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# Developments in Double Jeopardy

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# The Application of the Statutory Non-Parole Period

Presenter: Anthony Bellanto QC

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# About the Presenter

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The presenter for this seminar is Anthony J Bellanto QC.

Anthony was called to the Bar in 1967 and has practised in all areas of law.

In 1975 he was appointed Crown Counsel and later Senior Crown Counsel in Hong Kong. He returned to Australia in 1978 and was commissioned a Crown Prosecutor for six years. He returned to private practice in 1984 and took silk in July 1988.

His principal area of practice is criminal law - trial advocacy, sentencing and appeals.

He is an active member of the NSW Bar Association, has served on the NSW Bar Council and is actively involved in the Bar Reading Course and Continuing Professional Development. He is also the advisory editor of Sentencing Law, New South Wales, published by LexisNexis in 2003.

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# Double Jeopardy

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## Brief History

Defenders of Double Jeopardy would like it to be enhanced with an added justification that it has a legal heritage of 800 years stemming back to the life and martyrdom of St Thomas Becket. Abiding by a principle of canon law, “not twice for the same fault”, Becket strenuously objected to his King’s advocacy that guilty clerks should be punished again by lay authority (Crown courts), no matter what their original sentence had been;

*“The controversy between Henry II and Archbishop Thomas à Becket – and Henry’s concession in 1176 following Becket’s murder – that clerks convicted in the ecclesiastical courts were exempt from further punishment in the King’s courts was primarily responsible for bringing about the adoption of the concept of double jeopardy in the common law.”<sup>2</sup>*

The origins of the double jeopardy rule are in both Roman and Greek law but gained more widespread use under 12th century English law. At that time there were two different court systems - ecclesiastical and the king’s court, and there was concern about whether someone convicted in the church run court could subsequently be tried in the king’s court. By the middle of the following century the principle of double jeopardy had emerged to mean that a defendant could only be prosecuted once, no matter what the verdict<sup>3</sup>.

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<sup>2</sup> Friedland, Martin *“Double Jeopardy”* Clarendon Press, Oxford, 1969, p.5

<sup>3</sup> Hunter, J. (1984) *“The development of the rule against double jeopardy”*, Journal of Legal History, p.5.

## Definition and Related Concepts

Sir William Blackstone's 1769 statement of the doctrine of double jeopardy remains the standard definition:-

*“The plea of autrefois acquit, or a former acquittal, is grounded on this universal maxim of the common law of England, that no man is to be brought into jeopardy of his life or limb more than once for the same offence ... The plea of autrefois convict, or a former conviction for the same identical crime ... is a good plea in bar to an indictment. And this depends upon the same principle as the former that no man ought to be twice brought in danger of his life for one and the same crime”<sup>4</sup>.*

The term ‘jeopardy’ generally means “putting yourself in danger, at risk, or facing some kind of peril”. In the law, the term ‘double jeopardy’ generally means that “a person who is acquitted at one trial should not be in danger of being tried again for the same crime”. This rule has been a fundamental principle of most criminal justice systems, especially those based on the common law<sup>5</sup>.

Although the pleas of autrefois acquit and autrefois convict are often discussed together, they rest on different basis. Autrefois acquit precludes the Crown from asserting, in the second proceedings, the question of guilt decided in favour of the accused in the first proceedings. Autrefois convict precludes the Crown from re-asserting an issue previously determined in its favour if there has been a final adjudication and the court has passed sentence or made some other order.

Autrefois acquit is the species of estoppel by which the Crown is precluded from re-asserting the guilt of the accused when that question has previously been determined against it, whereas autrefois convict on the other hand is akin to merger, that is, the

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<sup>4</sup> Blackstone, William *“Commentaries on the Laws of England”* (first published 1765–69, 17<sup>th</sup> ed) vol IV, 329.

<sup>5</sup> Hunter, J supra.

Crown is precluded from re-asserting the very same facts as in earlier proceedings which formed the basis of a conviction in which its rights have merged.

The doctrine of ‘Res Judicata Estoppel’ precludes the parties from challenging the decision itself, or findings fundamental to it.

In English law a res judicata is a decision pronounced by a Judicial Tribunal having jurisdiction over the cause and the parties which disposes once and for all of the matters decided, so that except on appeal they cannot be afterwards relitigated between the same parties or their privies<sup>6</sup>.

Every res judicata operates as an estoppel. In modern terms the rule, like double jeopardy, is grounded on public policy. The community has an interest in the termination of disputes and in the finality and conclusiveness of judicial decisions, and the individual has a right to be protected from vexatious multiplication of suits and prosecutions.

There is no magic in the word “estoppel” – “conclusive”, “cannot be questioned”, “preclude” and “bar” have similar import.

There are nice questions as to what constitutes a judicial tribunal, what is a judicial decision and what constitutes a res judicatae however, these are not within the province of this paper.

It is important to note the rules of admissibility where res judicata is pleaded in subsequent proceedings on the basis that evidence tendered introduces the fact of a previous acquittal<sup>7</sup>.

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<sup>6</sup> Handley, The Honourable Justice Mr KR “*The Doctrine of Res Judicata*”, Butterworths, 3<sup>rd</sup> ed, 1996 at [1-10]

<sup>7</sup> *Garrett v R* (1977) 139 CLR 437; *R v Story* (1978) 140 CLR 364.

The rule is that if earlier proceedings are referred to, the tendered evidence must be relevant on the assumption that the accused was innocent of the previous charge.

In *Rodgers v The Queen*<sup>8</sup> the High Court considered the admissibility of records of interview in subsequent proceedings (the court held that the doctrine of issue estoppel as it has developed in civil proceedings is not applicable in criminal proceedings). The majority<sup>9</sup> held that the tender of the records of interview would be a direct challenge to an earlier determination in other proceedings and in the circumstances would be an abuse of process.

It is therefore necessary to distinguish between issues that may arise in earlier proceedings and verdict – the latter giving rise to considerations of double jeopardy.

### The nature of Double Jeopardy

“The expression double jeopardy is not always used with a single meaning. Sometimes it is used to refer to the pleas in bar of *autrefois acquit* and *autrefois convict*; sometimes it is used to encompass what is said to be a wider principle that no-one should be ‘punished again for the same matter’. Further, double jeopardy, is an expression that is employed in relation to several different stages of the criminal justice process: prosecution, conviction and punishment.

If there is a single rationale for the rule or rules that are described as the rule against double jeopardy, it is that described by Black J in *Green v United States*:

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<sup>8</sup> *Rodgers v The Queen* [1994] 181 CLR 251 at [258].

