see Kirby J, *Carol*, *Double Jeopardy and International Human Rights Law* (2003) 27 Crim LJ 231.

³ *Supreme Court of Ordinance*, s 21(1).

⁴ Paul Byrne, *Prosecution Appeals Against Sentence* [1988] 62 ALJ 465 at 465.

⁵ F Rinaldi, *Crown Appeals Against Sentence* (1984) 8 Crim LJ 1 at 2, fn 4.

⁶ Holdsworth, fn 1 at p 216; and see *Reg v Duncan* (1881) 7 QBD at 98.

jeopardy. Except where the trial had been a nullity, the Court of Criminal Appeal in England had never granted a retrial if the accused had been acquitted.⁷ The principle upon which this was based was the same principle which enables an accused who had been acquitted to plead *autre fois acquit* on being charged again for the same offence, viz. that a person shall not be brought into jeopardy more than once for the same offence.

6. In *R v Carroll*,⁸ Gleeson CJ and Hayne J explained that the reasons for the Rule rest in four considerations:

- (1) the power and resources of the State as prosecutor are much greater than that of an individual accused;
- (2) the consequences of conviction are very serious;
- (3) without safeguards the power to prosecute can be used an instrument of oppression; and
- (4) there is a need for finality in legal proceedings and the status conferred by an acquittal is important.⁹

⁷ In *Re Harrington* [1984] 1 AC 743.

⁸ (2002) 213 CLR 635.

⁹ At p 643-644 [21], [24]

7. In that case, the accused having being acquitted of murder was charged with perjury in respect of the evidence he gave at his trial. The Court unanimously held that charge of perjury was an abuse of process because it sought to controvert the acquittal, given that the charge of perjury raised the same ultimate issue as that which had been raised at trial.

8. In the following year, in an article published in the *Criminal Law Journal* by our then patron, Justice Kirby,¹⁰ who was not a member of the Court which decided *R v Carroll*, explored the history of the Rule, and identified 10 separate explanations offered by the law for upholding the rule against double jeopardy. I do not intend to go over the matters raised in that article, but I wish to make a few observations. As everyone here knows, an innocent person charged with a serious criminal offence faces a long period of uncertainty in life before a verdict of acquittal is finally entered. During that time, the accused may or may not be granted bail and, if bail is refused, the conditions in remand are likely to be, at least in some jurisdictions, as onerous as prisoners held in maximum security. Unless the accused is of modest means such as to be entitled to a grant of legal aid, the cost of defending the charge will be very significant, if not ruinous. Whilst there are schemes in place in all jurisdictions to compensate the victims of crime, and in most States there are suitors' costs funds, there is no such fund in the Northern Territory, and, in any event, such funds may

¹⁰ See fn 1.

not cover all of the costs involved. Are not the innocent who are acquitted just as much victims of crime? Is it right to put someone who has been acquitted through the process again, perhaps years afterwards? Are acquittals to be treated as merely provisional?

9. The importance of the double jeopardy principle has been recognised internationally. It is enshrined by the Fifth Amendment of the Constitution of the United States of America and, by way of the 14th Amendment, it has been held to apply to the states as well as to federal law.¹¹ It is reflected in Article 14(7) of the *International Covenant on Civil and Political Rights*, to which Australia is a party. It is contained in the *Canadian Charter of Rights and Freedoms* (1982), s 11(h), in the *Bill of Rights Act* (1990) (NZ) s 26(2), in Article 50 of the *Charter of Fundamental Rights of the European Union* (2000) and in the *European Convention on Human Rights*.¹² Constitutional provisions also exist in a wide range of foreign countries including France, Germany, India, Japan, Netherlands, Pakistan, Serbia and South Africa.¹³
10. Notwithstanding the powerful objections which can be prayed in aid of maintaining the Rule, there is a strong movement towards relaxing the Rule in “exceptional cases”. Legislation has been passed in the United

¹¹ *Benton v Maryland* 395 US 784 (1999).

¹² Article 4 of Protocol 17.

¹³ See Wikipedia, “Double Jeopardy”.

