LAW·COMMISSION
TE·AKA·MATUA·O·TE·TURE

Preliminary Paper 42

ACQUITTAL FOLLOWING PERVERSION OF THE COURSE OF JUSTICE: A RESPONSE TO *R V MOORE*

A discussion paper

The Law Commission welcomes your comments on this paper and seeks your response to the questions raised.

These should be forwarded to
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by 30 November 2000

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Note

WE WISH TO THANK the Right Hon Justice Henry, the Hon Justice Wild, Professor Gerry Orchard, Associate Professor Richard Mahoney and Dr DL Mathieson QC for their comments on this paper. In particular Professors Orchard and Mahoney gave us much assistance with repeated drafts and a number of their comments have been incorporated in this paper. The form of the paper is of course the responsibility of the Commission alone.

The Commissioners in charge of preparing this discussion paper were Justice Baragwanath and Judge Lee. The research was undertaken by Andru Isac and Jason Clapham.

Submissions or comments on this paper should be sent by 30 November 2000 to the Law Commission, PO Box 2590, DX SP23534, Wellington, or by email to com@lawcom.govt.nz. We prefer to receive submissions by email if possible. Any initial inquiries or informal comments can be directed to Karen Belt: phone (04) 473–3453; fax (04) 471–0959. This paper is also available on the Internet at the Commission's website: http://www.lawcom.govt.nz.

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1
Introduction

1 THE COMMISSION WAS ASKED by the former Minister of Justice to consider and report on the case of Kevin Moore. In May 1992 Moore was tried with two fellow members of a New Plymouth gang for the murder of a member of a rival gang. A defence witness, a Mr M, gave alibi evidence in favour of Moore and his co-accused that may have led to their acquittal.[1] In August 1999 Moore was convicted of conspiracy to pervert the course of justice in relation to that evidence. The sentencing judge imposed the maximum term of imprisonment. In his remarks he stated:

> A conspiracy to [per]vert the course of justice to avoid your rightful conviction for murder and a life sentence of imprisonment must be as serious as any that could be committed. It must call for a deterrent sentence. Even the maximum sentence of seven years imprisonment for the conspiracy cannot act as an appropriate deterrent for your crime as in all respects it is substantially less than the sentence you would otherwise have received. That maximum sentence is an encouragement to offenders like you to commit the type of conspiracy you committed. The law does not permit you to be retried for the murder you committed as you were acquitted of it because of your conspiracy. You escape the sentence of life imprisonment that should be the minimum you receive. Instead you receive a much lesser sentence . . . The maximum sentence of seven years imprisonment is itself a very lenient sentence in your case when by your conspiracy you have literally got away with murder and avoided life imprisonment. To impose any lesser sentence would further benefit you in respect of the crime of conspiracy committed by you.[2]

2 Moore appealed his sentence. The Court of Appeal dismissed the appeal stating "[t]his offending falls squarely within the band or bracket comprising the worst class of cases under this section and therefore qualifies for the maximum term".[3]

3 A very possible result was that, by reason of a second crime, conspiracy to pervert the course of justice, for which he is eligible to apply for release on parole after two years and four months,[4] Moore escaped conviction for an earlier

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1 In *R v Moore* [1999] 3 NZLR 385 there are reported both a High Court ruling, at a second trial, rejecting an application for severance of proceedings against an alleged party to the same murder from Moore's charge of conspiracy to pervert the course of justice, and also the Court of Appeal's judgment allowing Moore's appeal from a subsequent conviction and granting him severance. His conspiracy conviction and second appeal – against sentence – followed.

2 *R v Moore* (17 September 1999) unreported, High Court, Palmerston North Registry, T31/99, 3–5, Doogue J.

3 *R v Moore* (23 November 1999) unreported, Court of Appeal, CA399/99.

4 One-third of seven years: Criminal Justice Act 1985, s 89(3).

crime of murder, which carries a minimum non-parole period of 10 years or more.[5]

4 Moore cannot be retried for the murder because of the rule of law, enshrined in section 26 of the New Zealand Bill of Rights Act 1990 and expanded in sections 357 to 359 of the Crimes Act 1961, which prohibits retrial following acquittal or conviction. In this preliminary paper this rule is called 'the rule against double jeopardy'. New Zealand criminal law, following the common law, provides for the alternative verdicts of guilty or not guilty. Whichever verdict is delivered, barring an appeal, there can never be a further prosecution for the same offence.

5 The broad purpose of the rule against double jeopardy is to prevent the unwarranted harassment of an accused by repeated prosecution for the same matter. It has been said that:

> The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.[6]

6 The Law Commission for England and Wales, in its 1999 consultation paper *Double Jeopardy*, observed:

> Black J, . . . saw repeated trials as increasing the likelihood of wrongful conviction. For Friedland, this point "is at the core of the problem", as "[i]n many cases an innocent person will not have the stamina or resources effectively to fight a second charge".[7] In England and Wales, lack of *financial* resources is not usually a serious problem for defendants in criminal cases because of the availability of legal aid. But the risk of wrongful conviction must be increased to some extent by any retrial. If it is accepted that juries do on occasion return perverse verdicts of guilty, the chance that a particular defendant will be perversely convicted must increase if he or she is tried more than once. Moreover, because there has already been one trial at which the defence has shown its hand, the prosecution may enjoy a tactical advantage at a second trial; and this will increase the likelihood of a conviction, whether the defendant is guilty or innocent.[8]

7 The broad effect of the rule against double jeopardy is to protect the administration of justice itself. By preventing harassment and inconsistent results it promotes confidence in court proceedings and the finality of verdicts. A clear corollary of the rule is that occasionally the guilty will escape punishment, but that is inevitable in any system of justice that must accommodate conflicting interests and finite resources. The question posed by Moore's case is whether a situation in which the rule against double jeopardy may itself be seen to bring the law into disrepute should remain unchanged.

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5 Criminal Justice Act 1985, ss 89(1), 80(1)(a), 89(2).

6 *Green v United States* (1957) 355 US 184, 187–188, per Black J.

7 Martin Friedland *Double Jeopardy* (1969) 4.

8 Law Commission for England and Wales *Double Jeopardy: Consultation Paper 156* (HMSO, London, 1999) 30 [*Double Jeopardy*].

8 There are a number of arguments that can be raised in support of narrowing the double jeopardy rule in specific respects, and there are limits to the extent to which acquittal can sensibly be equated with innocence for every purpose. A verdict of not guilty may be reached for reasons other than the innocence of the accused, including:

- the Crown has failed to satisfy its burden of proving guilt beyond reasonable doubt;
- witnesses have given false evidence;
- jurors have been suborned.

9 Because the function of the courts is to decide cases rather than to attempt coherent general reform of the law, the decided cases contain no broad appraisal of how the competing interests should be reconciled in a systematic fashion. The fundamental question for us is how New Zealand law should weigh the high public interest that the verdict should provide a definitive conclusion to a case following acquittal, against the competing public interest in bringing wrongdoers to justice.

10 The purpose of this preliminary paper is to identify the issues, to offer provisional views upon them, and to invite public comment on and criticism of both.

11 The issues may be broadly summarised as:

(1) How does New Zealand law deal with the case where an acquittal is alleged to have been secured following some perversion of the course of justice?

(2) Is that law satisfactory?

(3) If not:

- What options warrant consideration?
- What are their implications?

12 In addition to the rule against double jeopardy, there are related principles developed by the courts to protect a verdict of acquittal from subsequent attack. These were relevant in Moore's trial for conspiracy to pervert the course of justice, and are discussed in Chapter 4.

2
The special pleas of previous acquittal and previous conviction

13 THE SPECIAL PLEAS OF AUTREFOIS ACQUIT and autrefois convict prohibit retrial on the same or substantially the same charge following acquittal or conviction, unless the verdict is vacated on appeal. They are of ancient origin and in New Zealand they are codified in sections 357–359 of the Crimes Act 1961 as the special pleas of previous acquittal and previous conviction.[9] These defences are unlike other related principles in that so long as the verdict subsists they bar further proceedings even though there is previously unavailable evidence showing that the verdict was procured by fraud.

