

The Law Reform Commission published a report today (28 February 2012) proposing that the rule against double jeopardy, which prevents a person who has been acquitted of an offence from being tried again for the same offence, should be relaxed in exceptional circumstances. The report contains the Commission's final conclusions, having considered the responses to a consultation paper on this subject issued by the Commission's Double Jeopardy Sub-committee in March 2010.

The Commission proposes that where "fresh and compelling" evidence came to light subsequent to an acquittal of a serious offence, or where there the original acquittal was the result of perjury, perversion of the course of justice or the like, the existing rule against double jeopardy should be relaxed.

Under the existing rule against double jeopardy, if a person has been previously acquitted or convicted of an offence, any subsequent prosecution for the same offence will be barred. The rule stems from the notion that a person who has undergone the ordeal of a criminal trial should be left undisturbed following the final verdict, either to go on to lead a normal life if acquitted or to face the appropriate punishment if convicted.

The chairman of the sub-committee, Mr Paul Shieh SC, said, "The existing rule is intended to protect offenders from being prosecuted again for the same offence based on the same facts, but it is not in the interests of justice and is unsatisfactory from the community's point of view when its effect is to allow a person to escape justice and punishment for a serious offence when new and compelling evidence pointing to his guilt has emerged subsequent to the acquittal.

"Such situations may arise where, for instance, DNA evidence is uncovered, or where an individual admits his guilt after acquittal, safe in the knowledge that he can no longer be prosecuted. Public concern in a number of other jurisdictions about the effects of a strict application of the rule has led to proposals for, or the adoption of, changes in the law."

Mr Shieh SC explained that the Commission was not recommending the complete abolition of the rule against double jeopardy, but merely its relaxation in certain exceptional circumstances.

He believed that the relaxation of the rule would address potential injustice and public concern arising from strict adherence to the rule in some circumstances.

The Commission recommends empowering the court to make an order to quash an acquittal and direct a retrial where:

- there is subsequent revelation of "fresh and compelling" evidence against an acquitted person in relation to a serious offence of which he was previously acquitted; or
- his acquittal is "tainted" (that is, the acquittal involves some interference with, or perverting of, the administration of justice, such as perjury or interference with witnesses, in the previous proceedings which contributed to his acquittal).

In recommending the relaxation of the rule, Mr Shieh SC said that the Commission was mindful of the need for any reform to be compatible with the Basic Law and the Hong Kong Bill of Rights.

He emphasised that a number of safeguards had been incorporated to ensure that the power to quash an acquittal would not be abused and that the scope of the relaxation would be narrowly tailored to achieve the legitimate purpose of pursuing and convicting the guilty.

The safeguards include the following:

- the proposed reform will only apply to serious offences, and not to offences only triable at the magistrates court level;
- the consent of the Director of Public Prosecutions will be needed before law enforcement agencies can reinvestigate an acquitted person;
- only the Court of Appeal will have the jurisdiction to quash an acquittal and order a retrial;
- if the Court of Appeal is satisfied on an application to quash an acquittal that the new evidence could have been obtained by law enforcement agencies acting with reasonable diligence at the time of the original proceedings, it will not meet the threshold of the "fresh and compelling evidence" exception;
- before quashing an acquittal and ordering a retrial, the Court of Appeal must be satisfied that it is in the "interests of justice" to do so;
- in order to prevent prejudicial publicity from affecting the fairness of any retrial, there are proposed prohibitions on publication so as to protect the identity of the accused in any application to the Court of Appeal to quash his acquittal; and
- the prosecution will only have one opportunity to apply for a retrial in respect of any particular case that originally resulted in an acquittal.

"The recommendations only concern the quashing of an acquittal, which the Courts are presently powerless to do because of the rule against double jeopardy," Mr Shieh SC added.

"It is important to note that the recommendations only concern the power to quash an *acquittal* (a power which the Courts currently lack). They do not concern the quashing of a *conviction* by way of appeal. The existing law in Hong Kong already provides for procedures and mechanisms for a convicted person to appeal against his conviction (and for the Court's power, in some circumstances, to order a re-trial following the quashing of a conviction)."

Copies of the report are available on request from the Secretariat of the Law Reform Commission at 20/F Harcourt House, 39 Gloucester Road, Wanchai, Hong Kong. The report can also be accessed on the Commission's website at www.hkreform.gov.hk.

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