<sup>9</sup> Mason CJ, Dean and Gaudron JJ.

*“The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offence, 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.”*

That underlying idea can be seen behind the pleas in bar of autrefois acquit and autrefois convict as well as behind the other forms or manifestations of the rule against double jeopardy. It also finds reflection in constitutional guarantees such as the Fifth Amendment to the United States Constitution, which states in part:

*“[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb”.*

The fact that double jeopardy is spoken of at several different stages of the process of criminal justice and the presence of other (sometimes competing) forces means that the treatment of double jeopardy has not always been clearly based on identified principles”<sup>10</sup>.

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<sup>10</sup> *Pearce v The Queen* [1998] 194 CLR 610 at [614] McHugh, Hayne and Callinan JJ.



### Connelly v DPP<sup>11</sup>

Much of the law of *autrefois acquit* can be found in this case. The accused was charged with and prosecuted for murder and a second charge of robbery with aggravation was held over. The accused was convicted of murder but the conviction was quashed and he was then tried on the count of robbery with aggravation. His plea of *autrefois acquit* was rejected and this decision was upheld by the House of Lords. The court held that the plea did not protect a person from further prosecution on the same facts simply because he has been prosecuted on those facts and acquitted. Abstract considerations might suggest this, but as Lord Reid said, the law has taken a more restricted view, and “many generations of Judges have seen nothing unfair in holding that the plea of *autrefois acquit* must be given a limited scope”<sup>12</sup>. Lord Morris, in his speech, listed a number of propositions which defined the scope of the plea:

- A man cannot be tried for a crime in respect of which he has been previously acquitted – In modern times the plea also affords a shield against cognate charges sufficiently connected with the original charge;
- A man cannot be tried for a crime in respect of which he could, on some previous indictment, have been convicted – The classic example is murder and manslaughter. The plea is also an answer to charges of criminal attempts where the accused was acquitted of the crime itself because on the first indictment the jury could have convicted of an attempt;

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<sup>11</sup> *Connelly v Director of Public Prosecutions* [1964] AC 1254

<sup>12</sup> *Ibid* at [1295].

- The same rule applies if the crime in respect of which the prisoner is being charged is in effect the same, or substantially the same, as the principle or a different crime in respect of which he has been acquitted, could have been convicted or has been convicted (emphasis added);
- The test as to whether the plea is available is whether the evidence which is necessary to support the second indictment or the facts which constitute the offence charged within it would have supported a conviction on the first indictment or some count on which it was competent for the jury to convict;
- On a plea of autrefois acquit the accused is not restricted to a comparison of the indictments; he may prove the identity between persons, transactions and offences required to sustain the plea – The court is not confined to the record, but the reality of the matter will be considered (emphasis added);
- It is the substantial identity of the crime charged in each of the proceedings that is the criterion, and it is immaterial whether the facts under examination, or the witnesses to be called, in the later proceedings are the same as those in the earlier proceedings – The facts under examination and the witnesses may be identical; yet the crime charged in the second indictment may be one in which the accused could not have been convicted on the first indictment. Unless this test is satisfied, the plea is not available<sup>13</sup> (emphasis added); and

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<sup>13</sup> Handley supra at [318].

- Autrefois acquit is an alternative to the plea of not guilty which the accused may make when arraigned. If the plea is put forward, the Crown must either admit it, in which case the accused will be discharged or answer it by filing a notice that the plea is denied. The fundamental principle applies that a man is not to be prosecuted twice for the same crime(emphasis added).

In *Connelly* it was argued that, even if a plea of autrefois acquit was not strictly available the court had a discretion to stay the second proceedings. This claim failed because their Lordship saw nothing unfair in the appellant being charged with robbery when his acquittal for murder was due to an error in the summing up. But note, different views are expressed on this question<sup>14</sup>. The majority accepted the existence of issue estoppel against the Crown in criminal cases although these views were not necessary for the decision.

The views expressed by the majority in *Connelly* on the availability of issue estoppels in criminal law were not accepted in subsequent proceedings in *Mills v Cooper*<sup>15</sup>. Diplock LJ said:

*“Issue estoppel is a particular application of the general rule of public policy that there should be finality in litigation. That general rule applies also to criminal proceedings but in a form modified by the distinctive character of criminal as compared with civil litigation. Here it takes the form of the rule against double jeopardy of which the simplest application is the pleas of autrefois convict and autrefois acquit; but the rule against double jeopardy also applies in circumstances in which those ancient pleas are not strictly available... There are obvious differences – lack of mutuality is but one – between the application of the rule against double jeopardy in criminal cases, and the rule that there should be finality in civil litigation”.*

<sup>14</sup> Ibid at [324].

<sup>15</sup> *Mills v Cooper* [1967] 2 QB 459 at [467 and 469].

**R v Humphrys<sup>16</sup>**

The House of Lords reconsidered the doctrine of double jeopardy in 1977. The accused had been acquitted on a charge of driving whilst disqualified, the only issue was whether a police officer had correctly identified him as the driver. The accused denied on oath that he was the driver. He was later charged with perjury and the case for the prosecution included witnesses who had not been called at the first trial. The defence set up an issue estoppel arising from the acquittal but this was overruled and the accused was convicted which was restored by the House of Lords. The views of Lord Diplock were endorsed and cases relied on by the majority in *Connelly* were explained as based on the exclusiveness of an acquittal and the rule against double jeopardy.

*Humphrys* reaffirmed the established principle that although the prosecution cannot challenge an acquittal in another trial by seeking to prove that the accused was guilty of the crime by which he had been acquitted, this did not mean that evidence relevant to a later trial was inadmissible merely because its incidental effect was to cast doubt on an acquittal. Thus the prosecution for perjury supported by evidence not called at the first trial was not an abuse of process. Lord Hailsham said<sup>17</sup> that the analogous rule of public policy “in criminal proceedings is aimed at the need to prevent double jeopardy and not at the need to effect finality in litigation. It is thus aimed at verdicts rather than issues and though issues may sometimes be isolated and examined to see whether there has in fact been a danger of inconsistent verdicts and thus a double jeopardy...where there is no such double jeopardy...the prosecution is not prohibited from

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<sup>16</sup> *R v Humphrys* [1977] AC 1.

<sup>17</sup> *Ibid* at [40]

adducing the evidence or making assertions, the incidental effect of which is to cast doubt on a previous verdict” (emphasis added).

### Donald Hume

One less than glorious example in the United Kingdom of the law of double jeopardy was that of British bank robber and multiple murderer Donald Hume.