14 It is the availability of the defence of previous acquittal that means that Moore cannot be tried again for murder. In this chapter we discuss the various options to resolve the dilemma posed by Moore's case.

THE OPTIONS

15 We have considered the following options:

(a) maintain the status quo;

(b) increase the maximum sentence for perjury and related crimes;

(c) create a crime of aggravated perjury/conspiracy to pervert justice containing additional elements;

(d) abandon the double jeopardy rule altogether;

(e) create a principled exception to the double jeopardy rule.

Option 1: Maintain the status quo

16 Current law prevents Moore from being tried again for murder.

17 The main reason for maintaining the status quo is that it is the most certain way to ensure continued recognition of the rule against double jeopardy (and the principles behind it). Any exception would be an exception to what has up to now been an axiom of existing procedural protections.

18 A further factor in favour of the status quo is that there will be a limited number of cases where a person is able to secure an unmerited acquittal by his or her own perjury or that of another. In cases where such an acquittal does occur, the present maximum penalty of seven years for perjury or conspiring to pervert

[9] For the prohibition of double punishment for one offence, see the Crimes Act 1961, s 10(4).

the course of justice is adequate for the majority of crimes. It is only in relation to the most serious crimes (such as murder and sexual violation) that the penalty currently available to a sentencing Judge is inadequate.

19 Against that are factors that point towards the need for a change to the status quo. Public confidence in the administration of justice is likely to be undermined when offenders are permitted to benefit from their own abuse of the criminal justice system. The current law may be thought to be an inadequate deterrent for perjury or conspiracy to mislead the court and thereby pervert justice.

20 Yet whatever the penalty for perjury, there has always been an incentive to resort to it rather than face conviction and sentence for any crime. That is why under current law a perjury prosecution following an acquittal, where there is no new previously unavailable evidence, is regarded as an abuse of process, because it is a poorly shielded attempt to circumvent the double jeopardy rule.[10] There is nothing new about Moore's case; it is simply one where the fact and apparent result of the perjury are particularly pronounced.

21 The Law Commission seeks submissions on whether any change of the present law is necessary.

Option 2: Increase the maximum sentence for perjury and other crimes against justice

22 A logical question is whether an increase in penalties for perjury and other crimes affecting the administration of law and justice would provide a wider range of sentencing options for the trial judge. The temptation to pervert the course of justice may be diminished if penalties are increased adequately.

23 Increasing the maximum sentence to meet such cases could be seen as permitting sentencing on the basis that the charge avoided by acquittal was in fact proved. There is a dilemma. Either the sentence would be imposed on the basis that the original crime had been committed, thus disregarding the acquittal, or there would be fundamental uncertainty as to the principles that the court should apply.

24 Because crimes against the administration of justice are by definition non-violent offences, parole (under section 89 of the Criminal Justice Act 1985) will be considered after a prisoner serves *one-third* of the sentence imposed, instead of 10 years if the conviction avoided is of a serious violent offence. That conflicts with the notion that the offender should not obtain any benefit from deliberately misleading the court.

25 We seek submissions on:

(a) whether the penalties for perjury and other crimes against justice should be increased;

(b) whether there should be amendment to section 89 of the Criminal Justice Act 1985 so that a person convicted of a crime against justice will no longer be eligible for release on parole after the expiry of *one-third* of the sentence.

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[10] See the discussion in paras 101–102.

Option 3: Creating a crime of aggravated perjury/conspiracy to pervert the course of justice – that contains additional elements

26 A crime of aggravated perjury/conspiracy could be created requiring proof that either:

(i) the accused secured acquittal by perjury/conspiracy; or

(ii) the accused enhanced the prospect of acquittal by reason of the perjury/conspiracy.

27 The advantages of creating a new crime largely overlap with the benefits to be derived from increasing the maximum sentence for existing offences. Rather than creating uncertainty as to the principles for sentencing, the addition of elements to create an aggravated offence would reflect the added culpability of offenders who obtain, *or seek to obtain*, acquittal through their wrong-doing.

28 There are, however, significant arguments against both proposals in paragraph 26.

29 In relation to the former, an additional ingredient requiring proof of acquittal *by reason* of perjury would introduce an element of materiality that does not currently exist. A causation requirement would place an onerous evidential requirement, effectively requiring the jury to speculate as to how the original jury would have responded to the further evidence.

30 In relation to the latter (merely enhancing the prospect of acquittal), disadvantages include:

- It may add little to the existing crime of perjury/conspiracy.
- The proposal would require a decision-maker to embark upon an enquiry involving degrees of probability as a finding of fact. Such enquiries are notoriously difficult.

31 We seek submissions as to whether there is a need for the creation of new crimes of 'aggravated perjury' and/or 'aggravated conspiracy to pervert the course of justice'. If so, what should the elements of each offence be?

Option 4: Abandon the previous acquittal rule altogether

32 There is a logical question whether the previous acquittal rule should be abolished.

33 We think it inconceivable that in New Zealand simple repeal of the previous acquittal rule could be justified. It is enshrined as a basic right in section 26(2) of the New Zealand Bill of Rights Act 1990, which itself reflects New Zealand's international human rights obligations.[11]

34 Abolition of the previous acquittal rule would weaken fundamental protections for the individual against the oppressive exercise of State power.

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[11] For this reason we have not thought it appropriate to adopt the proposal of the Law Commission for England and Wales that, subject to certain conditions, the High Court should be able to quash an acquittal on the grounds of new evidence: *Double Jeopardy*, above n 8, 39. The Home Affairs Committee of the House of Commons conducted an inquiry into those proposals and expressed general support for them in its Third Report, Session 1999–2000, which may be found at: http://www.publications.parliament.uk/pa/cm 199900/cmselect/cmhaff/190/19002.htm.

Option 5: Create a principled exception to the previous acquittal rule

35 Our provisional preference is either to maintain the status quo (Option 1) or to create a principled *exception* to the previous acquittal rule.

36 A coherent argument can be advanced in favour of an exception. The principal purpose of the double jeopardy rule is to prevent prosecutorial harassment of defendants through repeated trials for the same offence. The underlying purpose of punishing crimes against the administration of justice is to preserve the authority of the courts and to ensure the effective administration of justice. By intentionally misleading the court, or otherwise perverting the course of justice and securing acquittal, an individual deliberately destroys a fundamental objective of the justice system: to conduct an untainted trial. Should such a person then obtain the protection of the double jeopardy rule and the interests it promotes? Some form of an exception to the rule may be less objectionable when viewed this way. An accused can reasonably expect to be subjected to the criminal prosecution system only once for an offence, *provided* he or she has not deliberately perverted the first process.

37 An advantage of this reform option is intellectual coherence. It squarely confronts the double jeopardy rule and seeks to balance the rights which that rule protects with the interests encompassed by the untainted administration of justice.

38 However, there are disadvantages. If that approach were taken, three trials of the relevant facts could be required (that is, the original trial at which the defendant was acquitted, the crime against justice trial, and the retrial of the substantive charge). Are three trials justified, bearing in mind the stress on witnesses, cost, and the rarity of this kind of case?

39 To consider this option requires appraisal:

- of the conduct that would give rise to it;
- of whether the Crown should have to prove that the acquittal resulted from that conduct.

40 Crimes that interfere with the purity of the criminal process are:

- perjury (section 108)
- attempting or conspiring to obstruct, prevent, pervert or defeat the cause of justice (section 117(d) and section 116)
- fabricating evidence (section 113)
- bribery of judicial officer (section 101)
- corruption and bribery of a law enforcement officer (section 104)
- corrupting juries and witnesses (section 117).

