

LAW REFORM OF COMMISSION OF HONG KONG

REPORT ON DOUBLE JEOPARDY

EXECUTIVE SUMMARY

1. The rule against double jeopardy stipulates that no-one may be put in peril twice for the same offence. If a person has been previously acquitted or convicted (or could, by an alternative verdict, have been convicted) of an offence and is later charged with the same offence, the rule against double jeopardy will apply to bar the prosecution. The rule is grounded on 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.

2. While the rule against double jeopardy provides certainty and a conclusion for the individual who has been tried, from the community's point of view the question arises as to whether a person should be allowed to escape justice when new and compelling evidence has emerged subsequent to his acquittal which points to his guilt. Rapid developments in recent years in forensic science and DNA testing have highlighted these concerns. Anomalies arising from strict adherence to the rule has sparked public outcry in some jurisdictions. Changes to the law have therefore been proposed or adopted in a number of jurisdictions.

3. The terms of reference for the Double Jeopardy Sub-committee in respect of this project are:

"To examine the protections against double jeopardy found in the present law, particularly in relation to autrefois acquit, autrefois convict and stay of proceedings, and to recommend such changes in the law as may be thought appropriate."

4. The sub-committee set out its preliminary recommendations in a consultation paper published in March 2010. Annex A to the report lists the 22 persons and organisations who responded to the consultation paper while Annex B indicates which respondents supported and which opposed (or had reservations about) the proposed relaxation of the rule against double jeopardy. After carefully considering the responses, we decided to maintain our recommendation to relax the rule.

Chapter 1 The rule against double jeopardy

5. The rule against double jeopardy was founded on the principle that no man ought to be punished twice for the same offence which had its origins in the ecclesiastical concept that "God judges not twice for the same offence".

6. The rule may be regarded as having two limbs. The first involves the plea of *autrefois acquit* or *autrefois convict*. A person cannot be prosecuted for the same offence for which he has previously been acquitted (*autrefois acquit*) or convicted (*autrefois convict*). A successful *autrefois* plea for a particular charge bars a prosecution on that charge. The *autrefois* plea is, however, formalistic in nature; narrowly defined; and leaves very little discretion for the court to determine the plea. Thus, an *autrefois* plea would fail if the circumstances do not fall within the narrowly defined situations under which the doctrine operates.

7. The second limb of the rule empowers the court to order a stay of proceedings for abuse of process. In contrast with the *autrefois* doctrine, the power to stay proceedings provides a wider discretionary power for the court, and is wider in scope. Because of this, a defendant may fail in an *autrefois* plea but may succeed in an application to stay the court proceedings on the basis of an abuse of process.

8. In Hong Kong, the right of an accused to plead *autrefois* is found in the Hong Kong Bill of Rights Ordinance (Cap 383) and the Criminal Procedure Ordinance (Cap 221). Article 11(6) of the Hong Kong Bill of Rights in Cap 383 (the "HKBOR"), similar to Article 14(7) of the International Covenant on Civil and Political Rights (the "ICCPR"), provides that:

"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 Hong Kong."

Section 31(1) of Cap 221 states that:

"In criminal proceedings in any court on a plea of autrefois convict or autrefois acquit the accused person may state that he has been previously convicted or acquitted, as the case may be, of the offence charged."

Chapter 2 Should the rule against double jeopardy be reformed?

Arguments for and against reform

9. The principal justifications for the rule against double jeopardy are as follows:

- (a) *Avoids the repeated distress of the trial process* - The rule avoids the repeated distress of the trial process, which affects not only the accused, but also his family, witnesses on both sides and the victim.
- (b) *Reduces the risk of a wrongful conviction* - The chances of a wrongful conviction must increase if an individual is tried more than once for the same offence. The likelihood of conviction, whether the defendant was guilty or not, might be greater at a second trial as the prosecution may have acquired, because of the first trial, a tactical advantage. Furthermore, an innocent person may not have the stamina or resources to fight a second prosecution.

- (c) *Promotes finality in the criminal justice system* - It is clearly desirable from the point of view of all parties (whether victims, witnesses or the accused) that there is a point at which the circumstances of the offence can be put behind them, so that life can move on. The rule against double jeopardy promotes confidence in court proceedings and the finality of verdicts.
- (d) *Encourages the efficient investigation of crime* - It could be argued that if the prosecution were able to prosecute once again a defendant who had been acquitted there would be a risk that the initial investigation might not be carried out as diligently as it should have been. The fact that there is but one chance to convict a defendant operates as a powerful incentive to efficient and exhaustive investigation.