In a much publicised case in 1949, a wrapped dismembered body was found in the Essex marshes in eastern Britain. The police suspect, petty criminal, imposter and perennial liar Donald Hume, was found to have piloted a plane over the area at the time and to have traces of blood in the floorboards of his London flat. On being presented with this evidence Hume changed his story from total non involvement to declaring that the dismembered body was at his flat when he returned home and that he had disposed of it to avoid suspicion of murder.

The jury at his subsequent trial was unable to come to a decision and a new trial was held. Hume pleaded guilty to the lesser charge of accessory after the fact. Upon release, after serving an eight year sentence Hume sensationally revealed that he had in fact murdered Stanley Setty because he suspected he was having an affair with his wife.

Not only was he free from any criminal sanction due to Double Jeopardy, but he also profited from selling his story to London’s Sunday Pictorial for an estimated £3,600<sup>18</sup>.

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<sup>18</sup>Lillingston, Phillip “*Double jeopardy History*” 24 September 2011, <http://www.autrefoisacquit.info/html/history.html>

## O.J.Simpson

In the most famous (or infamous) American criminal case of recent times, ex football star O.J Simpson managed to evade a conviction for the murder of Nicole Brown Simpson and Ronald Goldman<sup>19</sup>.

At 12:00am on June 13 1994 Nicole Brown Simpson and Ronald Goldman were found murdered outside Brown's condominium in Los Angeles, California. Evidence collected at the scene led police to suspect that O.J Simpson was the murderer.

The investigation, arrest, and trial were among the most widely publicised events in American history. The trial, often characterized as "the trial of the century," culminated on October 3, 1995 in a jury verdict of not guilty for the two murders.

11 years later, Simpson was back in the spotlight, planning to release a book titled "If I did it". The book purportedly details how Simpson, "hypothetically" would have carried out the murder of his wife and Goldman. The book's Publisher, Judith Regan, told the Associated Press:-

*"This is an historic case, and I consider this his confession."*

With the upcoming release, many wondered if this "confession" could lead to another prosecution for the double homicide. The answer was **NO** because of the principle of double jeopardy<sup>20</sup>.

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<sup>19</sup> Lovitt, J and Price, R "Confusion for Simpson kids 'far from over'". *USA Today*. February 12, 1997. <http://www.usatoday.com/news/index/nns224.htm>.

<sup>20</sup> Wolfe, D. "O.J Simpson's "Confession" and Double Jeopardy" Law Info, November 20, 2006 <http://blog.lawinfo.com/2006/11/20/oj-simpsons-confession-and-double-jeopardy/>. The book was withdrawn by the publisher just days before its release. It was later released by the Goldman family who changed the title to "If I did it; Confessions of a Killer".

## Jack McCall

The most famous American court case invoking the claim of double jeopardy however is the second murder trial in 1876 of Jack McCall, killer of Wild Bill Hickok.

McCall was acquitted in his first trial, which Federal authorities later ruled to be illegal because it took place in an illegal town, Deadwood, then located in South Dakota Indian Territory. At the time Federal law prohibited all except Native Americans settling in the Indian Territory. McCall was retried in Federal Indian Territorial court, convicted, and hanged in 1877. He was the first person executed by Federal authorities in the Territory of Dakota.

## Australia

The view taken by the United Kingdom towards the law of double jeopardy also represented the dominant view in Australia, or at least until 1946, when Dixon J in *Broome v Chenoweth*<sup>21</sup> limited the application of double jeopardy to later proceedings ‘for the same offence’<sup>22</sup>. It was not until 1964 in *Connelly* that the House of Lords held that the courts possess an inherent jurisdiction to stay a prosecution for a charge that should have been included in the indictment at an earlier trial.

This broader approach was adopted by the High Court of Australia<sup>23</sup> and extended further to include interlocutory rulings in criminal proceedings that resulted in the conviction or acquittal of the accused<sup>24</sup>. Thus, the doctrine now comprises a core rule of criminal procedure, augmented by a judicial discretion to stay proceedings on

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<sup>21</sup> *Broome v Chenoweth* (1946) 73 CLR 583.

<sup>22</sup> *Ibid* at [599].

<sup>23</sup> *Garrett v The Queen* *supra* at [445].

<sup>24</sup> *Rogers v The Queen* *supra*, [256–7] (Mason CJ), [280] (Deane and Gaudron JJ).

the grounds of an abuse of process. This composite was noted by the High Court in *Pearce*<sup>25</sup>.

### Reform

From 2002 there has been reform in Australia of the law of double jeopardy which in all probability has come about as a response to the public backlash from the outcomes of the infamous *R v Carroll*<sup>26</sup> saga of prosecutions and appeals.

“In 1985 Carroll gave evidence on oath at his trial for the murder of Deidre Maree Kennedy, denying that he had killed her. Despite his denial, the jury returned a verdict of guilty. On appeal, the Court of Criminal Appeal of Queensland concluded that, on the evidence led at trial, it was not open to a properly instructed jury to conclude beyond reasonable doubt that the respondent was guilty.

Accordingly, the court ordered that the conviction be quashed and directed that a verdict of acquittal be entered.

More than 14 years after his trial for murder, he was indicted for perjury. He was charged that “in a judicial proceeding [namely, his trial for murder, he] knowingly gave false testimony to the effect that he .... did not kill ... Deidre Kennedy, and the false testimony touched a matter which was material to a question then depending in [his trial for murder]”<sup>27</sup>. On his trial for perjury Carroll argued that his trial should not proceed as it violated the law of double jeopardy. Justice Muir ruled there was no substance to the plea that Carroll was in jeopardy of prosecution and punishment for the same crime and the jury returned a verdict of guilty. On appeal to the Court of appeal of Queensland, that court concluded that the trial

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<sup>25</sup> *Pearce v The Queen* supra at [614], cited with approval in *R v Carroll* (2002) 213 CLR 635 (Gleeson CJ and Hayne J).

<sup>26</sup> *R v Carroll* (2002) 213 CLR 635

<sup>27</sup> *Ibid* at [1-2].



should have been stayed as an abuse of process and that, in any event, the verdict returned by the jury was unsafe and unsatisfactory. The court ordered that the respondent's conviction for perjury be quashed and a verdict of acquittal be entered.

The prosecution sought special leave to appeal to the High Court. The appeal was dismissed.

The joint judgment of Gleeson CJ and Hayne J considered "some fundamental underpinnings of the criminal law"; issue estoppels and preclusion; abuse of process and the incontrovertibility of an acquittal. Their Honours referred, inter-alia, to *Pearce, Garrett, Connelly, Rogers and Humphrys*.

