

Passed by both Houses



New South Wales

Crimes (Appeal and Review) Amendment (Double Jeopardy) Bill 2006

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I certify that this PUBLIC BILL, which originated in the LEGISLATIVE ASSEMBLY, has finally passed the LEGISLATIVE COUNCIL and the LEGISLATIVE ASSEMBLY of NEW SOUTH WALES.

*Clerk of the Legislative Assembly.
Legislative Assembly,
Sydney, , 2006*



New South Wales

Crimes (Appeal and Review) Amendment (Double Jeopardy) Bill 2006

Act No , 2006

An Act to amend and rename the *Crimes (Local Courts Appeal and Review) Act 2001* to enable the retrial of acquitted persons for very serious offences in certain cases; and for other purposes.

See also *Crimes (Appeal and Review) Amendment (DNA Review Panel) Act 2006*.

I have examined this Bill, and find it to correspond in all respects with the Bill as finally passed by both Houses.

Chairman of Committees of the Legislative Assembly.

The Legislature of New South Wales enacts:

1 Name of Act

This Act is the *Crimes (Appeal and Review) Amendment (Double Jeopardy) Act 2006*.

2 Commencement

This Act commences on a day or days to be appointed by proclamation.

3 Principal amendment of Crimes (Local Courts Appeal and Review) Act 2001 No 120

The *Crimes (Local Courts Appeal and Review) Act 2001* is amended as set out in Schedule 1.

4 Other amendments

Each Act listed in Schedule 2 is amended as set out in that Schedule.

5 Repeal of Act

- (1) This Act is repealed on the day following the day on which all of the provisions of this Act have commenced.
- (2) The repeal of this Act does not, because of the operation of section 30 of the *Interpretation Act 1987*, affect any amendment made by this Act.

Schedule 1 Principal amendments

(Section 3)

[1] Section 3 Definitions

Insert in alphabetical order in section 3 (1):

acquittal includes:

- (a) an acquittal in appeal proceedings in respect of an offence, and
- (b) an acquittal at the direction of a court.

[2] Part 8

Insert in appropriate order:

Part 8 Acquittals

Division 1 Preliminary

98 Definitions

(1) In this Part:

administration of justice offence means any of the following offences:

- (a) bribery of, or interference with, a juror, witness or judicial officer,
- (b) perversion of (or conspiracy to pervert) the course of justice,
- (c) perjury.

life sentence offence means murder or any other offence punishable by imprisonment for life.

Note. On the enactment of this Part, the following offences were offences punishable by imprisonment for life:

- (a) murder (section 19A of the *Crimes Act 1900*),
- (b) an offence under section 61JA (1) of the *Crimes Act 1900* (Aggravated sexual assault in company),

- (c) an offence under section 23 (2), 24 (2), 25 (2), 25 (2A), 26, 27 or 28 of the *Drug Misuse and Trafficking Act 1985*, being an offence that relates to a large commercial quantity of certain prohibited plants or drugs.

15 years or more sentence offence means an offence punishable by imprisonment for life or for a period of 15 years or more.

- (2) For the purposes of this Part, the retrial of an acquitted person for an offence includes a trial if the offence is not the same as the offence of which the person was acquitted.
- (3) In this Part, a reference to the proceedings in which a person was acquitted includes, if they were appeal proceedings, a reference to the earlier proceedings to which the appeal related.

Division 2 Retrial after acquittal for very serious offence

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. An application cannot be made in relation to an acquittal resulting from a retrial under this Part.

- (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.

Division 3 Appeals on questions of law

107 Directed jury acquittals or acquittals in trials without juries

- (1) This section applies to the acquittal of a person:
 - (a) by a jury at the direction of the trial Judge, or
 - (b) by a Judge of the Supreme Court or District Court in criminal proceedings for an indictable offence tried by the Judge without a jury, or
 - (c) by the Supreme Court or the Land and Environment Court in its summary jurisdiction in any proceedings in which the Crown was a party.
- (2) The Attorney General or the Director of Public Prosecutions may appeal to the Court of Criminal Appeal against any such acquittal on any ground that involves a question of law alone.

- (3) An appeal may be made within 28 days after the acquittal or, with the leave of the Court of Criminal Appeal, may be made after that period.
- (4) The accused person is entitled to be present and heard at the appeal. However, the appeal can be determined even if the person is not present so long as the person has been given a reasonable opportunity to be present.
- (5) The Court of Criminal Appeal may affirm or quash the acquittal appealed against.
- (6) If the acquittal is quashed, the Court of Criminal Appeal may order a new trial in such manner as the Court thinks fit. For that purpose, the Court may (subject to the *Bail Act 1978*) order the detention or return to custody of the accused person in connection with the new trial.
- (7) If the acquittal is quashed, the Court of Criminal Appeal cannot proceed to convict or sentence the accused person for the offence charged nor direct the court conducting the new trial to do so.
- (8) This section does not apply to a person who was acquitted before the commencement of this section.

Note. See section 5C of the *Criminal Appeal Act 1912* for appeals against the quashing of an indictment.

108 Appeals not affecting existing acquittal

- (1) This section applies to the acquittal of a person:
 - (a) in any proceedings tried on indictment (whether in respect of the whole or part of the indictment), or
 - (b) in any proceedings tried by the Supreme Court or the Land and Environment Court in its summary jurisdiction in which the Crown was a party.
- (2) The Attorney General or the Director of Public Prosecutions may submit for determination by the Court of Criminal Appeal any question of law arising at or in connection with the trial (together with a statement of the circumstances out of which the question arose). The Court is to hear and determine any such question.