41 A threshold consideration is that at many trials conflicting evidence will be given. The purpose of the trial process includes securing a definitive result. Unless there is important new and previously unavailable evidence,[12] it would be oppressive if a mere assertion of perjury at the original trial were sufficient

[12] See the discussion in paras 83–87 and 101–105.

basis for a second trial – of whether perjury had occurred – let alone a retrial of the original charge.

42 The safeguard of section 112 of the Crimes Act 1961 goes some way to meet the point:

> No one shall be convicted of perjury, or of any offence against section 110 [false oaths] or section 111 [false statements or declarations] of this Act, on the evidence of one witness only, unless the evidence of that witness is corroborated in some material particular by evidence implicating the accused.

43 If Option 5 is adopted, a similar corroboration requirement could be extended to the other relevant crimes. We seek submissions on the point.

44 It would be impracticable to require the Crown to prove that the acquittal resulted from the relevant crime. To do so may be impossible without calling the jurors from the first trial. It is, in our view, enough that the relevant crime is proved. Its commission must almost inevitably have tended to contribute to the acquittal; it is impracticable to cater for any rare case in which it did not.

45 The United Kingdom Parliament has adopted a 'tainted acquittal' procedure. 'Tainted acquittal' is described in the *Double Jeopardy* consultation paper of the Law Commission for England and Wales as follows:

> The Criminal Procedure and Investigations Act 1996 provided for the first time a procedure by which a person could be retried for an offence of which he or she had already been acquitted, if the acquittal was "tainted".[13] This procedure is available where:
>
> (a) a person has been acquitted of an offence, and
>
> (b) a person has been convicted of an administration of justice offence[14] involving interference with or intimidation of a juror or a witness (or potential witness) in any proceedings which led to the acquittal.[15]
>
> If these conditions are met, and it appears to the court before which the person was convicted that there is a real possibility that, but for the interference or intimidation, the acquitted person would not have been acquitted, and that it would not be contrary to the interests of justice to take proceedings against the acquitted person for the offence of which he or she was acquitted and the court certifies that this is so, an application may be made to the High Court for an order quashing the acquittal.[16]
>
> The High Court may then make an order under section 54(3) of the Act quashing the acquittal, but only if:
>
> (1) it appears to the High Court likely that, but for the interference or intimidation, the acquitted person would not have been acquitted;
>
> (2) it does not appear to the court that, because of lapse of time or for any other reason, it would be contrary to the interests of justice to take proceedings against the acquitted person for the offence of which he or she was acquitted;

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13 Criminal Procedure and Investigations Act 1996 (UK), ss 54–57.

14 This means the offence of perverting the course of justice, under the Criminal Justice and Public Order Act 1994 (UK), s 51(1) (intimidation etc of witnesses, juries and others) or an offence of aiding, abetting, counselling, procuring, suborning or inciting another person to commit an offence under the Perjury Act 1911 (UK), s 1: Criminal Procedure and Investigations Act 1996 (UK), s 54(6).

15 Criminal Procedure and Investigations Act 1996 (UK), s 54(1).

16 Criminal Procedure and Investigations Act 1996 (UK), s 54(2), (3) and (5).

(3) it appears to the court that the acquitted person has been given a reasonable opportunity to make written representations to the court; and

(4) it appears to the court that the conviction for the administration of justice offence will stand.

Where the High Court quashes the acquittal under section 54(3), new proceedings may be taken against the acquitted person for the offence of which he or she was acquitted.[17]

46 The Law Commission for England and Wales has stated that, in its view, the tainted acquittal procedure is justifiable in principle. That Commission has proposed that the tainted acquittal procedure should be extended to apply to interference with, or intimidation of, a judge or magistrate. It has also recommended that the requirement of a conviction for an administration of justice offence should be done away with and that it should instead be a requirement that the High Court be satisfied (to the criminal standard of proof) that an administration of justice offence has been committed.[18] On that approach there would be two jury trials and one determination by judge alone.

47 Our tentative view is that, in order for the Crown to sustain a retrial, an accused should first be convicted of perjury, attempt or conspiracy to defeat the course of justice, or another of the crimes listed in paragraph 41 in relation to the trial at which he or she was previously acquitted and the Crown would then obtain leave from the court for the retrial. The essential difference between this proposal and that of the Law Commission for England and Wales is that it requires guilt of the administration of justice offence which justifies retrial of the original charge to be determined by a jury rather than by a High Court judge.

48 We seek submissions as to whether an exception to the previous acquittal rule should be created. If so, what form should it take? Should a jury or a High Court judge decide whether the acquitted person is guilty of the crime against justice?

49 Because the change will be substantive, substantially affecting the position of persons to whom it applies,[19] the new regime should apply only to misconduct at trials held after any reform comes into effect.

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[17] *Double Jeopardy*, above n 8, 10–11.

[18] The Law Commission for England and Wales questions the requirement that a person must have been convicted of an administration of justice offence. The Commission notes that the requirement means that an acquittal could not be reopened if the author of the interference were dead, overseas or had not been identified or apprehended. The Commission was of the view that the High Court should be satisfied that an offence had been committed. It was noted that the High Court is not a worse fact-finder than a jury and such a reform would make the procedure much easier without being unfair to the accused. The Commission stated that if it was thought necessary to retain the requirement for a conviction then, in their view, the requirement could be retained subject to certain exceptions where it is impossible to try the person alleged to have committed the administration of justice offence.

[19] New Zealand Bill of Rights Act 1990, s 26; *L'Office Cherifien des Phosphates v Yamashita-Shinnihon Steamship Co Ltd* [1994] 1 AC 486 (HL).

3
The Bill of Rights and the Covenant

50 SECTION 26 of the New Zealand Bill of Rights Act 1990 provides:

> **Retroactive penalties and double jeopardy**– . . . (2) No one who has been finally acquitted or convicted of, or pardoned for, an offence shall be tried or punished for it again.

51 The practical application of section 26 is elaborated by sections 357–359 of the Crimes Act 1961, which are reproduced in Appendix A.

52 By way of comparison, Article 20 of the Statute of the International Criminal Court is reproduced as Appendix B.

53 New Zealand has acceded to the International Covenant on Civil and Political Rights (ICCPR). Article 14(7) provides:

> 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.

54 In its recent consultation paper on double jeopardy the Law Commission for England and Wales said of Article 14(7):

> Article 14 applies both to the reopening of a conviction and to the reopening of an acquittal. Read literally, it therefore prohibits even the power of an appellate court to quash a criminal conviction and to order a retrial if new evidence or a procedural defect is discovered after the ordinary appeals process has been concluded. In its General Comment on Article 14(7),[20] however, the United Nations Human Rights Committee, the treaty body charged with implementing the ICCPR, expressed the view that the reopening of criminal proceedings "justified by exceptional circumstances" did not infringe the principle of double jeopardy. The Committee drew a distinction between the "resumption" of criminal proceedings, which it considered to be permitted by Article 14(7), and "retrial" which was expressly forbidden.[21]

[20] General Comment 13/21, para 19.

[21] *Double Jeopardy*, above n 8, 18.

55 In this context 'resumption' contemplates a revisiting of a fundamentally defective proceeding; 'retrial' the exposure of an accused to a retrial where there has been no fundamental defect.[22] Thus the retrial of a defective proceeding would not offend against Article 14(7) or section 26.

56 Section 5 of the New Zealand Bill of Rights Act 1990 provides a standard against which proposals for reform affecting section 26 may be measured:

> Subject to section 4 of this Bill of Rights, the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

We seek submissions on whether the principled exception to the previous acquittal rule contained in Option 5 is justifiable in terms of section 5.

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[22] The concept of fundamental defect is seen in Article 4 of Protocol 7 to the European Convention on Human Rights, to which a number of signatories to the ICCPR (although not New Zealand) are parties. The Convention provides by Article 4:

> (1) No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State.
>
> (2) The provisions of the preceding paragraph shall not prevent the reopening of the case in accordance with the law and penal procedure of the State concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case.