As to the charge of perjury their Honours said at [25-26]:

*"Common to both charges was the prosecutions allegation that the respondent had killed Deidre Kennedy. To establish the charge of murder other facts (particularly the intention with which the killing occurred) had to be established and those other facts were not an issue at the perjury trial. On the perjury trial the prosecution had to demonstrate that the respondent had given sworn evidence that he did not kill Deidre Kennedy and, of course that formed no part of the proofs the prosecution had to make on the murder trial. What the prosecution had to prove at each trial was, therefore, not identical.*

*Nonetheless, the factual inquiries made at the two trials, in the end, came to focus upon the same issue – did the respondent kill Deidre Kennedy? At his trial for murder, the issue which was fought was whether it was the respondent who had killed her. The trial had been conducted on the footing that there had been a murder. On his trial for perjury there appears to have been no controversy about the fact that the respondent had sworn that he had not killed Deidre Kennedy; again, the focus of factual inquiry was, did he kill her? In the course of argument in the Court of Appeal the prosecutor expressly acknowledged that the perjury case was conducted, in practical effect, as a re-trial for murder".*

And at [40-44]:

*“There are cases where a charge of an offence would be manifestly inconsistent on the facts with a previous acquittal, even though no plea of autrefois acquit is available. Since, in most cases of trial by jury, it will not be known why the accused was acquitted, and in many cases the reason may simply be that the jury had a doubt about whether the prosecution had established some element of the offence, the inconsistency, if it exists, will appear from a comparison of the elements of the new charge with the verdict of not guilty of the previous charge, understood in the light of the issues at the first trial.*

*The present case provides an example. The only element of the offence of murder that was in issue at the original trial of the respondent was whether he killed Deidre Kennedy. The perjury alleged at the second trial consisted of the respondent’s falsely denying, on oath, that he killed Deidre Kennedy. The falsity of the testimony was claimed to be that he said he did not kill Deidre Kennedy whereas in truth he killed her. It was accepted in argument in this court that, although it was not expressly averred, it was necessarily implied in the perjury indictment that the respondent had killed the child.*

*In the present case, there was manifest inconsistency between the charge of perjury and the acquittal of murder. That inconsistency arose because the prosecution based the perjury solely upon the respondent’s sworn denial of guilt. The alleged false testimony consisted of a negative answer to a question, asked by his Counsel, whether the respondent killed the child. The fact that the question asked was whether the respondent killed Deidre Kennedy rather than whether he murdered her, or whether he was guilty, is immaterial. Discretionary decision do not turn upon such differences. One such manifest inconsistency appeared, then the case for a stay of proceedings was irresistible.*

*The prosecuting authorities considered that they had available to them further evidence which became available only after the first trial, and which, so it was argued, strengthened the case that the respondent had murdered Deidre Kennedy. Much of the reasoning of the Court of Appeal was addressed to an examination of the strength and cogency of the new evidence. In this respect the court was strongly influenced by the reasoning in *Humphrys* where the evidence at a later perjury trial was substantially identical with the evidence given at the first trial, and a case where new and cogent evidence of guilt had emerged.*

*The Court of Appeal concluded that the further evidence adduced at the perjury trial was deficient and unsatisfactory, and that it added little to the original evidence, but it considered that examining the strength and cogency of the new evidence was crucial to the exercise of the discretion to stay proceedings. In that*

*respect, the reasoning of the Court of Appeal was unduly favourable to the prosecution. The inconsistency between the charge of perjury and the acquittal of murder was direct and plain. The laying of the charge of perjury, solely on the basis of the respondents sworn denial of guilt, for the evident purpose of establishing his guilt of murder, was an abuse of process regardless of the cogency and weight of the further evidence that was said to be available”.*

This case reflects the importance given by our legal system to the finality of verdicts in the resolution of disputes, particularly the status conferred by an acquittal.

It also reflects a number of other important considerations such as:

- That a person should not be harassed by multiple prosecutions about the same issue;
- The fact that the powers and resources of the State as prosecutor are much greater than those of any individual;
- The fact that prosecution has in the past and may in the future be used as an instrument of ‘tyranny’;
- That trials are by nature stressful for all concerned;
- The serious consequences of conviction; and
- One of the fundamentals of our system of law and justice that a verdict of acquittal should be treated final and not subject to further investigation.

### **Removing the rule?**

The most coherent argument for abolition of the Rule was found in Lord Auld’s 2002 Report<sup>28</sup> at [47]-[63]<sup>29</sup>. He argued that:-

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<sup>28</sup> Following on from the review of civil justice undertaken by Lord Woolf, Lord Auld undertook a review of the operation of the criminal courts in England and Wales from 1999 to 2001, producing a report known as the "Auld Report".

<sup>29</sup> The Auld Report - HC Deb 30 April 2002 vol 384 cc799-801

*“The Law Commission's proposals, if implemented, would make inroads on our hallowed common law doctrine of *autrefois acquit* ... Like many of our principles of criminal law, it has its origin in harsher times when trials were crude affairs affording accused persons little effective means of defending themselves or of appeal, and when the consequence of conviction was often death. Thus, in *Hawkins' Pleas of the Crown* it is said that it is founded on the maxim "that a man shall not be brought into danger of his life for one and the same offence more than once". The doctrine, in its application to an acquittal, is not absolute and, as a matter of common sense, should not be so... the general justifying aim of the administration of criminal justice is to control crime by detecting, convicting and duly sentencing the guilty. It is not part of that aim, simply a necessary incident of it, that the system should acquit those not proved to be guilty. If there is compelling evidence, say in the form of DNA or other scientific analysis or of an unguarded admission, that an acquitted person is after all guilty of a serious offence, then, subject to stringent safeguards of the sort proposed by the Law Commission, what basis in logic or justice can there be for preventing proof of that criminality? And what of the public confidence in a system that allows it to happen? To permit reopening of an acquittal in such a circumstance is not inconsistent with the International Covenant on Civil and Political Rights 1966 or with the European Convention of Human Rights.”*

Justice Hayne in *Carroll* (although supporting the Rule) displayed a similar attitude at [23]<sup>30</sup>:

*“At the very root of the criminal law system lies the recognition by society that some conduct is to be classified as criminal and that those who are held responsible for such conduct are to be prosecuted and, in appropriate cases, punished for it. It follows that those who are guilty of a crime for which they are to be held responsible should, in the absence of reason to the contrary, be prosecuted to conviction and suffer just punishment”.*

### **The Proposal ~ Australia**

Since *Carroll* there has been extensive public criticism of the concept of “double jeopardy” described by many as an anachronism, because a suspect can avoid punishment despite the strength of incriminating evidence that may subsequently come to light<sup>31</sup>.

