

2008

## The second time around

David Field

*Bond University*, [David\\_Field@bond.edu.au](mailto:David_Field@bond.edu.au)

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### Recommended Citation

Field, David (2008) "The second time around," *The National Legal Eagle*: Vol. 14: Iss. 1, Article 2.  
Available at: <http://epublications.bond.edu.au/nle/vol14/iss1/2>

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# The Second Time Around

**Associate Professor  
David Field  
Faculty of Law  
Bond University**

*A look at the new 'double jeopardy' laws in Queensland*

## So what is 'double jeopardy' anyway?

Most students taking a Legal Studies course will sooner or later come across the concept of 'double jeopardy', an old principle of English common law which emigrated to Australia along with the First Fleet, and ultimately became embedded in the criminal laws of all Australian states and territories. It means simply that no person may be placed on trial more than once in respect of any criminal act on their part, whether they are convicted or acquitted at the end of the first trial.

This does not prevent any appeal being raised against the outcome of the first trial, because this is regarded as being part of the first trial process. But once the appeal process has been exhausted in relation to this first trial, neither party (Crown or defence) may seek to revisit the outcome of the first trial by bringing a second one.

The rule operates primarily so as to support the principle of 'finality of litigation'. However, when the party seeking to re-open the matter is the Crown, then the rule operates as a form of civil liberty described in the mid-eighteenth century by the English jurist Blackstone in these terms:

'No man is to be brought into jeopardy of his life, more than once, for the same offence.'<sup>1</sup>

For more than two centuries, this rule existed under Australian law without challenge. But demands for reform began bubbling to the surface in most states towards the end of the previous century, when the double jeopardy laws<sup>2</sup> were challenged as being inadequate in two broad classes of case in which the wider interests of what some observers saw as 'true justice' seemed to have come a very poor second-best to the strict letter of the law.

These two broad classes of case involve situations where either:

- the accused had secured his<sup>3</sup> previous acquittal by tampering with the justice system itself; or
- following the accused's acquittal, convincing evidence comes to light, which it is believed would have resulted in his conviction, had it been available to the previous jury.

We will examine two classic Queensland cases, which between them demonstrate precisely why there was pressure for reform which eventually bore fruit in 2007.

## An 'administration of justice' offence which leads to an unjust acquittal

In the 1991 case of *El Zarw*,<sup>4</sup> E had originally been charged with the murder of his wife, and had been acquitted

largely on the strength of his own denial of guilt on oath, and an alibi supplied by two friends. One of the friends subsequently confessed that the three men had conspired together to give perjured evidence by inventing the alibi. E was charged with perjury and with conspiracy to pervert the course of justice, but in the end, the Supreme Court of Queensland seems to have fixated on the perjury charge.

Although E was not being charged again with murder, or even manslaughter,<sup>5</sup> the essence of the Crown case on the perjury charge was that the accused had falsely stated in the witness box that he had not murdered his wife, when in fact he had. Nothing could have been a more open admission that an accused was being called upon to prove his innocence a second time on a matter in respect of which he had already been acquitted, and, in the words of Ambrose J:

'In the absence of substantially different evidence placed before the jury, the ... perjury count would infringe the rule against double jeopardy and would be an abuse of the process of the court, albeit that the charge was one of perjury and not one of murder.'<sup>6</sup>

As will be seen below, the existence of 'substantially different evidence' has become a separate ground of argument for an exception to the double jeopardy rule, but in the context of Queensland law, it was, well over a decade ago, clearly being mooted as a basic pre-requisite for even what we may now call the 'perversion of justice' exception. It was therefore hardly surprising that when the DPP tried again ten years later in the *Carroll* case, it loaded both barrels.

## The emergence of 'compelling' new evidence

There can be little doubt that the legislation which emerged late last year in order to punch the first hole in the double jeopardy laws in Queensland's legal history was the result of the political pressure generated in the wake of the so-called 'Carroll saga'.<sup>7</sup>

The case had its origins in 1985, when C was convicted of the murder of a small child, K. During the course of the trial, he gave evidence on oath, denying that he had killed her. On appeal, his conviction was overturned by the Queensland Court of Appeal (QCA) as being 'unsafe and unsatisfactory'.

In 1999 (some 14 years later), he was indicted for perjury, on the basis that he had lied in his original trial, when he denied murdering K. He was convicted, but the QCA subsequently overturned his conviction on the grounds that (a) it was unsafe and unsatisfactory; and (b) the perjury indictment should have been stayed as 'an abuse of process'. The Crown appealed to the High Court.