The Law Commission for England and Wales has noted that Article 4(1):

> ". . . embodies the principle of double jeopardy as it applies to the unilateral action of a prosecuting authority or private prosecutor. But Article 4(2) permits a case to be "reopened", in accordance with the provisions of domestic law, if there is "evidence of new or newly discovered facts", or if there has been "a fundamental defect in the previous proceedings": *Double Jeopardy*, above n 8, 19.

4
The effect of an acquittal on subsequent proceedings

57 IN ADDITION TO THE SPECIAL PLEA of previous acquittal, the law has formulated a number of related doctrines to protect a verdict of acquittal from subsequent attack. They are: issue estoppel, the rule in *Sambasivam*, the rule against collateral attack, and the court's duty to prevent unfairness to the defendant.[23] In Moore's case, these doctrines were relevant to the admissibility, in his subsequent trial for conspiracy to pervert the course of justice, of evidence adduced in the trial that ended with his acquittal for murder.

Issue estoppel

58 In modern times this doctrine has become well established in civil law. Briefly, the rule is that where in one proceeding a court decides a particular matter of law or fact which is an essential element of the cause of action or defence, that decision may not be contradicted when the same matter is an essential element in later proceedings between the same parties. Such an estoppel is 'mutual', meaning that it may be relied on by either party (plaintiff or defendant). But it will not apply if there is important fresh evidence on the matter, and it may not apply if there are other 'special circumstances'.[24]

59 Although issue estoppel has been applied to the criminal law in some jurisdictions (notably Australia and Canada), in England and New Zealand the courts have confined it to the civil law. There have been two main reasons for this. First, it has been accepted that it would be wrong for the Crown to be able to rely on it in a prosecution, so that the principle of mutuality would have to be abandoned. Second, because juries are not required or permitted to give reasons for their verdicts, it will often be impossible to identify with any degree of confidence precisely what issues were determined.[25] But in those jurisdictions where issue estoppel has not been applied in criminal cases, the *Sambasivam*, collateral attack and fairness rules operate as an extended principle of res judicata.

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[23] *R v Davis* [1982] 1 NZLR 584, 589, (CA) per Cooke J.

[24] *Arnold v NatWest Bank Plc* [1991] 2 AC 93 (HL).

[25] In *R v Davis*, above n 23, 589, Cooke J said "on the pragmatic ground that it introduces unwanted complications and is not really needed to do justice, we would favour following *Humphrys* in New Zealand and treating issue estoppel as having no place in our criminal law".

The rule in *Sambasivam*

60 This is a rule, generally attributed to *Sambasivam v Public Prosecutor, Federation of Malaya*,[26] to the effect that the Crown is precluded from advancing at a later trial propositions inconsistent with innocence on any count on which there has been a prior acquittal. There is high New Zealand authority, following *Sambasivam*, that the second trial must proceed on the premise that the accused was innocent of the charge on which he or she was previously acquitted.[27] The rule has been challenged by the Law Commission for England and Wales, criticised by the English Court of Appeal and recently overturned by the House of Lords.[28]

The rule against collateral attack

61 More recently the courts have developed a general principle of public policy that prevents a party in later proceedings from making a collateral attack on a subsisting decision of a Court of competent jurisdiction.

62 This principle was enunciated in the civil case of *Hunter v Chief Constable of West Midlands Police*.[29] Although its application has been seen as uncertain in England,[30] in New Zealand the principle has been applied in criminal cases to prevent collateral attacks on decisions in earlier criminal cases.[31]

63 When the decision under consideration is a verdict of acquittal the effect of the principle against collateral attack appears to be the same as the rule in *Sambasivam* (paragraph 60 above). On New Zealand authority, either or both of these principles may sometimes lead to the exclusion of evidence which is necessarily inconsistent with a previous acquittal.[32]

64 In *Hunter* it was recognised that the rule against collateral attack would not apply if there was relevant and important new evidence not available at the earlier trial such as entirely changes the aspect of the case.[33]

Fairness to the accused

65 In order to protect defendants from unfairness, the courts have recognised a general rule that all charges arising out of one incident should normally be dealt with in a single trial. It was said by Lord Devlin in *Connelly v DPP*, that:

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[26] *Sambasivam v Public Prosecutor, Federation of Malaya* [1950] AC 458 (PC) [*Sambasivam*].

[27] *R v Davis*, above n 23, 591.

[28] See paras 91–100 below.

[29] *Hunter v Chief Constable of West Midlands Police* [1982] AC 529 (HL).

[30] *Double Jeopardy*, above n 8, 71–72. However, in affirming that a court has power to strike out a proceeding that seeks to mount a collateral attack upon a final determination if the relitigation would be unfair to a party or bring the administration of justice into disrepute, the majority decision of the House of Lords in *Arthur JS Hall & Co v Simons*, 20 July 2000, has diminished that uncertainty and brought English criminal law closely in line with New Zealand authority.

[31] *R v Davis*, above n 23, 589; *Bryant v Collector of Customs* [1984] 1 NZLR 280 (CA); *Ferris v Police* [1985] 1 NZLR 314 (HC).

[32] *Bryant v Collector of Customs*, above n 31; *R v Roberts* (1992) 10 CRNZ 172, 176–177 (CA); *R v Wilson* [1997] 2 NZLR 161, 167 (CA).

[33] *Hunter v Chief Constable of West Midlands Police*, above n 29, 545. The test was laid down by Earl Cairns LC in *Phosphate Sewage Co Ltd v Molleson* (1894) 4 App Cas 801, 814 (HL). See paras 101–104 for further discussion of fresh evidence requirement.

> the judges of the High Court have in their inherent jurisdiction, both in civil and in criminal matters, power (subject of course to any statutory rules) to make and enforce rules of practice in order to ensure that the court's process is used fairly and conveniently by both sides. I consider it to be within this power for the court to declare that the prosecution must as a general rule join in the same indictment charges that "are founded on the same facts, or form or are a part of a series of offences of the same or a similar character" . . . and power to enforce such a direction (as indeed is already done in the civil process) by staying a second indictment if it is satisfied that its subject-matter ought to have been included in the first . . . [34]

66 In *R v Davis* it was stated that the Court has a "special discretion" in criminal cases to prevent unfairness to the accused.[35] This, rather than the narrower principle of *Sambasivam*, may sometimes be relevant when there have been multiple charges and proceedings. An example may be *R v Arbuckle*.[36] There the accused had been tried for various offences of dishonesty and had been acquitted of some and convicted of others. He was now to be tried for various other similar offences. The Court of Appeal upheld a ruling that the Crown was not to adduce evidence of the offences the subject of the first trial. The Court accepted that no rule of law required this result, but concluded that it was justified in the interest of fairness, in particular because to allow the evidence would substantially thwart the purpose of a previous order for severance, against which the Crown had not appealed.

APPLICATION OF THE RULE IN *SAMBASIVAM*

67 For the purpose of our discussion, the cases can be grouped into three broad categories:

1 Where a defendant was tried for two offences arising out of the same incident, and was acquitted of one offence but is retried on the other.

2 Where evidence relating to charges on which the defendant was acquitted is adduced as similar fact evidence in a later trial of a different charge.

3 Where a defendant is charged with an offence against the administration of justice alleged to have been committed in connection with a trial that ended in an acquittal.

The cases themselves do not distinguish among these categories. We have used them as a device to bring a sharper focus to our analysis.

Two offences arising out of the same incident, acquittal on one, retrial on the other

68 *Sambasivam* was a case in this category. The accused had been prosecuted for two capital offences:

1 carrying a firearm; and

2 possession of 10 rounds of ammunition, six of which were in the firearm.