- (3) The determination by the Court of Criminal Appeal of the question submitted does not in any way affect or invalidate the verdict of acquittal or any other decision given at the trial.
- (4) Any person charged at the trial or affected by the decision is entitled to be heard before the Court of Criminal Appeal on the determination of the question submitted. If the person does not propose to be represented, the Attorney General or Director of Public Prosecutions is to instruct (and pay the reasonable costs of) counsel to argue the question before the Court on behalf of the person.
- (5) The hearing and determination of any question under this section is to be held in camera.
- (6) The following is not to be published:
 - (a) any report of a submission made under subsection (2),
 - (b) any report of proceedings under this section that discloses the identity of the person charged at the trial or affected by the decision given at the trial.

Any such publication is punishable as a contempt of the Supreme Court.

Division 4 Miscellaneous

109 Authorisation of police investigations

- (1) This section applies to any police investigation of the commission of an offence by an acquitted person in connection with the possible retrial of the person for the offence under Division 2.
- (2) For the purposes of this section, a police investigation is an investigation that involves:
 - (a) any arrest, questioning or search of the acquitted person (or the issue of a warrant for the arrest of the person), or
 - (b) any forensic procedure carried out on the person or any search or seizure of premises or property of or occupied by the person,

whether with or without his or her consent.

- (3) A police officer is not to carry out or authorise a police investigation to which this section applies unless the Director of Public Prosecutions:
 - (a) has advised that in his or her opinion the acquittal would not be a bar to the trial of the acquitted person in this State for the offence, or
 - (b) has given his or her written consent to the police investigation on the application in writing of the Commissioner or a Deputy Commissioner of Police.
- (4) The Commissioner or a Deputy Commissioner of Police may make an application for the police investigation only if satisfied that relevant evidence for the purposes of an application for a retrial under Division 2 has been obtained or is likely to be obtained as a result of the investigation.
- (5) The Director of Public Prosecutions may not give his or her consent to the police investigation unless satisfied that:
 - (a) there is, or there is likely as a result of the investigation to be, sufficient new evidence to warrant the conduct of the investigation, and
 - (b) it is in the public interest for the investigation to proceed.

110 Bail

- (1) This section has effect despite anything to the contrary in the *Bail Act 1978*.
- (2) There is a presumption in favour of bail in respect of a person who is charged with an offence for which a retrial is sought under Division 2 until the application is dealt with.

111 Restrictions on publication

- (1) A person must not publish any matter for the purpose of identifying or having the effect of identifying:
 - (a) an acquitted person the subject of a police investigation referred to in section 109 (or of an application for authority for such an investigation), or

- (b) an acquitted person the subject of an application for a retrial under Division 2 or an appeal under Division 3, or
 - (c) the acquitted person the subject of an order for retrial under this Part or who is being retried under this Part,unless the publication is authorised by order of the Court of Criminal Appeal or of the court before which the acquitted person is being retried.
- (2) The relevant court may make an order under this section only if the court is satisfied that it is in the interests of justice to do so.
- (3) Before making an order under this section, the Court is to give the acquitted person a reasonable opportunity to be heard on the application for the order.
- (4) The Court may at any time vary or revoke an order under this section.
- (5) The prohibition on publication under this section ceases to have effect (subject to any order under this section):
 - (a) when there is no longer any step that could be taken which would lead to the acquitted person being retried under this Part, or
 - (b) if the acquitted person is retried under this Part, at the conclusion of the trial,whichever is the earliest.
- (6) Nothing in this section affects any prohibition of the publication of any matter under any other Act or law.
- (7) A contravention of the prohibition on publication under this section is punishable as contempt of the Supreme Court.

112 Other appeal or review rights not affected

- (1) Nothing in this Part affects a right of appeal in respect of a person's acquittal on the ground of mental illness where mental illness was not set up as a defence by the person, as provided by section 5 (2) or 5AA (2) of the *Criminal Appeal Act 1912*.
- (2) Nothing in this Part affects a right of appeal or review under this or any other Act or law in respect of a person's acquittal.

[3] Section 81 Review of Act (renumbered as section 120)

Insert at the end of the section:

- (4) A review of the provisions of Part 8 is to be undertaken as soon as practicable after the period of 5 years after their insertion into this Act by the *Crimes (Appeal and Review) Amendment (Double Jeopardy) Act 2006* (and the report of the outcome of that review is to be tabled in each House of Parliament within 12 months after the end of that period) despite anything to the contrary in this section.

Schedule 2 Other amendments

(Section 4)

2.1 Crimes (Local Courts Appeal and Review) Act 2001 No 120

[1] Long title

Omit “in Local Courts and other courts of comparable jurisdiction”.

[2] Section 1 Name of Act

Omit “*Local Courts*”.

[3] Part 7, sections 74–81

Re-number Part 7 and sections 74–81 as Part 9 and sections 113–120, respectively.

[4] Schedule 1 Savings, transitional and other provisions

Insert at the end of clause 1 (1):

*Crimes (Appeal and Review) Amendment (Double Jeopardy)
Act 2006*

2.2 Criminal Appeal Act 1912 No 16

[1] Section 5A Point of law stated by judge

Omit section 5A (2) and (3).

[2] Section 5B Case stated from District Court

Insert at the end of the section:

- (3) The Court of Criminal Appeal may, in connection with the determination of a question of law in the circumstances referred to in subsection (2), quash any acquittal, conviction or sentence of the District Court on the appeal to the District Court.

[3] Section 22 Powers of a judge sitting alone

Insert after section 22 (1) (h):

- (h1) in the case of the hearing of an application under Division 2 of Part 8 of the *Crimes (Appeal and Review) Act 2001*, the power to conduct any part of the hearing as directed by the court,