10. While there are sound justifications for the rule against double jeopardy, that does not mean that a case cannot be made for relaxation of that rule in certain circumstances. The most obvious is where new and compelling evidence is brought to light after the completion of the original proceedings which points to the guilt of an acquitted defendant. This situation is increasingly likely to arise with the rapid advances in recent years in the scope and quality of scientific evidence, particularly DNA testing, which offers persuasive evidence which was not previously available. Other compelling evidence which may come to light after the conclusion of the original trial may be from a newly identified witness or even a confession statement. The question is whether the principles underpinning the rule against double jeopardy can be outweighed by the need to pursue and convict the guilty, a key aim of the criminal justice system.

Constitutional and human rights implications

11. Article 39 of the Basic Law provides that the provisions of the ICCPR shall remain in force and shall be implemented through the laws of Hong Kong. Article 39 further provides that the rights and freedoms enjoyed by Hong Kong residents shall not be restricted unless as prescribed by law, and such restrictions shall not contravene this Article. Article 14(7) of the ICCPR, similar to Article 11(6) of the HKBOR, provides that 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.

12. An issue of concern is whether any relaxation of the rule against double jeopardy would be compatible with the Basic Law and the HKBOR. To address the concern, we have first considered the equivalent provisions in England, New Zealand, South Africa, and also commentaries by some overseas law reform agencies, academics and other relevant authorities. As absolute as Article 14(7) of the ICCPR may sound, the general consensus in these jurisdictions is that a relaxation of the rule can be justified if there are exceptional circumstances.

13. In our opinion, there already exists in the current human rights jurisprudence a sufficient basis for the creation of an exception to the right guaranteed by Article 11(6) of the HKBOR. Restriction of that right could be justified if it passes rationality and proportionality tests:

- (a) the restriction must be rationally connected with one or more of the legitimate purposes; and
- (b) the means to impair the right must be no more than what is necessary to accomplish the legitimate purpose in question.

14. We therefore set out our view that the right guaranteed under Article 11(6) of the HKBOR is not absolute, and the derogation of an acquitted person's right can be justified under exceptional circumstances in compliance with the rationality principle and the proportionality principle. The pre-conditions for the derogation should be set out clearly in the legislation so as to fulfil the "prescribed by law" requirement.

15. The relaxation of the rule proposed in Chapter 3 of the report would satisfy the rationality test as the restriction of the right under Article 11(6) is rationally connected with the legitimate purpose of pursuing and convicting the guilty, a key aim of the criminal justice system. The relaxation would also satisfy the proportionality test as the means (ie relaxation only under the two exceptional circumstances of "tainted acquittal" and "fresh and compelling evidence" as to guilt) is no more than what is necessary to accomplish the legitimate purpose.

16. We emphasise the presence of a series of safeguards to ensure that the power to quash an acquittal will not be abused and that the scope of the relaxation is narrowly tailored to the legitimate purpose. The salient features of these safeguards are as follows:

- (a) the reform only applies to acquittals of serious offences and not all criminal offences;
- (b) the consent of the Director of Public Prosecutions is needed before law enforcement agencies can reinvestigate the acquittal case;
- (c) only the Court of Appeal will have the jurisdiction to quash the acquittal and order a retrial;
- (d) new evidence which could have been found by law enforcement agencies acting with reasonable diligence will not meet the "fresh and compelling" evidence exception proposed in Chapter 3;
- (e) before quashing the acquittal and ordering a retrial, the Court of Appeal must be satisfied that it is in the "interests of justice" to do so;
- (f) prohibitions on publication apply to protect the identity of the accused so as to prevent prejudicial publicity from affecting the fairness of any retrial; and
- (g) the prosecution will only have one opportunity to apply for a retrial in respect of any particular case that originally resulted in an acquittal.

17. Based on the totality of these safeguards, the recognition of exceptions to the rights against double jeopardy in other jurisdictions, and the rigour of our proposals as compared to similar reforms in other jurisdictions, we believe that the proposed relaxation will survive scrutiny under the Basic Law and HKBOR. Those who responded to the consultation paper, in general, agreed with us.

Should the rule against double jeopardy be reformed?

18. There are three options in response to the question whether the rule against double jeopardy should be reformed:

- (a) maintain the status quo;
- (b) abolish the rule in its entirety;
- (c) retain the rule, but relax it in exceptional circumstances (a halfway-house approach).