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[34] *Connelly v DPP* [1964] AC 1254, 1347 (HL). The 'general rule' enunciated by Lord Devlin has become known as the rule in *Connelly*.

[35] *R v Davis*, above n 23, 589.

[36] *R v Arbuckle* (2 March 2000) unreported, Court of Appeal, CA 526/99.

He was acquitted of (2) but there was a disagreement as to (1), and a retrial of that charge was ordered. On retrial of Sambasivam, the prosecution put in evidence a statement that the accused denied making and that had not been produced in the first trial, in which the accused allegedly confessed to both charges. The accused was convicted of the firearm offence. The Privy Council quashed this conviction because it held that the acquittal meant the accused must be taken to be innocent of the ammunition charge, and the assessors had not been told this, although it was something clearly tending to undermine the weight of the alleged confession. Had the assessors known that only a part of the statement could be relied on, they might have rejected it altogether. And had they done that, they might not have accepted the testimony of the prosecution witnesses in preference to that of Sambasivan.

69 The result of *Sambasivam* was probably correct, because the appellant was facing the death penalty, and the statement was taken in circumstances that the Privy Council said "were such as to provoke comment and even suspicion"[37] and which would in all probability have seen it thrown out in a present-day New Zealand court.[38] The appellant was in hospital a few hours after having been gravely wounded and left lying on the road by people who thought he was about to die.

70 *Sambasivam* may be an example of hard cases making bad law, because the Privy Council's reasoning would have been valid only if the defendant had been acquitted despite the confession. But the court that acquitted Sambasivam of the ammunition charge was not aware of the confession, and there was nothing to suggest what the verdict would have been had the confession been produced. While a confession may cast doubt on an acquittal entered in ignorance of the confession, it does not seem logically feasible for an acquittal to cast doubt on a confession of which the acquitting court was unaware. Yet this was the basis for Lord MacDermott's resounding pronouncement that has bound the courts for over half a century:

> The effect of a verdict of acquittal pronounced by a competent court on a lawful charge and after a lawful trial is not completely stated by saying that the person acquitted cannot be tried again for the same offence. To that it must be added that the verdict is binding and conclusive in all subsequent proceedings between the parties to the adjudication. The maxim "Res judicata pro veritate accipitur" is no less applicable to criminal than to civil proceedings. Here, the appellant having been acquitted at the first trial on the charge of having ammunition in his possession, the prosecution was bound to accept the correctness of that verdict and was precluded from taking any step to challenge it at the second trial. And the appellant was no less entitled to rely on his acquittal in so far as it might be relevant in his defence.[39]

71 Application of the rule in *Sambasivam* has led to the courts making distinctions without a difference. In *R v Roberts* the appellant was charged with rape and threatening to kill arising from the same episode.[40] He was acquitted of the charge of threatening to kill the complainant; the jury disagreed on the count of rape. The Court of Appeal allowed on the retrial of the rape count evidence of the use of a knife said to have been used to secure submission, but held that

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37 *Sambasivam*, above n 26, 478.

38 Counsel's argument had been directed only to weight and not to admissibility.

39 *Sambasivam*, above n 26, 479.

40 *R v Roberts*, above n 32.

the accused must not be put in jeopardy of any finding that he made a threat to kill the complainant intended to be taken seriously.

72 No doubt such result was compelled by *Davis*. But in the absence of such authority it might be thought that the threat to kill was as much a part of the means used to overcome resistance to the rape as the use of the knife to which it referred.

73 In both *Sambasivam* and *Roberts*, the Crown had, as required by *Connelly*, included in the one indictment charges arising from the same event. The retrial came about because of jury disagreement, and not because the Crown was seeking to relitigate an acquittal. Because it was not a case of having to protect the defendant against double jeopardy, the only reason for excluding the disputed evidence was if issue estoppel applied in criminal cases, and both English and New Zealand authorities are quite categorical that it does not.

Use of acquitted events as similar fact evidence in a later trial

74 Here again, the rule in *Sambasivam* has led to results that some would regard as undesirable. In *R v Davis*:

> The accused had been tried jointly with two other men on a charge of importing cannabis on 8 January 1982. At that trial he was found not guilty. Subsequently he was charged with importing cannabis into New Zealand on or about 19 December 1981. The method used for the importations on both 19 December and 8 January had an unusual and distinctive hallmark. The accused appealed against a pre-trial ruling that certain evidence relating to the importation on 8 January was admissible at his pending trial.[41]

75 The Court of Appeal held, following *Sambasivam*, that the jury would have to be told that they must accept that Davis was entirely innocent of importing the cannabis in January 1982. If the evidence relating to the January importation was admitted:

> The jury would have to be invited to approach the matter on the theory that cannabis was brought in by the same method on both occasions but that Davis was not a party on the second occasion.
>
> It would be expecting too much of any reasonable jury to instruct them to see the evidence in blinkers in that way. And if they did manage to do so, it would not add much to the Crown's case that Davis was involved in the first importation. But what is much more likely is that the prejudicial effect of the challenged evidence would overwhelm its probative value.[42]

Although of the view that "the challenged evidence was of real and legitimate probative value on the charge of the December importation"[43] the Court excluded it "as a matter of fairness and respect for the conclusiveness of the prior acquittal".[44]

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41 *R v Davis*, above n 23, headnote.

42 *R v Davis*, above n 23, 592.

43 *R v Davis*, above n 23, 588.

44 *R v Davis*, above n 23, 592.

76 The accused was not at risk of double jeopardy, since the Crown was not seeking to overturn the acquittal. Neither was the Crown seeking a second opportunity to secure a conviction by separating the trial of charges arising out of the same incident, contrary to *Connolly*. Admission of the January evidence to prove the December importation was only unfair because the accused had to be taken to be innocent of the January importation. Aside from *Sambasivam*, the only reason the defendant must be taken to be innocent of the January importation is the doctrine of issue estoppel, which the Court in *Davis* said did not apply in criminal proceedings in New Zealand.

77 The courts have used dubious reasoning to get round the rule in *Sambasivam*. In *R v Wilson*,[45] the appellant had been acquitted of a charge of rape in 1978 after it had been alleged that he had drugged and raped a woman D. E had given evidence against the appellant at the rape trial. The appellant was later charged with stupefying a number of other women and E was allowed to give the same evidence at the subsequent trial. The appellant appealed against the admission of E's evidence. In upholding the trial judge, the Court of Appeal said:

> Here, the matter had to be approached on the basis that the appellant did not rape D; but that did not preclude a finding, if the jury accepted the evidence, that [the appellant] administered drugs to the woman intending to facilitate intercourse with her. In 1978 the appellant had not been charged with stupefying.[46]

78 The Court said the acquittal need not be seen as consistent only with rejection of the evidence of stupefying. But E's evidence at the rape trial was that the appellant had told her that if D did not agree to have intercourse with him he would put something in D's drink, and that later when the appellant "apparently was having sex with D, she was 'out cold' and did not wake up at any stage".[47] The Court acknowledged that E's evidence "was well capable of supporting the inference that the appellant had administered a drug to D to facilitate his being able to have intercourse with her".[48] It is hard to see what other relevance E's evidence had in the case, and how acquittal on the charge of rape did not necessarily imply rejection of her evidence.

79 *R v Ollis* demonstrates how a court untrammelled by *Sambasivam* was able to deal with the issue.[49] In that case, the defendant gave Ramsey a cheque on 5 July 1899 in exchange for cash. The cheque was dishonoured and the defendant was charged with obtaining by false pretences. The defendant was acquitted. The next day he was charged on another indictment alleging three other acts of obtaining money by false pretences by issuing three cheques to Rawlings and Morris on 24 June, 26 June and 6 July respectively. At the second trial, the prosecution was allowed to call Ramsey to repeat the evidence he had given at the first trial, with the point as to its admissibility reserved. The defendant was convicted on the second indictment. On appeal, the majority held that Ramsey's evidence was admissible to show the defendant's guilty knowledge of the state of his bank account when he issued the cheques to Rawlings and Morris. The

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45 *R v Wilson*, above n 32.