The main thrust of the Crown's argument on appeal was that the effect of trying C for perjury was not technically double jeopardy, since C had never before been tried for perjury. On behalf of Carroll, it was argued that the bringing of a perjury charge against him was an 'abuse of process' by the Crown which was seeking to try again the facts essential to the original murder charge, and thereby 'controvert' the original acquittal for murder.

In the High Court, Gleeson CJ and Hayne J observed that: '[T]he factual inquiries made at the two trials, in the end, come to focus on the same issue – did [C] kill [K]? ... [I]n 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.'<sup>8</sup> Their Honours went on to conclude that the QCA had

been 'unduly favourable to the prosecution' in the present case by even considering alleged new evidence presented by the Crown (which in the event did not impress them anyway), because:

"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 [C's] 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."

Gaudron and Gummow JJ referred specifically to the previous decision of the QCA in *El Zarw*, which prohibited the Crown 'simply going behind the verdict of acquittal' where it would infringe the double jeopardy rule.



Their Honours noted that in the present case, the Crown was in essence arguing for an exception to such a prohibition where allegedly 'new' evidence was available which suggested that the previous acquittal was obtained by what amounted to 'fraud'. However, they rejected that argument on the following ground:

"The recognition of perjury as a general exception for "fraud" would enable the state, by the expedience of laying such a charge, to controvert an earlier acquittal in any case in which the accused had given evidence affirming a plea of not guilty. Similarly, an exception for "fresh evidence" ... removes an encouragement to thorough investigation in the first instance. Any weakening of the "double jeopardy" principles in the fashion proposed should be by legislative action."

McHugh J, in concurring with the opinion of the remaining judges, added the stern observation that:

"It is an abuse of process for the Crown to charge a person with an offence of perjury when proof of the charge necessarily contradicts or tends to undermine an acquittal of the accused in respect of another criminal charge ... even if the evidence supporting the charge is different from the evidence that supported the prosecution case in respect of

the charge on which the accused was acquitted. The long established policy of the law is that an acquittal is not to be contradicted or undermined by a subsequent charge that raises the same ultimate issue or issues as was or were involved in the acquittal. That is so even though the evidence proving perjury is unanswerable."

It is difficult to envisage a subsequent perjury charge, following an acquittal obtained by means of that perjured evidence, which would not fall foul of such a broadly-stated principle. Any change in the law would have to be, as was suggested by Gaudron and Gummow JJ, by means of statute.

This has now occurred, and in changing the law in this manner, the Queensland Government has followed the path of other jurisdictions, including New Zealand and the UK.

## Ring in the changes in Queensland

The *Criminal Code (Double Jeopardy) Amendment Act 2007 (Qld)* passed the Queensland Parliament in mid-October 2007. Its effect has been to make two distinct amendments to the double jeopardy provisions of s 17 of the state's *Criminal Code*. Both of these are to be found in new, later, provisions of the *Code*, which allow the re-trial of a person previously acquitted of a crime when either:

- there is 'fresh and compelling evidence' in a homicide case; or
- the accused obtained his previous acquittal by means of 'an administration of justice' offence, which has resulted in that previous acquittal being regarded as 'tainted'.

These are clearly separate scenarios, and must be considered separately.

## Re-trial for murder on 'fresh and compelling evidence'

Under a new s 678B of the *Criminal Code*, the DPP may apply to the QCA for leave to re-try for murder a person previously acquitted of murder or some lesser offence, when the Court can be 'satisfied' that:

- (1) there is 'fresh and compelling evidence' against the accused; and
- (2) 'in all the circumstances it is in the interests of justice for the order to be made'.

What may be classed as 'fresh and compelling evidence' is further defined under s 678D of the *Code*. This states that evidence will be regarded as 'fresh' if:

- (1) it was not adduced in the previous trial; and
- (2) it could not have been so adduced 'with the exercise of reasonable diligence'.

This should meet the objection voiced by some against 'trial by instalment', and lack of efficiency in the original prosecution. So far as what may be classed as 'compelling' new evidence, the section states that in order to thus qualify, the new evidence will need to be:

- (1) reliable; and
- (2) substantial; and
- (3) 'highly probative of the case against the acquitted person'.

