Policy: Double Jeopardy

Criminal Law Taskforce

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Introduction

The rule against double jeopardy prevents a person who has been acquitted or convicted of an offence from being tried again for an offence relating to the same conduct or event. It is a principle of the common law that can be traced back some 800 years.

The right not be tried or punished more than once is protected by s26 of the Victorian Charter of Human Rights and Responsibilities Act 2006 (the Charter) and in Article 14(7) International Covenant on Civil and Political Rights, to which Australia is a signatory.

At the Law Institute of Victoria’s (LIV) Council Meeting on 21 October 2010 it was resolved that a Criminal Law Taskforce Committee (CLT) be established to review the LIV policy in relation to the law of double jeopardy.

Background

The LIV’s policy on double jeopardy was last reviewed at the LIV Council meeting on 19 February 2004. It was resolved at that meeting:

5.1 That Council adopt the positions suggested in the paper:–

Prosecution for an administration of justice offence connected to the original trial

“That the LIV supports the right of the Crown to launch a prosecution for an administration of justice offence connected to the original trial”

Retrial of the original or similar offence where there is fresh and compelling evidence

In the absence of evidence that injustice is occurring, the LIV does not support the proposal. The effect of the proposed changes will be to undermine the important legal principles of finality of litigation, the right of the individual not to be subject to repeated prosecutions by the state, and the possibility of wrongful convictions. The LIV is particularly concerned at the suggestion of retrospectivity.

However since 2004, New South Wales, Queensland, South Australia and Tasmania have abolished the law of double jeopardy to allow for retrials of serious offences where either fresh and compelling evidence has come to light, or where the acquittal was tainted (or both).

The background of the proposal for change of the law of double jeopardy in Australia is set out in the memorandum to the LIV Council dated 14 October 2010, attached.

Criminal Task Force Meeting

The CLT met on 17 November 2010 to examine the LIV’s existing policy in relation to double jeopardy, and make any recommendations (if appropriate) as to an amendment to the existing policy. The CLT examined a range of material including the legislation from NSW, QLD, SA and Tasmania to inform their opinion.

After lengthy discussion, the CLT determined that LIV policy in relation to the law of double jeopardy in Victoria should be reviewed to recommend that the LIV support a position that would allow for appeals for tainted trials in limited circumstances, with the strictest safeguards around the seriousness of the original offence and time frames, and only on the order of the Court of Appeal.

This was decided on the basis that it is difficult to argue against the justice of a retrial when the administration of justice of the first trial is demonstrably tainted.
Examples of this would include the bribing or threatening of a juror, a prosecutor, substantial witness or judicial officer.

However, the commission of perjury by the Accused would not amount to a tainted trial. The CLT determined that there would be no recommendation to support a retrial in the event that fresh and compelling evidence of guilt emerges after the original trial. To do so would be to expose the individual citizen with limited resources to unlimited prosecution by the State, and would erode the principal of finality to which all citizens facing criminal charges are entitled.

The CLT also recommended that the LIV Council retreat from the existing policy position supporting the right of the DPP to bring perversion of justice proceedings and adopt the position of the Majority of the High Court in R v Carroll [2002] HCA 55.

The CLT could think of no instance when the factual situation would justify a re-trial on the basis of “new and compelling evidence”.

**Recommended form of policy**

To ensure the strictest safeguards possible, the CLT proposes to put the amended policy in the following terms.

A retrial of an acquitted person as a result of a tainted trial should only be supported in the following circumstances:

1) The original offence must be of a very serious nature, carrying with it a maximum penalty of level 2 imprisonment (25 years);

2) The acquittal at the original trial was tainted. The acquittal will be tainted if:-

   a. Another person has been convicted of perjury under s314 Crimes Act 1958, or perverting the course of justice in connection with the trial resulting in the acquittal, or bribery of a public official where the public official is a judicial officer; and

   b. Had it not been for the commission of the conviction for the offence set out in a), the person would have been convicted of the offence at the original trial;

3) An order for a retrial may only be made by the Court of Appeal on application of the Director of Public Prosecutions;

4) The Court of Appeal must only order an acquitted person to be retried if it is in the interests of justice to do so.

5) When considering whether it is in the interests of justice to order a retrial, the Court of Appeal must consider:-

   a. Whether a fair retrial is likely in the circumstances

   b. The length of time since the acquitted person allegedly committed the offence, and

   c. Whether any police officer or prosecutor has failed to act with reasonable diligence or expedition in connection with the application for the retrial of the acquitted person.

6) No more than one application for a retrial of an acquitted person may be made.