46 *R v Wilson*, above n 32, 167.

47 *R v Wilson*, above n 32, 165.

48 *R v Wilson*, above n 32, 165.

49 *R v Ollis* [1900] 2 QB 758.

majority and the minority differed on the question of relevance of the disputed evidence. Lord Russell of Killowen CJ of the majority said:

> *The evidence was not less admissible because it tended to shew that the accused was, in fact, guilty of the former charge*. The point is, was it relevant in support of the three subsequent charges? In the opinion of the majority of the Court, and in my own opinion, it was relevant as shewing a course of conduct on the part of the accused, and a belief on his part that the cheques would not be met. The accused gave cheques on June 24 and 26 which were dishonoured, and, finally, a further dishonoured cheque on July 6, all three cheques having been drawn on the same bank as the first dishonoured cheque was drawn upon. It is impossible to say that all these facts were not relevant as shewing an intention to defraud. The fact of the dishonour of the first cheque might, and perhaps ought to, have been capable of explanation, but it is impossible to say that it was not relevant.[50] [emphasis added]

80 The disputed evidence was held to be relevant because the majority took a global view of the passing of the four dishonoured cheques, unconstrained by any presumption that the defendant was innocent of the July 5 charge.

81 This treatment can be compared with that of the minority. Bruce J, with whom the other dissenting judge agreed, held the evidence was irrelevant. He distinguished the case before him from those where evidence of similar acts had been admitted to negative mistake or accident, such as successive acts of passing counterfeit coins or administering the same kind of poison, and any mistake:

> is as to the inherent character of the thing administered, which does not vary, and is the same at the time of the commission of each successive act. But the act of pretending that a genuine cheque is a valid one is in substance a pretence that circumstances exist at the time of the passing of the cheque which justify a belief that the cheque will be met. Such circumstances may exist on one day and not on another . . . [51]

82 Bruce J thought it obvious that the passing of the dishonoured cheque on July 5 had no bearing upon the question of the knowledge of the prisoner of the state of his banking account on June 24 or 26. He also thought:

> such evidence was not admissible on the charge of July 6 . . . *because there is no evidence to shew that the dishonour of the cheque of July 5 was brought to the knowledge of the prisoner before or at the time he issued the cheque of July* 6.[52] [emphasis added]

Unless of course the possibility was open – as the majority held it was – that the accused might be guilty of the charge of which he had been acquitted. It was implicit in the minority's approach and in what Bruce J said that the defendant must be taken to be innocent of the charge relating to the July 5 incident.

An offence against justice committed to procure an acquittal

83 In the third category of cases, in a trial for perjury (or some other offence against justice), *Sambasivam* would have prevented the Crown from calling evidence that may cast doubt on the integrity of the very acquittal that it alleges the perjury was committed to procure. The jury would be denied the opportunity

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[50] *R v Ollis*, above n 49, 764.

[51] *R v Ollis*, above n 49, 776.

[52] *R v Ollis*, above n 49, 778.

to consider what the Crown alleges to be the motive for the perjury. Yet, as long as the purpose of calling the evidence is not to overturn the acquittal, the principle against double jeopardy does not require exclusion.

84 The courts have recognised this, and have allowed an exception to *Sambasivam* in perjury cases where there is important new evidence. In *DPP v Humphrys* the defendant was stopped by a police officer for speeding and charged with riding a motorcycle whilst disqualified.[53] The defendant testified that it was a case of mistaken identity, as he had not ridden his motorcycle during the period of his disqualification, and was acquitted. Subsequent inquiries revealed that he had been riding his motorcycle during the period of disqualification, and he was tried for perjury. The police officer repeated his evidence, which was inconsistent with the previous acquittal, and Humphrys was convicted. Humphrys appealed on the ground that the acquittal had finally settled in his favour the issue of whether he was the rider stopped by the police officer. The House of Lords dismissed his appeal.

85 Lord Hailsham said:

> In an indictment for perjury like the present I would think that it is the duty of the court to apply the double jeopardy rule against the Crown not as a matter of discretion but as a matter of law where it is satisfied in substance that all the prosecution is doing is trying to get behind the original verdict by re-trying the same evidence. But where the prosecution by calling additional evidence which it could not have had available using reasonable diligence at the time of the first trial is in substance as well as in form putting the accused in jeopardy not for the original alleged misdemeanour of which he has been acquitted (or convicted) but for his crime against justice committed by perjuring himself at the first trial, there is no double jeopardy and the prosecution is entitled to adduce the evidence and make the assertions necessary to achieve its purpose whether or not the effect is to give rise to the inference that the previous verdict of acquittal was insupportable, or the previous conviction and punishment right.[54]

86 Lord Hailsham summarised the principles as follows:

> (6) In general, the doctrine in criminal law[55] precludes the Crown from adducing evidence or making suggestions which are inconsistent with a previous verdict of acquittal when its real effect is determined. The doctrine is one of substance rather than form. The court will inquire into realities and not mere technicalities.
>
> (7) Where a second charge is brought which is different both in substance and in form from an earlier charge, the mere fact that some of the evidence adduced in support of the second charge is inconsistent with innocence on the earlier charge does not preclude the Crown from adducing that evidence in asserting its truth when considering a verdict on the second charge.
>
> (8) Where the second charge consists in an allegation that the accused in the first charge has committed perjury in his evidence given on his own behalf in his defence on the former charge, the mere fact that some of the evidence brought in support of the charge of perjury is identical with evidence given in the first charge and inconsistent with innocence on that charge does not preclude the Crown from adducing that evidence or asserting its truth where it is accompanied by other evidence in support of the charge of perjury but

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53 *DPP v Humphrys* [1977] AC 1 (HL).

54 *DPP v Humphrys*, above n 53, 40–41.

55 Which Lord Hailsham said was in some ways analogous to issue estoppel.

(9) Where the evidence is substantially identical with the evidence given at the first trial without any addition and the Crown is in substance simply seeking to get behind a verdict of acquittal, the second charge is inadmissible both on the ground that it infringes the rule against double jeopardy and on the ground that it is an abuse of the process of the court whether or not the charge is in form a charge of perjury at the first trial.[56]

87 The principles enunciated in *Humphrys* were adopted by the High Court and upheld by the Court of Appeal in *Moore*. The Court of Appeal said:

> We agree with the Judge that the acquittal on the murder charge did not present a bar to the bringing of the conspiracy charge. The evidence being called was not very largely identical to the evidence put before the jury in 1992. There was substantial additional material, in particular the evidence of Mr M about how the defence evidence about the fingerprints came to be given. That evidence was obviously not available to the Crown in 1992. And, if there be a further requirement that the additional evidence must be shown not to have been available if reasonable diligence had been used by the Crown, that requirement was met. . . .
>
> The Crown was entitled to allege that the verdict of acquittal, whether it was right or wrong, was procured by an agreement to give false evidence. It was also entitled to place before the jury trying the conspiracy charge evidence about the homicide which was needed so that the jury understood what the 1992 trial was all about and, in particular, the significance of the fingerprint evidence called at that trial for the Crown. There was ample additional evidence relating to the conspiracy. If this is all the Crown had done there could have been no question of double jeopardy.[57]

But the Court of Appeal also said:

> Because of the existence of the not guilty verdict the Crown was bound to put its case on the basis that Mr Moore remained entitled to the benefit of that verdict but that, accepting that it could not be contradicted, there had nevertheless been a conspiracy to achieve that verdict by an improper means. It is to be remembered that a conspiracy to pervert the course of justice can mean either a conspiracy to secure a wrong or unjust result, or a conspiracy to secure what the conspirators think ought to be a right result, by unlawful means (*R v Senat* (1968) 52 Cr App R 282 at p 288). In neither case is it necessary to show that the attempt was successful in its objective.[58]

88 One must ask how realistic it is to require that Moore, at his trial for conspiracy to pervert the course of justice, had to be taken to be innocent of murder because of his prior acquittal. When a murder is the setting for a conspiracy to commit perjury it may be thought artificial to insist that the accused must be treated as innocent of the murder, and it constrains the Crown from alleging what it believes to be the true and complete motive for perjury.