19. The consultation paper rejected option (b) because the rule still has a role to play in our criminal justice system, as the justifications set out in this chapter clearly illustrate. Besides, Article 11(6) of the HKBOR would also render this option unconstitutional. Nevertheless, strict adherence to the rule may run counter to the interests of justice where subsequent revelation of compelling evidence as a result of, for example, scientific breakthrough proves the guilt of an acquitted person. The criminal justice system is likely to be even more acutely undermined if an acquitted person cannot be brought to justice, despite his subsequent confession to a serious crime. This could be expected to spark public disquiet and reduce public confidence in the criminal justice system.

20. The consultation paper recommended that the rule should be retained, but relaxed in exceptional circumstances. The majority of those who commented on this recommendation supported the proposed relaxation and generally agreed that the proposal would serve the public interest and that the rule as it stood was too stringent. We have accordingly maintained our recommendation that the rule should be retained, but relaxed in the exceptional circumstances proposed in the report. We also recommend that the proposed relaxation should not affect the power of the court to order a stay of proceedings where there has been an abuse of process.
(Recommendation 1)

Chapter 3 Relaxing the rule against double jeopardy

21. This chapter identifies what "exceptional circumstances" warrant the relaxation of the rule, and deals with a number of issues consequential to the relaxation. Before making a recommendation on each issue, we first studied how the issue had been addressed in other common law jurisdictions (Australia (New South Wales, Queensland, South Australia, Tasmania and Victoria), England & Wales, Ireland, New Zealand and Scotland).

"Exceptional circumstances" that warrant the relaxation

(a) *the grounds for relaxation of the rule*

22. Legislation in most of the jurisdictions studied in this chapter allow an application to quash an acquittal where there is subsequent revelation of "new"/"fresh" and "compelling" evidence against an acquitted person or where the acquittal is "tainted". A "tainted acquittal" is one unjustly obtained through the

commission of an administration of justice offence, either by the acquitted person himself or another person. As a result, the jury is unable to assess the case fairly.

23. We recommend empowering the court to make an order to quash an acquittal and direct a retrial where:

- (a) 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
- (b) an acquittal is tainted. **(Recommendation 2)**

(b) *the types of offences to which the relaxation applies*

24. The general trend in the jurisdictions studied in this chapter is that offences which can be retried under the "fresh and compelling" evidence limb are more serious than those under the "tainted acquittal" limb. We agree with this approach since the sense of unfairness, injustice and repugnancy is, in general, likely to be more pronounced in the case of a tainted acquittal than in a case where there is subsequent discovery of "fresh and compelling" evidence. In our opinion, this should be factored into our consideration of the appropriate threshold for quashing an acquittal. In other words, offences to be covered by the "fresh and compelling" evidence limb should be more serious (ie a higher threshold for invoking this limb) than offences to be covered by the "tainted acquittal" limb.

25. We recommend that the rule against double jeopardy should be relaxed to allow a retrial:

- (a) where there is "fresh" and "compelling" evidence in respect of an offence of which the accused has been acquitted in the High Court for which the maximum sentence is 15 years' imprisonment or more; or
- (b) where there is a "tainted acquittal" in respect of an indictable offence tried in the District Court or High Court.

26. We further recommend that descriptions of the offences to be covered by the proposed relaxation should be contained in a schedule to the relevant legislation. **(Recommendation 3)**

(c) *definition of the relevant terms*

27. Whether the operative phrase is "new and compelling" or "fresh and compelling" matters less than how the chosen phrase is defined. We prefer, however, the term "fresh" to the term "new". The word "new" might create the impression that it simply refers to evidence that was not used previously, whereas the word "fresh" carries the connotation that it was not found or located (and could not have been found or located) previously, which is more consistent with our proposal below. The additional criterion that the evidence "could not have been adduced in those proceedings with the exercise of reasonable diligence" addresses the argument that retaining the rule against double jeopardy encourages efficient investigation of crime.

28. We recommend that for the purpose of determining what amounts to "fresh and compelling evidence":

- (a) evidence is "fresh" if it was not adduced in the proceedings in which the person was acquitted, and it could not have been adduced in those proceedings with the exercise of reasonable diligence.
- (b) evidence is "compelling" if it is reliable, substantial, and in the context of the issues in dispute in the proceedings in which the person was acquitted, is highly probative of the case against the acquitted person.
(Recommendation 4)

29. In most of the jurisdictions discussed in this chapter, a tainted acquittal is defined by reference to the commission of certain specified offences the definitions or ingredients of which involve some interference with, or perverting of, the administration of justice (such as perjury, interference with witnesses, etc),¹ and to a particular causative link between the commission of such offences with the previous acquittal. Setting out a list of specified "administration of justice" offences in the relevant legislation has the benefit of certainty and clarity. We believe that the definition of "tainted acquittal" should not be restricted to the commission of an administration of justice offence (as was recommended in the consultation paper), but should additionally cover the commission of any offence that has the requisite causal link with the acquittal.