<sup>30</sup> *The Queen v Carroll* supra.

<sup>31</sup> McNamara, Noel “*What Reform to Double Jeopardy Can Do*”. 13 August 2011. [http://www.doublejeopardyreform.org/what\\_reform\\_can\\_do.html](http://www.doublejeopardyreform.org/what_reform_can_do.html)

## New South Wales

In February 2003 as part of the ‘Tough on Crime’ election campaign the Premier of NSW, the Honourable Bob Carr, announced that in its next term, the Government would abolish the common law Rule against double jeopardy.

The proposals were modelled on recent ‘reforms’ in England contained in the *Criminal Justice Bill 2002 (UK)*. They would apply to homicide (murder and manslaughter offences) and offences, such as gang rape and serious drug supply, carrying life imprisonment as a maximum penalty. They would be retrospective and would include, so the press release said, “important safeguards” as follows:-

- The Director of Public Prosecutions (DPP) would need to give consent for the “offence” to be reinvestigated;
- Where compelling fresh evidence emerges that could not reasonably have been made available at the first trial that strongly suggests guilt the DPP would be able to apply to the Court of Criminal Appeal to quash the acquittal;
- The Court of Criminal Appeal would have the power to quash the acquittal and order a retrial where there is compelling new evidence of guilt and it is in the interests of justice to do so; and
- There would be only one retrial.

On 15 October 2006, the NSW Parliament passed the *Crimes (Appeal and Review) Amendment (Double Jeopardy) Act 2006* (Now Repealed), which took effect on 15 December 2006, abolishing the rule against double jeopardy in cases in which:

- Someone is acquitted of a ‘life sentence offence’ (murder, violent gang rapes, large commercial supply or production of illegal drugs) where there is "fresh and compelling" evidence of guilt;
- Someone is acquitted of a ‘15 years or more sentence offence’ where the acquittal was tainted (by perjury, bribery or perversion of the course of justice); and
- Someone is acquitted in a judge only trial or where a judge directed the jury to acquit.

This Act inserted the following Part 8 into the *Crimes (Appeal and Review) Act 2001*.

## Retrial after acquittal for very serious offence

### Crimes (Appeal and Review) Act 2001

#### **PART 8**

#### **99 Application of Division**

- (1) This Division applies where:
  - (a) A person has been acquitted of an offence, and
  - (b) According to the rules of law relating to double jeopardy (including rules based on abuse of process), the person is thereby precluded or may thereby be precluded from being retried for the same offence, or from being tried for some other offence, in proceedings in this State.

Note. Under section 100 a person to whom this Division applies can only be retried for a life sentence offence (in the case of fresh or compelling evidence). Under section 101 a person to whom this Division applies can only be retried for a 15 years or more sentence offence (in the case of a tainted acquittal).
- (2) This section extends to a person acquitted in proceedings outside this State of an offence under the law of the place where the proceedings were held. However, this section does not so extend if the law of that place does not permit that person to be retried and the application of this Division to such a retrial is inconsistent with the Commonwealth Constitution or a law of the Commonwealth.
- (3) This section extends to a person acquitted before the commencement of this Division.

#### **100 Court of Criminal Appeal may order retrial—fresh and compelling evidence**

- (1) The Court of Criminal Appeal may, on the application of the Director of Public Prosecutions, order an acquitted person to be retried for a life sentence offence if satisfied that:
  - (a) There is fresh and compelling evidence against the acquitted person in relation to the offence, and
  - (b) In all the circumstances it is in the interests of justice for the order to be made.
- (2) If the Court of Criminal Appeal orders an acquitted person to be retried, the Court is to quash the person's acquittal or remove the acquittal as a bar to the person being retried for the offence (as the case requires).
- (3) The Court of Criminal Appeal may order a person to be retried for a life sentence offence under this section even if the person had been charged with and acquitted of manslaughter or other lesser offence.
- (4) The Court of Criminal Appeal cannot order a person to be retried for a life sentence offence under this section where the person had been charged with and acquitted of the life sentence offence but had been convicted instead of manslaughter or other lesser offence.

#### **101 Court of Criminal Appeal may order retrial—tainted acquittals**

- (1) The Court of Criminal Appeal may, on the application of the Director of Public Prosecutions, order an acquitted person to be retried for a 15 years or more sentence offence if satisfied that:
  - (a) The acquittal is a tainted acquittal, and
  - (b) In all the circumstances it is in the interests of justice for the order to be made.

- (2) If the Court of Criminal Appeal orders an acquitted person to be retried, the Court is to quash the person's acquittal or remove the acquittal as a bar to the person being retried for the offence (as the case requires).
- (3) The Court of Criminal Appeal may order a person to be retried for a 15 years or more sentence offence under this section even if the person had been charged with and acquitted of a lesser offence.

### **102 Fresh and compelling evidence—meaning**

- (1) This section applies for the purpose of determining under this Division whether there is fresh and compelling evidence against an acquitted person in relation to an offence.
- (2) Evidence is "*fresh*" if:
  - (a) It was not adduced in the proceedings in which the person was acquitted, and
  - (b) It could not have been adduced in those proceedings with the exercise of reasonable diligence.
- (3) Evidence is "*compelling*" if:
  - (a) it is reliable, and
  - (b) it is substantial, and
  - (c) in the context of the issues in dispute in the proceedings in which the person was acquitted, it is highly probative of the case against the acquitted person.
- (4) Evidence that would be admissible on a retrial under this Division is not precluded from being fresh and compelling evidence merely because it would have been inadmissible in the earlier proceedings against the acquitted person.

### **103 Tainted acquittals—meaning**

- (1) This section applies for the purpose of determining under this Division whether the acquittal of an accused person is a tainted acquittal.
- (2) An acquittal is "*tainted*" if:
  - (a) The accused person or another person has been convicted (in this State or elsewhere) of an administration of justice offence in connection with the proceedings in which the accused person was acquitted, and
  - (b) It is more likely than not that, but for the commission of the administration of justice offence, the accused person would have been convicted.
- (3) An acquittal is not a tainted acquittal if the conviction for the administration of justice offence is subject to appeal as of right.
- (4) If the conviction for the administration of justice offence is, on appeal, quashed after the Court of Criminal Appeal has ordered the acquitted person to be retried under this Division because of the conviction, the person may apply to the Court to set aside the order and:
  - (a) To restore the acquittal that was quashed, or
  - (b) To restore the acquittal as a bar to the person being retried for the offence, as the case requires.