Kingdom,¹⁴ Scotland,¹⁵ New Zealand,¹⁶ New South Wales,¹⁷ South Australia¹⁸ and Queensland.¹⁹ In addition, prosecution appeals against directed verdicts or acquittals where there is a trial by judge alone is available in Western Australia²⁰ and in Tasmania Crown appeals against an acquittal on a question of law alone is available, subject to obtaining leave.²¹ Reform is also on the agenda of the Victorian government following an electoral promise made in last year's state election. So far, despite support from the Federal Government for change, there has been no similar legislation introduced into the Northern Territory. Reform in most jurisdictions has largely been media driven following complaints made by the relatives of the deceased or by victims' support groups.²² Concerns about media influence in any retrials have resulted in one jurisdiction legislating to prevent media reporting of the identity of an acquitted person at the time of a retrial.²³ As cases of this nature are likely to be notorious, it is difficult to see how the impression upon the jury that the case was considered worthy of a retrial could be prevented.

¹⁴ *Criminal Justice Act 2003* (UK).

¹⁵ *Double Jeopardy (Scotland) Act 2011*.

¹⁶ *Criminal Procedure Act 2004* (NZ).

¹⁷ *Crimes (Appeal and Review) Amendment (Double Jeopardy) Act 2006* (NSW).

¹⁸ *Criminal Law Consolidation Act 1935* (SA) Part 10 (ss 331-339).

¹⁹ *Criminal Code (Double Jeopardy) Amendment Act 2007* (Qld).

²⁰ *Criminal Appeals Act 2004* (WA), s 24.

²¹ *Criminal Code Act 1924* (Tas), s 401(2).

²² See for example, Justice Kirby's article referred to in fn 1 above.

²³ See for example, *Criminal Code (Double Jeopardy) Amendment Act 2007* (Qld), s 678K.

The Extent of the Concept of Double Jeopardy

11. As the decision of the High Court in *Pearce v The Queen*²⁴ pointed out, the expression does not have a single meaning. Not only does it encompass pleas in bar of *autre fois acquit* and *autre fois convict*, but it is an expression which encompasses different stages of the criminal justice process in prosecution, conviction and punishment. Consequently, in *Pearce v The Queen*, it was made clear that a person cannot be prosecuted for an offence if all the elements are the same or included in the elements of the offence for which the accused has already been convicted or acquitted. Even if a plea in bar is not available, the Court has an inherent power to stay proceedings to prevent an abuse of its processes. Cases such as *Rogers v The Queen*,²⁵ where the prosecution had sought to rely on a record of interview held inadmissible in a previous trial and *The Queen v Carroll*,²⁶ where the accused, having been found not guilty of murder, was prosecuted for perjury at his trial for murder, are clear examples.
12. Similarly a person cannot be punished twice for separate offences arising out of the same circumstances in respect of which there has been a finding of guilt to the extent that there are common elements.²⁷

²⁴ (1998) 194 CLR 610 at 614 [9].

²⁵ (1994) 181 CLR 251.

²⁶ (2002) 213 CLR 635.

²⁷ *Pearce v The Queen* (1998) 194 CLR 610.

13. The principle has also been applied where, on a Crown appeal, the appellate court is asked to conclude that the sentence imposed is manifestly inadequate. As Warren CJ and Maxwell P pointed out in *DPP v Kontoklotsis*,²⁸ the concept imposed a more stringent analysis at the stage of identifying error alleged by the Crown than was applied to the sentencing appeals of convicted persons.
14. Furthermore, even if error is established, a failure by the Crown to avoid appellate error by the sentencing judge may lead to the appeal being dismissed.²⁹ Moreover, even if error is established, it is a factor which is relevant to the court's exercise of its discretion in re-sentencing,³⁰ although it may not always result in a lesser sentence than that which should have been imposed by the sentencing judge.³¹

Statutory Changes to the Double Jeopardy Principle in Crown Appeals against Sentence

15. A number of jurisdictions have now passed legislation aimed at preventing courts of criminal appeal from taking the concept of double jeopardy into account on a sentencing appeal by the Crown, following recommendation 4 of the Double Jeopardy Law Reform COAG Working

²⁸ [2010] VSC 350 at [12].

²⁹ *R v Tate & Bartley* (1979) 24 ALR 473 at 477; *R v Anzac* (1987) 50 NTR 6 at 15.

³⁰ See the joint judgment of Ashley JA, Redlich JA and Weinberg JA in *DPP v Kontoklotsis* [2010] VSC 350 at [40].

³¹ *R v Anzac* (1987) 50 NTR 6 at 16.

Group Report 2007 to the Council of Australian Governments and the Standing Committee of Attorneys-General, that:

All jurisdictions should implement reform that when a court is considering a prosecution appeal against sentence, no principle at sentencing double jeopardy should be taken into consideration by the court when determining whether to exercise its discretion to impose a different sentence, or in determining what sentence to impose.