30. We recommend that:

- (a) A "tainted acquittal" should be defined as one where the accused person or another person has been convicted (whether in Hong Kong or elsewhere) of:
 - (i) an administration of justice offence; or
 - (ii) any offence committed in connection with the proceedings in which the accused person was acquitted;and the commission of the administration of justice offence or that latter offence was, more likely than not, a significant contributing factor in the person's acquittal.
- (b) "Administration of justice offences" are those specifically listed in the legislation, ie offences the ingredients of which involve interfering with the administration, or perverting the course, of justice.
(Recommendation 5)

Measures to prevent abuses

31. Most of the jurisdictions discussed in this chapter require that the quashing of an acquittal must be "in the interests of justice". In determining this, the court must have regard in particular to a list of non-exhaustive factors set out in the legislation. We agree that an application to quash an acquittal (whether under the tainted acquittal ground or the fresh and compelling evidence ground) should only be

¹ Hence some jurisdictions use of the phrase "administration of justice offences".

granted where it is in the interests of justice to do so. This will give the court a wide discretion to decide on the basis of the facts of each case.

32. We recommend that before allowing an application to quash an acquittal under either the "fresh and compelling evidence" limb or the "tainted acquittal" limb, the court must satisfy itself that it is in the interests of justice to do so. **(Recommendation 6)**

Mechanism for making an application to quash an acquittal

33. (a) *forum and time limit for the application* - We recommend that an application to quash an acquittal should be made to the Court of Appeal within 28 days after the acquitted person is charged with the offence to which the application relates, or a warrant is issued for the person's arrest (whichever is the earlier). **(Recommendation 7)**
- (b) *number of permissible applications* - We recommend that only one application to quash an acquittal should be permitted upon the relaxation of the rule, regardless of which limb forms the basis of the application. **(Recommendation 8)**
- (c) *an appeal channel* - We recommend that:
- (i) an appeal can be made by the prosecution or an acquitted person against the Court of Appeal's decision on an application for an order to quash an acquittal under either limb;
 - (ii) Appeal should be by leave and the test for granting leave should be that provided in the Hong Kong Court of Final Appeal Ordinance (Cap 484);
 - (iii) The Hong Kong Court of Final Appeal Ordinance (Cap 484) should apply to this type of appeal. **(Recommendation 9)**
- (d) *time limits for commencing a retrial* - We recommend that an indictment/charge sheet for the retrial cannot be presented later than two months after the date of the order for retrial, unless the Court of Appeal gives leave. **(Recommendation 10)**

Restriction on publication and other safeguards

34. There are two main approaches to publication adopted in the jurisdictions studied in this chapter. The "default position" in, for example, New South Wales and Queensland is that of no publication and disclosure of the identity of the accused (against whom an application is made or an acquittal is quashed), unless it is sanctioned by a court order. The other approach (that, for example, in New Zealand and England) is that there is liberty to publish and disclose subject to the court's power to order otherwise or to give directions to safeguard a fair trial. We prefer the former approach because it provides a blanket and "pre-emptive" ban unless otherwise authorised by the court. This could avoid a situation where a person acquires knowledge of the identity of the acquitted person by attending a court hearing and then publishes the identity of that person before the court could make an order prohibiting disclosure of his identity.

35. We recommend, *inter alia*, that:
- (a) there should be a statutory prohibition on publication of anything which has the effect of identifying an acquitted person who is (i) the subject of an application or order for retrial; or (ii) the subject of a police investigation (or an application for authorisation of such an investigation) in connection with a possible retrial, unless the publication is authorised by an order of the Court of Appeal or the court of retrial;
 - (b) the court should be empowered to make an order prohibiting the publication of such further or other matters that the court regards as necessary in the interests of justice;
 - (c) a contravention of the prohibition on publication should be punishable as contempt of court;
 - (d) the prosecution at the retrial before a jury should not be permitted to mention that the Court of Appeal has found that it appears that there is fresh and compelling evidence against an acquitted person, or that it is more likely than not that the fact that the acquittal is tainted is a significant contributing factor in the acquittal, unless the court of retrial grants leave to do so. **(Recommendation 11)**