### **104 Interests of justice—matters for consideration**

- (1) This section applies for the purpose of determining under this Division whether it is in the interests of justice for an order to be made for the retrial of an acquitted person.



- (2) It is not in the interests of justice to make an order for the retrial of an acquitted person unless the Court of Criminal Appeal is satisfied that a fair retrial is likely in the circumstances.
- (3) The Court is to have regard in particular to:
  - (a) The length of time since the acquitted person allegedly committed the offence, and
  - (b) 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.

#### **105 Application for retrial—procedure**

- (1) Not more than one application for the retrial of an acquitted person may be made under this Division in relation to an acquittal.
  - (1A) An application may be made for a further retrial of a person acquitted in a retrial under this Part but only if it is made on the basis that the acquittal at the retrial was tainted.
  - (2) An application for the retrial of an acquitted person cannot be made under this Division unless the person has been charged with the offence for which a retrial is sought or a warrant has been issued for the person's arrest in connection with such an offence.  
Note. Section 109 requires the Director of Public Prosecutions' approval for the arrest of the accused or for the issue of a warrant for his or her arrest.
  - (3) The application is to be made not later than 28 days after the person is so charged with that offence or the warrant is so issued for the person's arrest. The Court of Criminal Appeal may extend that period for good cause.
  - (4) The Court of Criminal Appeal must consider the application at a hearing.
  - (5) The person to whom the application relates is entitled to be present and heard at the hearing (whether or not the person is in custody). However, the application can be determined even if the person is not present so long as the person has been given a reasonable opportunity to be present.
  - (6) The powers of the Court of Criminal Appeal under section 12 of the *Criminal Appeal Act 1912* may be exercised in connection with the hearing of the application.
  - (7) The Court of Criminal Appeal may at one hearing consider more than one application under this Division for a retrial (whether or not relating to the same person), but only if the offences concerned should be tried on the same indictment.
  - (8) If the Court of Criminal Appeal determines in proceedings on an application under this Division that the acquittal is not a bar to the person being retried for the offence concerned, it must make a declaration to that effect.

#### **106 Retrial**

- (1) An indictment for the retrial of a person that has been ordered under this Division cannot, without the leave of the Court of Criminal Appeal, be presented after the end of the period of 2 months after the order was made.
- (2) The Court must not give leave unless it is satisfied that:
  - (a) The prosecutor has acted with reasonable expedition, and

- (b) There is good and sufficient cause for the retrial despite the lapse of time since the order was made.
- (3) If, after the end of the period of 2 months after an order for the retrial of an accused person was made under this Division, an indictment for the retrial of the person has not been presented or has been withdrawn or quashed, the person may apply to the Court of Criminal Appeal to set aside the order for the retrial and:
- (a) To restore the acquittal that was quashed, or
- (b) To restore the acquittal as a bar to the person being tried for the offence, as the case requires.
- (4) If the order is set aside, a further application cannot be made under this Division for the retrial of the accused person in respect of the offence concerned.
- (5) At the retrial of an accused person, the prosecution is not entitled to refer to the fact that the Court of Criminal Appeal has found that it appears that there is fresh and compelling evidence against the acquitted person or, as the case requires, that it is more likely than not that, but for the commission of the administration of justice offence, the accused person would have been convicted.

## Crown appeals against sentence

### *Crimes (Appeal and Review) Act 2001*

#### **68A Double jeopardy not to be taken into account in prosecution appeals against sentence**

- (1) 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.
- (2) This section extends to an appeal under the *Criminal Appeal Act 1912* and accordingly a reference in this section to an appeal court includes a reference to the Court of Criminal Appeal.

### Regina v JW<sup>32</sup>

On 22 March 2010 the NSWCCA (Spigelman CJ, McClennan CJ at CL, Howie and Johnson JJ) allowed a Crown appeal and quashed a sentence of 80 hours community service handed down by North DCJ and instead imposed a term of imprisonment of two years suspended pursuant to s12 of the *Crimes (SP) Act* upon the respondent entering into a good behaviour bond for two years.

A five judge bench was convened to consider the effect of the provision of section 68A. It was held, per Spigelman CJ:

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<sup>32</sup> [2010] NSWCCA 49

[141] *“The following propositions emerge from the above analysis:*

*(i) The words "double jeopardy" in s 68A refer to the circumstance that an offender is, subject to the identification of error on the part of the sentencing judge, liable to be sentenced twice.*

*(ii) Section 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) Section 68A prevents the appellate court exercising its discretion not to intervene on the basis of such distress and anxiety.*

*(iv) Section 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) Section 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 to in (iii) or (iv), or otherwise”.<sup>33</sup>*

### **DPP (Cth) v De La Rosa<sup>34</sup>**

An issue arose as to whether s16A of the Crimes Act 1914 (Cth) and s68A of the Crimes (Appeal and Review) Act 2001 (NSW) were inconsistent for the purposes of s109 of the Constitution. That is, as s68A removes any consideration of “double jeopardy” in relation to a Crown appeal against sentence, the question was whether it was contrary to s16A(2)(m) of the Crimes Act (Cth) which requires the sentencing court to have regard to the “mental condition” of the offender.

On 17 September 2010 a five judge bench of the NSWCCA decided that there was no such inconsistency because s68A is not to be construed as operating of its own force to sentencing for

<sup>33</sup> Annual One Day Seminar on Criminal Law. The Law Society of New South Wales Young Lawyers, 5 March 2011, The Honourable Justice R A Hulme, Supreme Court of New South Wales.

<sup>34</sup> [2010] 194

Commonwealth offences (s68A of the *Crimes (Appeal and Review) Act* applied to Commonwealth as well as State offences).

### Queensland

On 18 October 2007, Queensland modified its double jeopardy laws to allow a retrial where fresh and compelling evidence becomes available after an acquittal for murder or a 'tainted acquittal' for a crime carrying a 25-year or more sentence. A 'tainted acquittal' requires a conviction for an administration of justice offence, such as perjury, that led to the original acquittal. Unlike reforms in the United Kingdom and New South Wales, this law does not have a retrospective effect.