89 In *Humphrys*, Viscount Dilhorne's ultimate conclusion was that when evidence is called for the purpose of proving perjury rather than guilt of the previously charged offence its admission is not barred even though acceptance of it "*will* lead to the inference that he was guilty of the offence of which he was acquitted at the first trial".[59] Then in proposition (8), Lord Hailsham said that where the Crown had other evidence to support the perjury charge it was not precluded

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[56] *DPP v Humphrys*, above n 53, 41.

[57] *R v Moore*, above n 1, 397.

[58] *R v Moore*, above n 1, 398.

[59] *DPP v Humphrys*, above n 53, 26.

from also adducing the same evidence as before, "*or asserting its truth*", merely because it was inconsistent with innocence on the earlier charge.[60]

90 Neither of these conclusions is consistent with the Crown's having to accept that the defendant must be taken to be innocent of the previous charge because of the acquittal. Moreover, they are conclusions arrived at in a case where it had not been strictly necessary for the Crown to rely on the previously rejected evidence, for the Crown had "fresh evidence" suggesting the falsity of the defendant's evidence when he went beyond denying the particular offence charged. When for practical purposes it *is* necessary for the Crown to prove guilt of the original offence in order to prove guilt of perjury in denying it, we think it is even clearer that it would be wrong to insist that the perjury charge must be determined on an artificial (and, indeed, incoherent) assumption of innocence of the original offence.

A RATIONALISATION OF THE COMMON LAW

91 On 22 June 2000, in *R v Z*,[61] the House of Lords finally distanced itself from *Sambasivam*.

92 The English Court of Appeal had rejected a Crown interlocutory appeal against a decision at the preparatory hearing of a rape case to exclude similar fact evidence.[62] There had been four previous occasions on which the accused was alleged to have committed rape, each involving a separate complainant, in circumstances that satisfied the test as to close similarity. The defendant had been tried separately in relation to each episode. On one occasion he had been convicted; on three he had been acquitted. The Crown sought to invite the jury to infer that, despite the previous acquittals, the accused had in fact been guilty on each occasion.[63]

93 The Court of Appeal accepted the Crown's submissions:

- that the acquittals established no more than that the jury were not sure of guilt;
- that similar fact evidence may have an evidential force not possessed by the facts of any one case alone.

94 It observed:

> There can, therefore, be no incongruity in allowing a jury in a later case to look back at earlier incidents, even if they have when viewed individually led to acquittals. The jury's verdict will be confined to the later case. If the jury can observe a previously unidentified pattern, which assists it to a result different from that to which it might otherwise have come, the ends of justice will simply have been served in respect of the later case. In our view this submission is in legal logic unanswerable. The only argument in an opposite sense is that, for reasons of policy and public expectation, the prior acquittals should be given an additional significance and value outweighing the public interest in a correct verdict on all the available evidence in the later case.

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60 *DPP v Humphrys*, above n 53, 41.

61 *R v Z* [2000] 3 WLR 117 (HL) [*R v Z (HL)*].

62 *R v Z* [2000] Crim LR 293 (CA) (Transcript: Smith Bernal) [*R v Z (CA) Smith Bernal Transcript*]

63 Standing by itself the evidence in the case on which he had been convicted was not enough to satisfy the test for admission of similar fact evidence.

That the acceptance of this argument could lead to incongruity appears from examples given in the judgments in *Ollis* and in academic writing cited in the recent Law Commission Consultation Paper No. 156 on Double Jeopardy, paras 8.20 and 8.21. Writing in [1997] Crim LR 93, Prof McEwan said:

> ". . . if in *Smith* [(1916) 11 CAR 229] the defendant had been accused of the murder of his second wife, who was found dead in her bath, he might well have been acquitted for want of convincing evidence. But when his third wife was discovered dead in her bath, bringing the total of 'Brides in the Bath' to three, it would be absurd if the prosecution could not adduce evidence of both former incidents, in order to prove the murder of the third wife, notwithstanding a previous acquittal in relation to one of them."

Michael Hirst writing in [1991] Crim LR 510 gave what the Law Commission described as an even more telling example:

> Imagine that D has been charged with a murder, and acquitted in controversial circumstances; imagine then that some months later a similar offence is committed, and that it is clear for various reasons that whoever committed the first offence also committed the second. Moreover, D seems to be the only person who could have been involved in both incidents. The *Sambasivam* rule would preclude us of that crucial similar fact evidence . . .

The risk of inappropriate or improperly prejudicial attempts by the Crown to revisit the subject-matter of past acquittals as similar fact evidence appears to us adequately covered by the courts' power to stay abusive proceedings and/or to exclude evidence as more prejudicial than probative at common law . . .[64]

95 Nevertheless the Court of Appeal felt reluctantly constrained to follow precedent and to disallow the Crown's appeal, even though it considered:

> The narrow and difficult distinction for which *Sambasivam*, as explained in *DPP v Humphrys*, appears to stand – between a subsequent challenge to a prior verdict of acquittal and evidence merely tending to show the commission of a prior offence – does not appear a wholly satisfactory basis for dealing with and balancing the complex considerations capable of arising. Our review of individual cases confirms us in this belief.
>
> Whether that be right or not, however, we consider that the principle in *Sambasivam* is both unnecessary and undesirable, in so far as it excludes absolutely evidence the relevance of which is to establish the defendant's guilt on the present charge by showing the commission of a series of such offences, including offence(s) in respect of which he has been previously acquitted, while allowing the admission of evidence which merely bears on one element of the current offence, such as knowledge. In our view, the problems of similar fact evidence in this area can and would be better addressed by use, where appropriate, of the court's powers to stay proceedings as an abuse. . . . Those powers are exercisable in the light of all the relevant circumstances. The interests of justice in particular cases would benefit by this more flexible approach.[65]

96 The House of Lords had no similar compunction. Lord Hutton who delivered the leading judgment, with which the other Law Lords agreed, said:

> My Lords, I consider, with great respect, that the distinction drawn between the prosecution adducing evidence on a second trial to seek to prove that the defendant was, in fact, guilty of an offence of which he had been earlier acquitted and the prosecution adducing evidence on a second trial to seek to prove that the defendant is guilty of the second offence charged in that trial even though the evidence may tend to show that he was, in fact, guilty of an earlier offence of which he had been acquitted

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[64] *R v Z (CA) Smith Bernal Transcript*, above n 62, 3–4.

[65] *R v Z (CA) Smith Bernal Transcript*, above n 62, 13.

is a difficult one to maintain. The reality is that when the Crown adduces evidence in a criminal trial for a second offence it does so to prove the guilt of the defendant in respect of that offence. In order to prove the guilt in respect of the second offence it may wish to call evidence which, in fact, shows or tends to show that the defendant was guilty of an earlier offence, but the evidence is adduced not for the purpose of showing that the defendant was guilty of the first offence but for the purpose of proving that the defendant is guilty of the second offence. Moreover I think that a distinction cannot realistically be drawn between evidence relating to a specific issue (such as intention or knowledge) and evidence which shows that, in fact, the defendant was guilty of the offence of which he had been acquitted because in some trials the proof of a single disputed issue will establish the guilt of the defendant. I also think that it is difficult to draw a distinction between evidence that shows that the defendant was, in fact, guilty of an earlier offence of which he has been acquitted and evidence which tends to show that he was, in fact, guilty of that offence.[66]

97 After reviewing the authorities, textbook writers and commentators, he concluded:

(1) The principle of double jeopardy operates to cause a criminal court in the exercise of its discretion, and subject to the qualification as to special circumstances stated by Lord Devlin in *Connelly's* case at p. 1360, to stop a prosecution where the defendant is being prosecuted on the same facts or substantially the same facts as gave rise to an earlier prosecution which resulted in his acquittal (or conviction) . . .