16. In New South Wales, the relevant provision was contained in s 68A(1) of the *Crimes (Appeal and Review) Act 2001* inserted by the *Crimes (Appeal and Review) Amendment (Double Jeopardy) Act 2009* (NSW), which provided relevantly:

An appeal court must not:

- (a) dismiss a prosecution appeal against sentence, or
- (b) impose a less severe sentence on any such appeal

than the court would otherwise consider appropriate because of any element of double jeopardy involved in the respondent being sentenced again.

17. In Victoria, the relevant provisions are contained in s 287, s 289 and s 290 of the *Criminal Procedure Act 2009*, the drafting of which reflected, in essence, both s 69A(1)(a) and s 69A(1)(b) of the NSW Act. A five

members bench of the Victorian Court of Appeal held by a majority that the Victorian provisions do not affect the requirement for the DPP to be personally satisfied that an appeal is warranted (including taking into account the double jeopardy principle) when the DPP decides whether or not to bring an appeal,³² but all members of the Court held that the Court's powers were constrained at both the level of deciding whether or not to allow the appeal and, if so, whether to discount the sentence on re-sentencing.

18. The relevant provision in Western Australia is contained in s 41(4) of the *Criminal Appeals Act 2004* as amended by the *Criminal Law and Evidence Amendment Act 2008* (WA) and although differently drafted, has been held to affect both the discretion to dismiss an appeal on double jeopardy grounds as well as the discretion on the sentencing.³³
19. In Tasmania, s 402(4A) of the *Criminal Code* (Tas) prevents a court from taking into account "the fact that the court's decision may mean that the person is again sentenced for the same crime". So far, the effect of this provision has not been definitively determined. In *DPP v Latham*,³⁴ the Full Court accepted that it prevented double jeopardy being considered on whether to allow a Crown appeal, but questioned whether it affected the court's powers on re-sentencing.

³² *DPP v Karazisis* [2010] VSCA 350 per Ashley, Redlich Weinberg JJA.

³³ *WA v Cunningham* (2008) 190 A Crim R 430 at [1], [2], [21]-[22]; *WA v Bennett* (2009) 194 A Crim R 137 at [1], [2], [67] & [68]; *WA v Atherton* [2009] WASCA 148 at [149], [385].

³⁴ [2009] TASSC 101.

20. In New South Wales, the relevant provisions of the legislation have been considered by the New South Wales Court of Criminal Appeal on a number of occasions. The following propositions emerged from the judgment of Spigelman CJ in *R v JW*,³⁵

- (i) The words “double jeopardy” in s 68A refer to the circumstance that an offender is, subject to identification of error on the part of the sentencing judge, liable to be sentenced twice.
- (ii) S. 68A removes from consideration on the part of the Court of Criminal Appeal the element of distress and anxiety to which all respondents to a Crown appeal are presumed to be subject.
- (iii) S.68A prevents the appellate court exercising its discretion not to intervene on the basis of such distress and anxiety.
- (iv) S.68A also prevents the appellate court from reducing the sentence which it otherwise believes to be appropriate on the basis of such distress and anxiety.
- (v) S.68A prevents the court from having regard to the frequency of Crown appeals as a sentencing principle applicable to an individual case by taking either step referred in (iii) or (iv) above.

³⁵ (2010) 199 A Crim R 486 at 513-514 [141].

21. However, if there is evidence of actual distress and anxiety arising from a Crown appeal, this could be taken into account.³⁶ Further, the discretion to dismiss a Crown appeal notwithstanding that error has been established and a finding that the sentence originally imposed was inadequate has not been affected. Consequently, inordinate delay by the Crown in bringing an appeal may have this result as it did in *R v Kwok Wai Cheung*.³⁷ Alternatively, it may reduce the sentence which would otherwise have been imposed.³⁸ It would also appear that the failure by the prosecutor to assist the sentencing judge to avoid appellable error may well also fall into the same category.³⁹ The general discretion is not confined to these examples: see *DPP v Karazisis*⁴⁰ where there are a number of other factors referred to.
22. The Victorian Court of Appeal has generally followed New South Wales authorities, noting that the provisions are relevantly indistinguishable.⁴¹ It would appear to be likely that these decisions will have a strong influence on the Northern Territory Court of Criminal Appeal when the matter is first discussed by that Court. I note in this respect that the Attorney-General for the Northern Territory in her second reading speech said:

³⁶ *R v Carroll* (2010) 239 FLR 11 at [1], [31]-[36], [71]-[72]; *DPP (Cth) v De La Rosa* (2010) 243 FLR 28 at [173]-[175], [275]-[276] and [315]; and *R v Nikolovska* [2010] NSWCCA 169 at [100]-[104], [107].

