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July 2019

Crimes (Appeal and Review) Amendment (Double Jeopardy) Bill 2019
Standing Committee on Law and Justice
2. Questions on Notice

I received two 'questions on notice':
A. regarding the Scottish double jeopardy reforms, and
B. a general invitation to review the transcript and respond to any points made by other witnesses, particularly those from the Bar Association, regarding my submission.

A. Scottish double jeopardy reform

I have not done exhaustive research on this, just a quick survey.

Double jeopardy exceptions were introduced into Scottish law by the *Double Jeopardy (Scotland) Act 2011*. It is interesting to note that the Scottish Government supported the passage of this legislation with a particular case in mind; that of Angus Sinclair, who had been acquitted in 2007 of the 'World's End' murders committed in 1977. In 2009 Justice Minister Kenny MacAskill indicated the Crown would have the Government's 'full support' if it wished to re-prosecute Sinclair: 'Double Jeopardy "to be abolished"', BBC News, 10 December 2009, http://news.bbc.co.uk/2/hi/uk_news/scotland/8406592.stm. Following the introduction of the double jeopardy exceptions, the Sinclair acquittal was the first to be set aside: see Fiona Leverick, ' "Legal history" in the making: *HM Advocate v Sinclair* and the *Double Jeopardy (Scotland) Act 2011*' (2015) 19 *Edinburgh Law Review* 402; [2014] HCJAC 131.

Scottish provisions diverge a little from those of England and Wales, and Australian jurisdictions. There are three exceptions covering, respectively, tainted acquittals (s 2), subsequent admissions (s 3), and new evidence (s 4). These exceptions apply more broadly than in other jurisdictions. The first two apply to all offences, while the 'new evidence' exception is limited to acquittals on indictment.

Like most jurisdictions, the Scottish double jeopardy exceptions apply retrospectively: s 14. Only one application may be made under the new evidence exception: s 4(5). But multiple applications may be made under the other exceptions. In this respect the Scottish subsequent admission exception operates more broadly than the fresh/new evidence exception of other jurisdictions.

The subsequent admission and new evidence exceptions do not require expressly that the evidence be 'compelling'. However, there are roughly comparable requirements. The Court in *Sinclair* said '[t]he safeguards … are designed to ensure that an acquittal is only set aside when there is new evidence of a compelling nature': [104]. The subsequent admission or new evidence must be such that 'the case against the person is strengthened substantially' (ss 3(4)(b), 4(7)(a)); and there is a further requirement that, the subsequent admission or new evidence together with 'the evidence which was led

at that trial [make it] highly likely that a reasonable jury properly instructed would have convicted the person' (ss 3(4)(c), 4(7)(c)). Further it must be 'in the interests of justice' to set aside the acquittal (ss 3(4)(d), 4(7)(d)).

In effect, 'new evidence' is defined in similar terms to 'fresh evidence' in Australia. 'The court may set aside the acquittal only if satisfied that … the new evidence was not available, and could not with the exercise of reasonable diligence have been made available, at the trial in respect of the original offence': s 4(7(b).

With regards to the specific issue presented by the NSW Bill, the Act expressly provides 'evidence which was not admissible at the trial in respect of the original offence but which is admissible at the time the court considers the application under subsection … is not new evidence': s 4(4).

Having said that, the Court in *Sinclair* said that freshly admissible evidence could be relied upon at the retrial. It noted that the Crown would 'bring a new prosecution': s 4(3)(ii). This supports the proposition that

> at a subsequent trial any available, competent evidence may be led. … Equally, although evidence which was not admissible at the time of the original trial but has since become so cannot be the basis for the granting of an application, if there is otherwise a basis for the granting of the application there is no reason why that evidence could not be led at any new trial … (at [104])

B. Response to other witnesses and submissions

Ms Bashir, for the Bar Association, did not accept many aspects of my submission. In most cases her opposition was merely stated without any substantiation, making it difficult for me to respond. Here I address only the most problematic aspects of her evidence. More generally, I maintain the position expressed in my submission and evidence.

i. expected incorrect acquittals

According to the draft transcript of the hearing, Ms Bashir said

> in relation to Professor Hamer's submission, one of his starting points is that the corollary to the criminal standard of proof—that is, beyond reasonable doubt—is an expectation that many acquitted defendants are actually guilty. We say we do not embrace that.

This is an accurate statement of what I said in my submission. I have substantiated this proposition in a couple of articles. In my submission I mentioned a *Criminal Law Review* article from 2009, however, the argument is more fully worked out in 'Probabilistic

Standards of Proof, Their Complements and the Errors that are Expected to Flow from Them' (2004) 1 *University of New England Law Journal* 72.

My claim is as much one of logic and mathematics as it is empirical. Suppose the criminal standard of proof demands a probability of guilt of greater than 90% for conviction. (This is one interpretation of Blackstone's proposition that it is better that 10 guilty men go free than that one innocent person hang.) That would mean that if 10 defendants were considered 90% guilty they would all be acquitted. Further, it would be expected that 9 of the 10 were actually guilty – 9 out of 10 of the acquittals would be expected to be incorrect.