### South Australia

On the 10<sup>th</sup> July 2008 the South Australian parliament passed the *Criminal Law Consolidation (Double Jeopardy) Amendment Act 2008*. It is applicable for crimes ranging from trafficking in a commercial quantity of controlled drugs and aggravated robbery to more serious crimes such as manslaughter and murder. Retrials will be allowed where there has been a conviction for an administration of justice offence relating to the original trial or where there is fresh and compelling evidence. The law has been introduced retrospectively<sup>35</sup>.

### Tasmania

On 19 August 2008, amendments were introduced in Tasmania to allow retrial in serious cases if there is "fresh and compelling" evidence<sup>36</sup>.

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<sup>35</sup> Criminal Law Consolidation (Double Jeopardy) Amendment Act 2008

<sup>36</sup> "Double Jeopardy Law Reform". Tasmanian Government Media Releases. <http://www.media.tas.gov.au/print.php?id=24539>.

## Western Australia

On 8 September 2011, amendments were introduced in the Western Australia parliament to reform the state's double jeopardy laws. The proposed amendments would allow a retrial if "new and compelling" evidence was found. It would apply to serious offences where the penalty was life imprisonment or imprisonment for 14 years or more. Acquittal because of tainting (threatening of witnesses, jury tampering, or perjury) would also allow retrial<sup>37</sup>.

## Victoria

People may be tried twice for the same crime if new evidence emerges under a reform of Victoria's double jeopardy law. The state government introduced legislation into parliament on Tuesday 8 November 2011 that will mean a fresh trial can be ordered where there is compelling new evidence that a person previously acquitted of a serious crime is guilty<sup>38</sup>.

## Reform United Kingdom

The UK changes follow a Review of the Rule by the Law Commission of England and Wales in March 2001, and the Review of the Criminal Courts of England and Wales (the Auld Report) in 2002.

In 1996 the *Criminal Procedure and Investigations Act* was introduced which allows retrials where an administration of justice offence had occurred which would have led to a false acquittal (Section 54). In 2005 the *Criminal Justice Act (2003)* was brought into law which, subject to other prerequisites, authorised new trials

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<sup>37</sup> Cox, Nicole & Hickey, Phil "*Attorney General Christian Porter welcomes double jeopardy law reform*". Perth Now, Sunday Times. September 8, 2011. <http://www.perthnow.com.au/news/western-australia/attorney-general-christian-porter-welcomes-double-jeopardy-law-reform/story-e6frg13u-1226132121880>.

<sup>38</sup> Iaria, Melissa "*Victorian double jeopardy reform begins*". Sydney Morning Herald. November 8, 2011. <http://news.smh.com.au/breaking-news-national/victorian-double-jeopardy-reform-begins-20111108-1n5c4.html>

where new and compelling evidence came to light. The Act was introduced retrospectively and relates to murder, manslaughter, kidnapping, rape, armed robbery, and serious drug crimes. All such retrials must be approved by the Director of Public Prosecutions. Once approved, the Court of Appeal can quash the original acquittal.

On 11 September 2006, William Dunlop became the first person to be convicted of murder after previously being “acquitted”. Twice he was tried for the murder of Julie Hogg in Billingham in 1989, but two juries failed to reach a verdict and he was formally “acquitted” in 1991. Some years later, he confessed to the crime, and was convicted of perjury. The case was re-investigated in early 2005, when the new law came into effect, and his case was referred to the Court of Appeal in November 2005 and permission for a new trial was granted<sup>39</sup>. Dunlop pleaded guilty to murdering Julie Hogg and raping her dead body repeatedly, and was sentenced to life imprisonment, with a recommendation he serve no less than 17 years<sup>40</sup>.

On 13 December 2010, Mark Weston became the first person to be convicted of murder after previously being found not guilty of the same offence, that of the murder of Vikki Thompson at Ascott-under-Wychwood on 12 August 1995. Weston's first trial was in 1996, when the jury found him not guilty. Following the discovery of compelling new evidence in 2009 – Thompson's blood on Weston's boots – Weston was arrested in 2009 and tried for a second time in December 2010, when he was found guilty of

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<sup>39</sup>BBC News “*Man faces double jeopardy retrial*”. November 10, 2005.  
[http://news.bbc.co.uk/2/hi/uk\\_news/england/tees/4426038.stm](http://news.bbc.co.uk/2/hi/uk_news/england/tees/4426038.stm)

<sup>40</sup> BBC News “*Double jeopardy man given life*”. October 6, 2006.  
[http://news.bbc.co.uk/2/hi/uk\\_news/england/tees/5412264.stm](http://news.bbc.co.uk/2/hi/uk_news/england/tees/5412264.stm)



Iemma, The World Today, ABC radio, 7th Sep, 2006.

- “It makes no sense to me that if someone gets off a particular case and then fresh evidence becomes available, DNA or otherwise, that they should ... literally get away with murder.”
  - **South Australian Premier Mike Rann, ABC News, 7th August, 2007.**
- “I think we've got to be prepared to review principles like this in a contemporary setting...There is a feature of modern life that distinguishes us from the situation 800 years ago, and that is, as we all know, DNA evidence, which can prove guilt with almost scientific exactitude, other matters being equal.”
  - **Queensland Chief Justice Paul de Jersey, The Courier Mail, (Brisbane), April 27 2007.**



# The Application of the Statutory Non-Parole Period

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## Operation of s44(1) of the *Crimes (SP) Act 1999*

Section 44(1) requires the sentencing court to first set a non-parole period for the sentence and then to set the balance of the term of the sentence. Section 44(2) provides that the balance of the term of the sentence must not exceed one-third of the non-parole period for the sentence, unless the court decides that there are special circumstances for it being more.

Section 44(1) involves a return to the requirement under s5 of the repealed Sentencing Act 1989 to first impose a non-parole period. In the second reading speech, the Attorney-General, Mr Debus said:

*“The replacement of the existing s44 is a necessary consequence of the introduction of the scheme of standard non-parole period sentencing”<sup>43</sup>.*

Section 44 applies to all sentencing determinations where a sentence of imprisonment of more than six months is imposed, whether or not the offence comes within the standard non-parole period sentencing scheme in Div 1A of Pt 4 of the Act. Note that a court may decline to set a non-parole period under s45, but must give reasons for doing so.

Where special circumstances have been found, the trial judge should determine what is the minimum period that the offender should serve, and not upon maintaining the proportion between the head sentence and the non-parole period<sup>44</sup>.

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<sup>43</sup> Legislative Assembly, Hansard, 23 October 2002, p5816

<sup>44</sup> *R v Chong* [2003] NSWCCA 274.