³⁷ [2010] NSWCCA 244 at [1], [151]-[152] and [154].

³⁸ *DPP (Cth) v Kieu Thi Bui* [2011] VSCA 61 at [90].

³⁹ *DPP (Cth) v De La Rosa* (2010) 243 FLR 28 at [81]-[84]; *DPP v Karazisis* [2010] VSCA 350 at [115].

⁴⁰ [2010] VSCA 350 at [99]-[115].

⁴¹ *DPP (Cth) v Kieu Thi Bui* [2011] VSCA 61 at [82]-[89].

I stress the amendment does not affect the underlying principles in relation to prosecution appeals; namely, that prosecution appeals should be rare; and the appeal court will only intervene when it identifies a sentencing error; and the court has a discretion to refuse to intervene even if an error is established. For example, the error might be trivial and may impose a discounted sentence if it does re-sentence, for example, on the ground of mercy.

Commonwealth Crown Appeals

23. In *R v Talbot*,⁴² the Tasmanian Full Court held that the statutory provisions introduced in that State did not apply to Commonwealth Crown appeals. The leading judgment was delivered by Blow J, who said:

[19] The Commonwealth has not introduced any legislation preventing a court that allows a Crown appeal against sentence from taking into account the fact that an unsuccessful respondent is to be sentenced a second time for the same crime. Under the *Crimes Act 1914* (Cth), s 16A(1), when a court is determining the sentence to be passed for a federal offence, that court must impose a sentence “that is of a severity appropriate in all the circumstances of the offence”. Prior to the enactment of s 402(4A), it was clear that “double jeopardy” in the re-sentencing process following a successful Crown appeal was to be taken into account in favour of the respondent: *R v Hayes* (1987) 29 A Crim R 452; *R v Clarke* (above); *R v Harland-White, Dinsdale v R* (2000) 202 CLR 321; *Attorney-General v McDonald* (above). In my view s 402(4A)(b) is

⁴² [2009] TASSC 107 at [19].

inconsistent with the general requirement in s 16A(1) to impose a sentence that is of appropriate severity, and therefore does not apply to re-sentencing under Commonwealth legislation: *Constitution*, s 109. Counsel did not submit otherwise at the hearing of the appeal.

24. However, *R v Talbot* has not been followed in other jurisdictions. In *R v Baldock*,⁴³ the Western Australian Court of Criminal Appeal held that there was no inconsistency between that state's statutory provision and s 16A of the *Crimes Act* (Cth). A majority of three judges of a five bench Court of Criminal Appeal of New South Wales decided likewise in *DPP (Cth) v De La Rosa*.⁴⁴ The basic difference between the majority and the minority Judges in that case was that the dissenting Judges were of the opinion that s 68A of the New South Wales Act precluded the Court from taking into account any actual mental distress caused by being again placed in jeopardy and, therefore, there was inconsistency between s 68A and s 16A (2)(m) of the *Crimes Act* (Cth).⁴⁵ The Victorian Court of Appeal followed *DPP (Cth) v De La Rosa* in the case of *DPP (Cth) v Kieu Thi Bui*.⁴⁶
25. So far, these decision have turned on s 109 of the *Constitution* (whether there is inconsistency) and/or on sections 68, 79 and 80 of the *Judiciary Act 1903* (Cth). There has been no occasion to consider whether as a

⁴³ (2010) 269 ALR 674 at [63]-[64].

⁴⁴ (2010) 243 FLR 28 per McClelland CJ at CL, Simpson J and Barr AJ agreeing; Allsop P and Basten JA dissenting.

⁴⁵ Allsop P at [48]-[55]; Basten JA at [104]-[109].