The section also contains a peculiar provision to the effect that:

'Evidence that would be admissible on a re-trial under this chapter is not precluded from being fresh and compelling evidence merely because it would have been inad-

missible in the earlier proceedings against the acquitted person.’

These new provisions will clearly facilitate the admission of new forensic evidence obtained by the application of newly proven techniques which have only recently become an appropriate subject for ‘expert’ evidence, and have now been admitted into the ‘established field of expertise’ category when they were not before.

This was alleged of the ‘odontology’ evidence in the *Carroll* case, where the previous ‘evidence’ had consisted of the somewhat unsatisfactory technique of comparing a dental cast with bruise marks on the skin of the victim, but a new technique had subsequently been developed by the time the matter came round again, although, as was noted above, the Crown was not allowed to re-indict Carroll for different reasons.

As to what may be considered as being ‘in the interests of justice’ so far as regards the ordering of a re-trial, s 678F requires that:

- (1) A ‘fair re-trial’ must be ‘likely in the circumstances’.
- (2) Regard must be had to the length of time which has elapsed since the date of the original alleged offence. (This could, for example, be a considerable obstacle should it ever be proposed to put Carroll back on trial, given that almost 35 years have now elapsed since the murder of Deidre Kennedy.)
- (3) Regard must also be had to any lack of ‘reasonable diligence or expedition’ in the investigation of the offence, the original prosecution or the decision to apply for a re-trial.

### Re-trial in respect of a ‘25 year offence’ following a ‘tainted acquittal’

Under a new s 678C of the *Criminal Code*, an acquitted person may be re-tried for a ‘25 year offence’ following an application by the DPP to the QCA as the result of which the Court is satisfied that:

- (1) the acquittal is a ‘tainted’ one; and
- (2) ‘in all the circumstances it is in the interests of justice for the order to be made’.

A ‘25 year offence’ is defined as an offence which is punishable by imprisonment for life or for a period of 25 years or more, while a ‘tainted acquittal’ is one in respect of which anyone (including the original accused) has been convicted of ‘an administration of justice offence’ (such as perjury or perversion of the course of justice) in respect of the original trial, and it is ‘more likely than not’ that had it not been for that offence, the original accused would have been convicted.

There still remains the theoretical difficulty of obtaining a conviction for, say, perjury, against the originally acquitted accused, if the effect of so doing would be to ‘subvert’ the finding of the original trial jury. In such a case, one might still use the High Court decision in *Carroll* as authority for ‘staying’ the indictment for perjury, in just the same way as it was in that case. But if there are co-accused involved (for instance, in a conspiracy to give perjured evidence regarding a false alibi for the accused), then there is nothing to prevent their being prosecuted, and their conviction then being used as the ‘trigger’ for a re-run of the original trial.

Provision is also made for the accused to be ‘re-tried’ for a new offence which is not the same offence of which he was originally acquitted.

This has been a massive change to the law, and reflects similar changes recently introduced in NSW, New Zealand and the UK. Only time will tell how effective the changes are likely to be. At the time of writing, neither of these new Queensland provisions has been invoked.

### References

- <sup>1</sup> In *Commentaries on the Laws of England* (1769).
- <sup>2</sup> In Queensland, these are to be found in the pleas of ‘autrefois convict’ and ‘autrefois acquit’ which are embodied in s 17 of the *Criminal Code*.
- <sup>3</sup> For ease of explanation, it is assumed throughout this article that the accused is male. They usually are anyway.
- <sup>4</sup> *R v El Zarw* [1994] 2 Qd R 67; (1991) 58 A Crim R 200.
- <sup>5</sup> The provisions of s 17 of the *Code* did not therefore strictly apply, since E was not being placed on trial for the same offence a second time, but for a new offence (perjury, etc) arising out of the previous trial.
- <sup>6</sup> While ‘striking out’ the indictment as an ‘abuse of process’ by the Crown.
- <sup>7</sup> There were several trials and appeals in this long saga, but the ultimate confrontation in the High Court is reported as *R v Carroll* (2002) 213 CLR 635.
- <sup>8</sup> *Ibid* [25].
- <sup>9</sup> *Ibid* [44].
- <sup>10</sup> *Ibid* [113].
- <sup>11</sup> *Ibid* [118].

### Reflect and debate:

*What do you see as the advantages and disadvantages of the rule against double jeopardy? Do you agree with the way the rule has been changed in some jurisdictions?*