13. Appeal from Acquittal

Contents

A common law principle

13.1 'It is a golden rule, of great antiquity, that a person who has been acquitted on a criminal charge should not be tried again on the same charge.'[1] It is said that to try a person twice is to place them in danger of conviction twice—to 'double their jeopardy'. However, critics of the principle argue that justice is not served when a guilty person is wrongly acquitted.

13.2 This chapter discusses the source and rationale of the rule against double jeopardy; how the rule is protected from statutory encroachment; and when laws that encroach on the rule may be justified. The ALRC calls for submissions on two questions.

> **Question 13–1** What general principles or criteria should be applied to help determine whether a law that allows an appeal from an acquittal is justified?
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> **Question 13–2** Which Commonwealth laws unjustifiably allow an appeal from an acquittal, and why are these laws unjustified?

13.3 It said to be 'an elementary principle' that 'an acquittal made by a court of competent jurisdiction and made within its jurisdiction, although erroneous in point of fact, cannot as a rule be questioned and brought before any other Court'.[2]

13.4 Usually the rule against double jeopardy is discussed in the context of whether a person can be re-tried in fresh proceedings for the same offence after an acquittal.

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1 *Davern v Messel* (1984) 155 CLR 21, 338 (Murphy J).

2 Ibid 31 (Gibbs CJ) and 62 (Murphy J) citing *Benson v Northern Ireland Road Transport Board* [1942] AC 520, 526 (HL) quoting in turn *R v Tyrone County Justices* (1906) 40 Ir LT 181, 182.

However, the rule also underpins a long-established aversion to allowing appeals from an acquittal, that is, in the same proceedings. In *Davern v Messel* (1984), Gibbs CJ explained the purpose of the rule of double jeopardy in both contexts:

> The purpose of the rule is of course to ensure fairness to the accused. It would obviously be oppressive and unfair if a prosecutor, disappointed with an acquittal, could secure a retrial of the accused person on the same evidence, perhaps before what the prosecutor 'considered to be a more perspicacious jury or tougher judge'. It might not be quite so obvious that it would be unfair to put an accused upon his trial again if fresh evidence, cogent and conclusive of his guilt, came to light after his earlier acquittal, but in such a case the fact that an unscrupulous prosecutor might manufacture evidence to fill the gaps disclosed at the first trial, and the burden that would in any case be placed on an accused who was called upon repeatedly to defend himself, provide good reasons for what is undoubtedly the law, that in such a case also the acquittal is final.
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> When the prosecution seeks to appeal from an acquittal, the rule against double jeopardy has an indirect application... The view has been taken that the common law rule against double jeopardy would be infringed by allowing an appeal from an acquittal, since the rule requires than an acquittal be treated as final.[3]

13.5 The Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General said in a 2003 discussion paper that the general principles underlying the double jeopardy rule include:

> the prevention of the State, with its considerable resources, from repeatedly attempting to convict an individual; the according of finality to defendants, witnesses and others involved in the original criminal proceedings; and the safeguarding of the integrity of jury verdicts.[4]

13.6 The Committee spoke of the desirability of achieving 'a balance between the rights of the individual who has been lawfully acquitted and the interest held by society in ensuring that the guilty are convicted and face appropriate consequences'.[5]

13.7 The principle applies where there has been a hearing on the merits—whether by a judge or a jury. It does not extend to appeals from the quashing or setting aside of a conviction,[6] or appeals from an acquittal by a court of appeal following conviction by a jury.[7]

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3 Ibid 30–31. Justice Black of the US Supreme Court provided a similar rationale for the rule against double jeopardy in *Green v United States* (1957): 'the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty ... It may be seen as a value which underpins and affects much of the criminal law': *Green v The United States* 355 US 184 (1957), 187-188, quoted in *Pearce v The Queen* (1998) 194 CLR 610, 614 [10] (McHugh, Hayne and Callinan JJ).

4 Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, 'Issue Estoppel, Double Jeopardy and Prosecution Appeals Against Acquittals, Discussion Paper, Chapter 2' (2003).

5 Ibid.

6 *Davern v Messel* (1984) 155 CLR 21, 62, (Murphy J).