⁴⁶ [2011] VSCA 61 at [1], [2], [62]-[74].

matter of statutory construction of the relevant State Act, the relevant provisions should be construed as applying only to State offences.⁴⁷

Constitutional Challenges

26. In *R v Carroll*,⁴⁸ the Court of Criminal Appeal of New South Wales decided that the provisions of s 68A of the New South Wales Act were not unconstitutional on *Kable* grounds.⁴⁹ The case was unusual. Carroll had been convicted of manslaughter following his plea of guilty in the District Court on 1 November 2007. On 24 April 2008 he was sentenced to an effective sentence of imprisonment for three years, 18 months of which was to be served by way of periodical detention, with a non-parole period of 18 months. The Crown appealed on the ground that the sentence was manifestly inadequate. On the 19 September 2008, the appeal was allowed and he re-sentenced to three years imprisonment with a non-parole period of 18 months. The High Court granted Carroll's appeal, quashed the orders of the Court of Criminal Appeal and remitted the matter back to the Court of Criminal Appeal.⁵⁰ On 29 April 2009, Carroll was granted bail. On 10 June 2009, the Crown appealed and Carroll's application for leave to appeal against sentence was heard by the Court of Criminal Appeal. The Court reserved its decision.

⁴⁷ I do not suggest that this is likely to be a fruitful exercise.

⁴⁸ (2010) 267 ALR 57.

⁴⁹ *Kable v DPP* (1996) 189 CLR 51.

⁵⁰ The ground which found favour with the High Court was that the only ground of appeal was that the sentence was manifestly inadequate and the Court of Criminal Appeal erred by taking a different view of the facts than the sentencing Judge had taken.

27. Prior to delivering judgment, the *Crimes (Appeal and Review) Amendment (Double Jeopardy) Amendment Act 2009* came into force. It was provided by that Act that its provisions applied to an appeal which had been commenced but not finally determined before s 68A came into force. Submissions were then made challenging the constitutionality of s 68A and the Court was reconstituted by a five member bench which heard the matter on 9 December 2009. By this time, the Court had heard and delivered judgment in *R v JW*.⁵¹ The Court held that the order for remitter did not confine the Court to consider only the issue raised by the Notice of Appeal. It was open to it to permit the Crown to amend the Notice of Appeal to canvass all of the issues. The Crown raised six new grounds, three of which the Court allowed and three of which the Court rejected on the grounds of unfairness and oppression. One of the other arguments rejected by the Court was that the retrospective operation of s 68A was invalid. The Court followed the majority decision in *Polyukhovich v Commonwealth of Australia*.⁵² The end result in *R v Carroll* was that although the Court allowed the appeal, because of the extraordinary circumstances of that case and the effect of various appeals on him personally as well as other matters a fresh sentence of 18 months was imposed but ordered to be fully suspended upon a good behaviour bond.

⁵¹ (2010) 199 A Crim R 486.

⁵² (1991) 172 CLR 501.

Conclusions

28. So far as the trials for acquitted persons are concerned, the experience both overseas and in Australia has shown that retrials are likely to be very rare indeed. Even the cases which created the controversy in the first place, apparently do not fit the criteria which are required to be met before leave could be obtained.⁵³ When such a case does arise and a retrial is ordered (assuming that the legislation survives any constitutional challenge) there will be significant difficulties facing the courts to ensure a fair trial, given that, despite restrictions intended to prevent jurors from thinking that the Crown case must be very strong to warrant such a course, such cases are likely to attract significant media attention and consequently, pressure on juries to convict. The history of the Chamberlain litigation is a salutary reminder of how things can go wrong.
29. The most common circumstance likely to arise relates to Crown appeals in circumstances which allow for a Crown appeal from a trial by judge alone, such as in South Australia. There is anecdotal evidence that judges in South Australia and the Australian Capital Territory are less likely to convict on serious charges such as murder, than juries. This legislation will be an additional factor to consider when deciding whether to opt for trial by judge alone.

⁵³ See Michelle Edgely, *Truth or Justice? Double Jeopardy Reform for Queensland: Rights in Jeopardy* [2007] QUT Law JJI 7.

30. The abolition of the double jeopardy principle in Crown appeals against sentence is likely to have a more significant impact, both on the question of whether to allow the appeal and, if so, on re-sentence. It will be necessary that counsel consider carefully whether fresh evidence at the hearing of the appeal as to the respondent's distress or mental condition since the appeal was lodged, needs to be obtained. If this is contentious there could be issues of fact which will need to be resolved by the courts of criminal appeal. The discretion not to interfere still remains and careful consideration will need to be addressed to the factors likely to influence the exercise of that discretion.
31. There remains a possibility that, despite these changes to the law, cases will emerge which fall outside of the statutory provisions resulting in the kind of media frenzy generated in the *Carroll* case. Organisations such as the Criminal Lawyers Association of the Northern Territory, Bar Associations, Law Societies and the Law Council of Australia, will need to remain vigilant if the fundamental principles upon which the criminal law operates are not further eroded.