Police powers of investigation after acquittal

36. The question here is what, if any, coercive powers (such as seizure, entry, etc) the police should possess, before a prior acquittal is quashed, in order to investigate an offence which has already been the subject of a prior acquittal and the prosecution of which would otherwise be met by an *autrefois* plea. The provisions in the jurisdictions considered in this chapter appear to be broadly similar, especially those in New South Wales, Queensland and England. We agree that the police's powers to investigate and the conditions to be fulfilled before such an investigation could be carried out should be expressly set out in the legislation. We are also of the view that the Director of Public Prosecutions is a more appropriate person than senior police officers or the Solicitor General to give consent to such an investigation. On the whole, we are in favour of adopting section 85 of the Criminal Justice Act 2003 (the "English 2003 Act") in England.

37. We agree that obtaining the Director of Public Prosecutions' prior consent may not be feasible or desirable in some urgent situations, and in the interests of justice the police's investigation should not be hindered. As a measure to cater for cases of urgent need, we recommend that the Director of Public Prosecutions' consent should not be needed if a police officer of the rank of superintendent or above believes that the investigation would be substantially and irrevocably prejudiced. This would cover, for example, circumstances where there is a real or imminent risk of an acquitted person departing from Hong Kong, or that significant evidence will be lost or destroyed.

38. We recommend that:
- (a) before an acquittal is quashed, the law enforcement agencies' powers to investigate an acquitted person and the conditions to be fulfilled (including the obtaining of the Director of Public Prosecutions' consent)

before such an investigation could be carried out should be expressly set out in the legislation and to that end provisions similar to section 85 of the English 2003 Act should be adopted;

- (b) the law enforcement agencies should have urgent investigative powers and to that end a provision similar to section 86 of the English 2003 Act should be adopted;
- (c) where an order for retrial is granted, provisions that currently enable a defendant who successfully appeals against conviction, but in respect of whom a retrial is ordered, to be arrested, summoned to appear, remanded in custody, or released on bail, pending his retrial, should apply to an acquitted person with necessary modifications. **(Recommendation 12)**

Retention of exhibits for a possible retrial

39. In reforming the law on double jeopardy, we need to consider the law and practice governing the retention and storage of exhibits. We should also consider whether the new legislation should stipulate the types of exhibits to be retained and the length of time they should be retained, or whether this should be dealt with by way of guidelines promulgated by the law enforcement agencies without legislative force. Instead of making a recommendation, we are of the view that these issues should be left to the relevant law enforcement agencies to decide on a case-by-case basis, subject to such guidelines as the agencies may devise.

40. However, we recommend removing the pre-condition that "the person so entitled is unknown or cannot be found" from section 102(2)(a)(ii) of the Criminal Procedure Ordinance (Cap 221). Both the prosecution and the defence should be provided with equal rights to apply for the retention of exhibits or seized materials. **(Recommendation 13)**

Scope of application of the relaxation

41. We have considered whether the relaxation of the rule should apply to acquittals ordered before the relaxation comes into force. If the relaxation does not have a retrospective effect, there would be no opportunity to rectify unjust acquittals made before the commencement of the relaxation, bearing in mind that there may be breakthroughs in forensic science, and fresh and compelling evidence or the fact of a tainted acquittal may be unearthed, only years after an unjustified acquittal (which was ordered *before* the relaxation comes into force). We are also of the view that the proposed relaxation should apply equally to a person acquitted in proceedings outside Hong Kong provided that the other criteria recommended in this report are fulfilled. We emphasise that the description "retrospective" must not be mistaken as carrying the connotation of punishing someone for doing an act that was not criminal at the time of its commission. Our proposal would not have that effect.

42. We recommend that the proposed relaxation of the rule against double jeopardy under both the fresh and compelling evidence limb and the tainted acquittal limb should apply to acquittals before and after the relaxation either by Hong Kong courts or courts in other jurisdictions. **(Recommendation 14)**

Miscellaneous

43. In relation to costs and the judges who should hear the application or the retrial, we recommend that:

- (a) the court should have a discretion to make a costs order in favour of an acquitted person if an application to quash the acquittal fails;
- (b) the judges assigned to hear an application should be different from those who presided over the original trial or heard the appeal resulting in the acquittal so as to avoid any perception or allegation of bias;
- (c) no judge who sits on the Court of Appeal hearing the application or who has heard the original trial or appeal resulting in the acquittal should sit as the trial judge in the subsequent retrial. **(Recommendation 15)**