7 Ibid 39–40 (Gibbs CJ); *R v Benz* (1989) 168 CLR 110, 112 (Mason CJ).

13.8 The rule against double jeopardy can be traced to Greek, Roman and Canon law, and is considered a cardinal principle of English law.[8] At common law, the principle originated in the dispute between King Henry II and Archbishop Thomas Becket over the role of the King's courts in punishing clerks convicted in the ecclesiastical courts. By the 1660s it was considered a basic tenet of the common law.[9] For instance, Blackstone in his *Commentaries on the Laws of England* grounds the pleas of *autrefois acquit* (former acquittal) and *autrefois convict* (former conviction for the same identical crime) on the 'universal maxim of the common law of England, that no man ought to be twice brought in danger of his life for one and the same crime'.[10]

13.9 The principle is also enshrined in the Fifth Amendment of the United States Constitution (1791).[11]

Protections from statutory encroachments

Australian Constitution

13.10 There is no express prohibition on appeals from acquittals in the *Australian Constitution.*

13.11 Section 73 of the *Constitution* provides the High Court with extensive jurisdiction, including, the High Court has held, jurisdiction to hear appeals from an acquittal made by a judge or jury at first instance.[12] While it is within the High Court's power to hear an appeal from an acquittal, it will generally not grant special leave, unless issues of general importance arise.[13] In *The King v Wilkes* (1948), Dixon CJ said the High Court should

> be careful always in exercising the power which we have, remembering that it is not in accordance with the general principles of English law to allow appeals from acquittals, and that it is an exceptional discretionary power vested in this Court.[14]

13.12 In *Thompson v Mastertouch TV Service Pty Ltd* (1978), Deane J said that to 'recognize how drastic such a departure from a time-honoured principle of the common law would be is not to question the legislative competence of the Australian Parliament to enact provisions' having the effect of allowing an appeal against an acquittal.[15]

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8 See the judgment of Murphy J, which provides an account of the history of this principle: *Davern v Messel* (1984) 155 CLR 21, 62–63 (Murphy J).

9 Martin Friedland, *Double Jeopardy* (Clarendon Press, 1969) 5–6.

10 William Blackstone, *Commentaries on the Laws of England* (15th ed, 1809) vol 1, ch XXVI.

11 *Davern v Messel* (1984) 155 CLR 21, 40: Gibbs CJ notes that the US constitutional protection does not have as wide an operation as some would argue.

12 Deane J discusses the history of the consideration of section 73 of the *Constitution*, including the decision in *Thompson v Mastertouch Television Service Pty Ltd (No 3)* (1978) 38 FLR 397, [17] – [19] (Deane J).

13 Ibid [18] (Deane J).

14 *R v Wilkes* (1948) 77 CLR 511, 516–517 (Dixon CJ). This suggests the High Court is unlikely to interfere with a verdict of not guilty entered by a jury: see *Thompson v Mastertouch Television Service Pty Ltd (No 3)* (1978) 38 FLR 397, [19].

15 *Thompson v Mastertouch Television Service Pty Ltd* (1978) 38 FLR 397, 408 (Deane J).

Principle of legality

13.13 The principle of legality provides some protection to this principle.[16] When interpreting a statute, courts will presume that Parliament did not intend to permit an appeal from an acquittal, unless such an intention was made unambiguously clear.[17]

13.14 For example, in *Thompson v Mastertouch TV Service Pty Ltd* (1978), the Federal Court found that the court's power to 'hear and determine appeals' under s 19 of the *Federal Court Act 1970* (Cth) should not be interpreted as being sufficient to override the presumption against appeals from an acquittal.[18] In that case, Deane J said:

> the right to be spared the jeopardy of an appeal from an acquittal after a hearing on the merits of a criminal charge by a court of competent jurisdiction, is not, upon proper principles of statutory interpretation, to be swept aside by the general terms of a statute which has no underlying policy requiring that such terms be given such an effect and which contains nothing that points clearly or unmistakably or, indeed, at all, to that effect as having been either contemplated or intended.[19]

13.15 In *Davern v Messel* (1984), the decision in *Thompson* was approved, with Gibbs noting:

> An appeal is a remedy given by statute; the scope of the appeal must be governed by the terms of the enactment creating it. The question whether an appeal lies from an acquittal therefore must be decided as a matter of statutory interpretation.[20]

International law

13.16 Article 14 (7) of the *International Covenant on Civil and Political Rights* states:

> No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

13.17 International instruments cannot be used to 'override clear and valid provisions of Australian national law'.[21] However, where a statute is ambiguous, courts will generally favour a construction that accords with Australia's international obligations.[22]

Bills of rights

13.18 In other countries, bills of rights or human rights statutes provide some protection from statutory encroachment. Bills of rights and human rights statutes

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16 The principle of statutory interpretation now known as the 'principle of legality' is discussed more generally in Ch 1.