### *Muldrock v The Queen*<sup>45</sup>

The full bench of the High Court in *Muldrock v The Queen* considered the application of Pt 4 Div 1A of the *Crimes (Sentencing Procedure) Act* 1999 (the Act) to sentencing offenders convicted of standard non-parole period offences. The court held that *R v Way* (2004) 60 NSWLR 168 was wrongly decided.

### Facts<sup>46</sup>

The offender pleaded guilty to one offence of sexual intercourse with a child under 10 pursuant to s 66A of the *Crimes Act*. The offence carries a standard non-parole period of 15 years and a maximum penalty of 25 years imprisonment. An offence of aggravated indecent assault was taken into account on a Form 1.

The sentencing judge found that the offender was "significantly intellectually disabled" and imposed a 9 year term of sentence with a non-parole period of 96 days. The latter expired on the date of imposition. The judge directed that the offender reside at a secure facility with a program that is designed to assist intellectually handicapped individuals to moderate their sexually inappropriate behaviour until such time as the Parole Authority determined that he be discharged. It was accepted on appeal that the judge had no power to impose the parole condition because the sentence was more than three years<sup>47</sup>.

The Crown appealed against the inadequacy of the 96 day non-parole period. The offender appealed against the 9 year term of sentence.

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<sup>45</sup> [2011] HCA 39

<sup>46</sup> Judicial Commission of New South Wales Sentencing Information System  
[http://sis.judcom.nsw.gov.au/benchbks/sentencing/special\\_bulletin\\_02.html](http://sis.judcom.nsw.gov.au/benchbks/sentencing/special_bulletin_02.html)

<sup>47</sup> ss 50-51 of the Crimes Act 1900 NSW

The New South Wales Court of Criminal Appeal held the judge failed to have proper regard to the objective seriousness of the offence, allowed the Crown appeal and dismissed the severity appeal. It re-sentenced the offender to a non-parole period of 6 years 8 months. The offender appealed to the High Court arguing that the CCA had erred in the re-sentencing exercise and in dismissing his severity appeal.

The High Court (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ) set aside the orders of the CCA and remitted the matter for the offender to be re-sentenced in accordance with the High Court judgment.

The following propositions follow from the judgment:

- Div 1A of Pt 4<sup>48</sup> governs the sentencing of offenders for standard non-parole period offences<sup>49</sup>. It is essential to recognise that fixing a non-parole period is but one part of the larger task of passing an appropriate sentence. It is not to be treated as if it were the necessary starting point or the only important end-point in framing a sentence to which Div 1A applies<sup>50</sup>. Section 54B(3) at the time provided:

*“The reasons for which the court may set a non-parole period that is longer or shorter than the standard non-parole period are only those referred to in section 21A.”*

- It is important in understanding the operation of Div 1A to recognise that the reference to s 21A in s 54B(3) permits the court to take into account all of the common law factors that

<sup>48</sup> Crimes (Sentencing Procedure) Act 1999

<sup>49</sup> *Muldock v The Queen* [2011] HCA 39 at [12].

<sup>50</sup> *Ibid* at [17].

are relevant to the determination of a sentence as well as the specific matters referred to in ss 21A(1)(c), 21A(2) and 21A(3)<sup>51</sup>. The introduction of standard non-parole periods was also accompanied by the incorporation of a statutory statement of the purposes of sentencing which reflected the common law<sup>52</sup>.

- The CCA's criticism that the judge failed to consider the objective seriousness of the offence reflected the analysis of Div 1A in *Way's* case. The Court in *Way* wrongly interpreted the meaning in s 54B(2) of:

*“the court is to set the standard non-parole period as the non-parole period for the offence unless the court determines that there are reasons for setting a non-parole period that is longer or shorter...[emphasis added].”*

The High Court said at [25]:

*“...it was an error [of the Court in R v Way] to characterise s 54B(2) as framed in mandatory terms. The court is not required when sentencing for a Div 1A offence to commence by asking whether there are reasons for not imposing the standard non-parole period nor to proceed to an assessment of whether the offence is within the midrange of objective seriousness.”*

- Section 54B must be read as a whole. A combined reading of ss 54B(2), 54B(3) and 21A, requires an approach to sentencing for Div 1A offences that is consistent with the approach described by McHugh J in *Markarian v The Queen*<sup>53</sup> whereby the judge identifies *all* the factors that are relevant to the sentence, discusses their significance and then makes a value judgment as to what is the appropriate sentence

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<sup>51</sup> Ibid at [19].

<sup>52</sup> Ibid at [20].

<sup>53</sup> (2005) 228 CLR 357 at [51].

given all the factors of the case<sup>54</sup>. Sections 54B(2) and 54B(3) oblige the Court to take into account the full range of factors in determining the appropriate sentence for the offence. In that task the Court is to be mindful of two guideposts: the maximum penalty and the standard non-parole period.

The objective seriousness of the offence as referred to in s 54A(2) is to be determined wholly by reference to the offending without reference to matters personal to the offender or class of offenders<sup>55</sup>.

- Div 1A does not require or permit a court to embark upon a two staged approach to sentencing, involving first assessing whether the offence falls in the middle range of objective seriousness and, if so, asking whether there are matters which warrant a longer or shorter non-parole period<sup>56</sup>.

The High Court stated at [29]:

*"The reference in s 54B(4) to 'mak[ing] a record of its reasons for increasing or reducing the standard non-parole period'... require[s] the judge to identify fully the facts, matters and circumstances which the judge concludes bear upon the judgment that is reached about the appropriate sentence to be imposed. The obligation applies in sentencing for all Div 1A offences regardless of whether the offender has been convicted after trial or whether the offence might be characterised as falling in the low, middle or high range of objective seriousness for such offences."*

- A standard non-parole period only represents the non-parole period for an hypothetical offence in the middle of the range of objective seriousness without regard to the range of

<sup>54</sup> *Muldock v The Queen* supra at [26].

<sup>55</sup> *Ibid* at [27].

<sup>56</sup> *Ibid* at [28].

aggravating and mitigating factors in an individual case<sup>57</sup>. It may be that a “likely outcome” of adding the court's awareness of the standard non-parole period to the various considerations is that there will be a move upwards in the length of the non-parole periods for some offences<sup>58</sup>.

- The CCA erred by treating the provision of the standard non-parole period as having determinative significance in sentencing the offender. That error affected the resolution of the offender’s severity appeal<sup>59</sup>.

Anthony J Bellanto  
Samuel Griffith Chambers

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<sup>57</sup> Ibid at [31].

<sup>58</sup> Ibid at [31].

<sup>59</sup> Ibid at [32].



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