The expected error rate depends not only on the probability level of the standard of proof; it depends on the strength of the evidence across the distribution of cases. If there were 10 cases where guilt was only proven to a probability of 10% then the defendants would all be acquitted and only one of them would be expected to be guilty. But if the evidence of guilt and the prospects of conviction were so weak it is unlikely that these cases would be pursued by the prosecution in the first place. (There would be a low rate of mistaken non-prosecutions rather than mistaken acquittals.) The bulk of the distribution is likely to be above the 50% mark, in which case, more than 50% of acquitted defendants would be expected to be guilty.

ii. rule of law

According to the draft transcript, Ms Bashir said

> many of the propositions of Professor Hamer … understood properly are premised actually on a rejection of the rule of law that is at the very heart of the administration of justice and how our system operates …

This kind of hyperbolic appeal to the rule of law is unhelpful at best. I note that Ms Bashir makes no attempt to substantiate her quite extreme claim.

The rule of law is a contested complex abstraction. The Bar Association (at p 5 of their submission, and the DPP at their p 3) have supported their views of restrictions on legislative power with quotes Gaudron J from *Polyukhovich* (1991) 172 CLR 501. Gaudron J's views are worthy of the highest respect of course, but it should be noted that she was dissenting in that decision. A majority of the High Court did uphold the retrospective war-crimes legislation. These are not easy issues. In my submission and evidence I sought to work my way through the rule of law implications of the Bill. I acknowledged concerns about separation of powers, retrospectivity, the ad hominem and ex post facto aspects, and I tried to deal with them in a reasoned and balanced fashion.

One of the key goals of the rule of law is to ensure that the law applies equally to all. Many commentators acknowledge the risk that the pursuit of formal equality can mask

substantive inequality. It may be necessary, in some situations, for the law to differentiate between people or groups of people in the pursuit of genuine equality. The Bowraville case is a case in point. As the Jumbunna Institute submission notes, at p 13, it was a case 'where initial investigations and trials are flawed not as a result of mistake, negligence or tactics but the systemic discrimination within such processes'. As Professor Behrendt indicates in her evidence, 'if the law does not work for the most marginalised and those who have the greatest difficulty accessing justice, then the law should be reviewed; not to accommodate one particular case but to ensure the overall justice, fairness and integrity of the legal system.'

iii. rules of the game

Ms Bashir, according to the draft transcript, in objecting to the Bill said

> It is a changing of the rules of the trial. Professor Hamer refers to it rather glibly in an effort to smack it down, as changing the rules of the game. We certainly do not. No practitioner who has appeared in a criminal trial or on an appeal, or on an appeal in relation to fresh evidence, would ever, ever call what goes on in the criminal justice system a game.

Here I think Ms Bashir may be a little confused. As is clear from my submission, I was not suggesting that criminal justice is a game. I was noting that others appear to view it that way. I quoted from the Wood review which characterised an objection to the earlier reform Bill in these terms (at 63): '[a]llowing the prosecution to take advantage of changes in the law of evidence which expand the range of admissible evidence smacks of changing the rules after the game has already been played'. Presumably James Wood QC, former Chief Judge at Common Law, considered this a fair characterisation of the opponents of the Bill, including the Bar Association.

My submission expressed opposition to this view. I sought to *distinguish* criminal justice from a game. Of course, I'm not the first to do this. Jerome Frank, Judge of the United States Court of Appeals for the Second Circuit, made a similar point in his classic book, *Courts on Trial* (1949). He contrasted the 'fight theory' of the trial with the 'truth theory'. He argued the former theory held too much sway. 'In short, the lawyer aims at victory, at winning in the fight, not at aiding the court to discover the facts' (at p 85 of the Antheum Edition, 1963).

***iv.* Reilly**

According to the draft transcript, Ms Bashir said

> In *Reilly*, which is a murder case that Professor Hamer refers to, there was fresh DNA evidence in 2015 and 2016 in relation to a 1986 acquittal. That is what formed the basis of the application. What Professor Hamer said must be read with that in mind, but it is not stated. There was also previously known

> propensity evidence that was available at the time of trial. The Court of Appeal took the view that the fresh DNA evidence was sufficient and the admissibility or otherwise of the propensity evidence could be left to the trial judge if they ordered a new trial on that basis. It was conceded that the DNA evidence was "new" and "compelling". It would be "fresh" under our provisions.
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> By the time of the application Reilly was terminally ill with a life expectancy of weeks. He was in custody, unlikely to ever be released and he was not fit to plead or stand trial. The Court of Appeal held that it was not fair or in the interests of justice for Reilly to stand trial. We do not think it is correct when Professor Hamer says that the issue in *Reilly* was "very similar" to the issue raised in XX and we invite you to read *Reilly* more closely. The application did not turn on change of law provisions or their interpretation.

Ms Bashir's claim that I misrepresented *Reilly* is clearly false. I noted that the case *raised* the issue of whether propensity evidence rejected at trial, but now potentially freshly admissible, could be viewed as 'new and compelling evidence' under the English/Welsh double jeopardy exception. That is certainly very similar to the issue raised in the Bowraville case.

I *did not* suggest that the English Court resolved this issue one way or the other. I said in my submission (including the parenthetical comments)

> the Court did not express a final view on the issue. (The prosecution in *Reilly* relied primarily on DNA evidence which was clearly new and compelling, and ultimately the application was rejected as being contrary to the interests of justice as Reilly was very unwell, mentally and physically, close to death, and unfit to plead.)

Contrary to Ms Bashir's claims, I *did* note that greater reliance was placed on the DNA evidence. And I *did* note that the application was rejected in any case as not being in the interests of justice. I would invite Ms Bashir to read my submission more closely.