17 *Thompson v Mastertouch Television Service Pty Ltd (No 3)* (1978) 38 FLR 397, 408 (Deane J); *R v Snow* (1915) 20 CLR 315, 322 (Griffith CJ); *R v Wilkes* (1948) 77 CLR 511, 516–517 (Dixon J); *Macleod v Australian Securities and Investments Commission* 211 CLR 287, 289.

18 *Thompson v Mastertouch Television Service Pty Ltd (No 3)* (1978) 38 FLR 397, 408 (Deane J).

19 Ibid 413.

20 *Davern v Messel* (1984) 155 CLR 21.

21 *Minister for Immigration v B* (2004) 219 CLR 365, 425 [171] (Kirby J).

22 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 287 (Mason CJ and Deane J). The relevance of international law is discussed more generally in Ch 1.

prohibit laws that permit an appeal from an acquittal in the United States,[23] Canada[24] and New Zealand.[25] For example, section 26(2) of the *Bill of Rights Act 1990* (NZ) provides:

> No one who has been finally acquitted or convicted of, or pardoned for, an offence shall be tried or punished for it again.[26]

13.19 The prohibition is also recognised in the *Charter of Human Rights and Responsibilities Act 2006* (Vic) and the *Human Rights Act 2004* (ACT).[27] For example, the Victorian Act provides:

> A person must not be tried or punished more than once for an offence in respect of which he or she has already been finally convicted or acquitted in accordance with the law.

Justifications for encroachments

13.20 Victims of crime and their families will sometimes believe a guilty person has been wrongly acquitted. For these people particularly, the application of the principle that a person should not be tried twice may be not only unjust, but deeply distressing. The principle will seem acceptable when the person acquitted is believed to be innocent, but not when they are believed to be guilty.

13.21 The Law Commission of England and Wales considered the rule against double jeopardy and prosecution appeals following a reference in 2001. Its findings and recommendations have laid the foundation for laws limiting the rule in UK and in other jurisdictions, such as New South Wales. The Law Commission concluded that interference with the rule may be justified where the acquittal is 'manifestly illegitimate ... [and] sufficiently damages the reputation of the criminal justice system so as to justify overriding the rule against double jeopardy'.[28] The scope of the interference must be clear-cut and notorious.[29]

13.22 The Law Commission recommended that additional incursions on the rule against double jeopardy be limited to acquittals for murder or genocide.[30] This built on existing rights of appeal from an acquittal where the accused has interfered with or intimidated a juror or witness.[31]

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23 *United States Constitution* amend V.
24 *Canada Act 1982 c 11, Sch B Pt 1 ('Canadian Charter of Rights and Freedoms')* s 11(h).
25 *Bill of Rights Act 1990* (NZ) s 26(2).
26 Ibid.
27 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 26; *Human Rights Act 2004* (ACT) s 24.
28 The Law Commission, 'Double Jeopardy and Prosecution Appeals: Report on Two References under Section 3(1)(e) of the *Law Commissions Act 1965*' [4.30].
29 Ibid [4.35].
30 Ibid [4.30] – [4.36].
31 In order for an appeal to lie, it must not be contrary to the interests of justice, and there must be a real possibility that the accused would not have been acquitted absent the interference or intimidation: *Criminal Procedure and Investigations Act 1996* (UK) ss 54–57.

13.23 Bills of rights allow for limits on most rights, but the limits must generally be reasonable, prescribed by law, and 'demonstrably justified in a free and democratic society'.[32]

13.24 Some Australian laws that permit an appeal from an acquittal may be justified. The ALRC invites submissions identifying those Commonwealth laws that are *not* justified, and explaining why these laws are not justified.

32 *Canada Act 1982 c 11, Sch B Pt 1 ('Canadian Charter of Rights and Freedoms')* s 1. See also, *Charter of Human Rights and Responsibilities 2006* (Vic) s 7; *Human Rights Act 2004* (ACT) s 28; *Bill of Rights Act 1990* (NZ) s 5.