(2) Provided that a defendant is not placed in double jeopardy as described in (1) above evidence which is relevant on a subsequent prosecution is not inadmissible because it shows or tends to show that the defendant was, in fact, guilty of an offence of which he had earlier been acquitted.[67]

98 In its consultation paper the Law Commission for England and Wales states that in its view the rule in *Sambasivam* is largely redundant and proposes:

(1) subject to the rule against double jeopardy and the rules on the admissibility of evidence of a defendant's previous misconduct, the rule in *Sambasivam* (which prevents the prosecution from making an assertion which is inconsistent with a previous acquittal of the defendant) should be abolished; and

(2) if, contrary to our proposal, the rule is retained, it should not apply to an assertion supported by new evidence which could not with due diligence have been adduced at the first trial.[68]

99 We agree with that approach, subject to our discussion below about fresh evidence. The arguments for abolishing the rule in *Sambasivam* appear irresistible (see the commentators quoted in paragraph 94). Further, the logic of absolutely forbidding the Crown in subsequent proceedings to make any propositions inconsistent with innocence on any count on which there has been an acquittal, but refusing to accord a co-defendant's acquittal any relevance whatsoever under any circumstances,[69] is not easily apparent.

100 Although the House of Lords was concerned with similar fact evidence, the logic of Lord Hutton's statements cited in paragraphs 96–97 applies equally to the other two categories of cases set out in paragraph 67. We consider that *Davis* should be reviewed and *R v Z* followed.

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[66] *R v Z* (HL), above n 61, 130.

[67] *R v Z* (HL), above n 61, 135. But see *R v ARP* [2000] 2 LCR 119 (Supreme Court of Canada) to the contrary.

[68] *Double Jeopardy*, above n 8, 82.

[69] See *Hui Chi-ming v R* [1992] 1 AC 34 (PC).

Should fresh evidence be required?

101 Lord Hailsham's reference to fresh evidence was made specifically in relation to perjury:

> In an indictment for perjury like the present I would think that it is the duty of the court to apply the double jeopardy rule against the Crown not as a matter of discretion but as a matter of law where it is satisfied in substance that all the prosecution is doing is trying to get behind the original verdict by re-trying the same evidence. But where the prosecution by calling additional evidence which it could not have had available using reasonable diligence at the time of the first trial is in substance as well as in form putting the accused in jeopardy not for the original alleged misdemeanour of which he has been acquitted (or convicted) but for his crime against justice committed by perjuring himself at the first trial, there is no double jeopardy and the prosecution is entitled to adduce the evidence and make the assertions necessary to achieve its purpose whether or not the effect is to give rise to the inference that the previous verdict of acquittal was insupportable, or the previous conviction and punishment right.[70]

102 For the reasons stated by Lord Hailsham, the requirement for fresh evidence makes perfect sense in a case of perjury allegedly committed in a previous proceeding.

103 But where a defendant was originally tried on two charges arising out of the same incident, was acquitted on one charge and is to be retried on the other charge only because the jury could not agree or because the trial on that charge was aborted, one would not normally expect fresh evidence to come to light between the two trials. There is also no reason to require fresh evidence because the retrial does not arise from any attempt by the Crown to have a second chance at proving the defendant was guilty of the charge of which he or she had been acquitted. That is why *Sambasivam* says nothing about requiring fresh evidence.

104 Equally, in similar fact cases the Crown is not seeking to overturn the previous acquittal. Here, it is the similar fact evidence itself that provides added weight to the evidence directly relevant to the charge the defendant is facing. To require fresh evidence would be both illogical and unnecessary. Alternatively, the new charge could itself be regarded as 'fresh evidence': just as the similar fact evidence strengthens the evidence directly supporting the new charge, so this later evidence will strengthen the similar fact evidence allowing the similar fact evidence to be adduced.

105 We consider the rule in *Sambasivam* should be replaced by the following:

1 No person may be prosecuted for the same offence or on the same facts or substantially the same facts as gave rise to an earlier prosecution that resulted in his or her acquittal or conviction.

2 Provided that a defendant is not placed in double jeopardy, as described in (1) above, evidence that is relevant on a subsequent prosecution is not inadmissible because it shows or tends to show that the defendant was, in fact, guilty of an offence of which he or she had earlier been acquitted.

3 Such evidence is admissible without fresh evidence, except on a charge of [perjury] [a crime against justice] committed in relation to a trial that ended in an acquittal.

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[70] *R v Humphrys*, above n 53, 40.

5
Questions

THE LAW COMMISSION SEEKS SUBMISSIONS on the following questions:

- Is any reform of the current law as applied in *Moore's* case necessary? (paragraphs 16–21). If so, how? In particular:
- Should the penalties for perjury and other related crimes be increased? (paragraphs 22–26)
- Should the minimum non-parole period in relation to perjury and related crimes be reviewed? (paragraphs 24–26)
- Is there a need for the creation of new crimes of 'aggravated perjury' and/or 'aggravated conspiracy to pervert the course of justice'? If so what should the elements of each offence be? (paragraphs 27–32)
- Should the previous acquittal rule be abandoned altogether? (paragraphs 33–35)
- Should an exception to the previous acquittal rule be created? If so what form should it take? (paragraphs 36–51)
- Should New Zealand adopt provisions similar to the 'tainted acquittal' provisions in the United Kingdom? If so, should New Zealand amend the provisions in line with the recommendations of the Law Commission for England and Wales of permitting a judge alone to direct retrial on the original charge without a jury conviction of an administration of justice offence? Or should a jury conviction be required as a condition of leave to retry? (paragraphs 46–49)
- If the law should be changed should the reform be purely prospective or should it be retrospective? (paragraph 50)
- Should the safeguard in section 112 of the Crimes Act 1961 apply to all the crimes against justice listed in paragraph 41?
- Is the principled exception to the previous acquittal rule proposed in Option 5 (paragraphs 36–50) justifiable in terms of section 5 of the New Zealand Bill of Rights Act 1990?
- Should the common law be developed as suggested in paragraphs 101–102 and 107? If so, should it be by legislative reform? Or should it be left to the Court of Appeal when an appropriate case comes before it?

APPENDIX A

Crimes Act 1961: Sections 357–359

357 Special pleas–

(1) The following special pleas, and no others, may be pleaded according to the provisions hereinafter contained – that is to say, a plea of previous acquittal, a plea of previous conviction, and a plea of pardon.

(2) All other grounds of defence may be relied on under the plea of not guilty.

(3) The pleas of previous acquittal, or previous conviction, and pardon may be pleaded together, and if pleaded shall be disposed of by the Judge, without a jury, before the accused is called on to plead further; and, if every such plea is disposed of against the accused, he shall be allowed to plead not guilty.

(4) In any plea of previous acquittal or previous conviction it shall be sufficient for the accused to state that he has been lawfully acquitted or convicted, as the case may be, of the offence charged in the count or counts to which that plea is pleaded.

358 Pleas of previous acquittal and conviction–

(1) On the trial of an issue on a plea of previous acquittal or conviction to any count, if it appears that the matter on which the accused was formerly charged is the same in whole or in part as that on which it is proposed to give him in charge, and that he might on the former trial, if all proper amendments had been made that might then have been made, have been convicted of all the offences of which he may be convicted on any count to which that plea is pleaded, the Court shall give judgment that he be discharged from that count.

(2) If it appears that the accused might on the former trial have been convicted of any offence of which he might be convicted on the count to which that plea is pleaded, but that he may be convicted on that count of some offence of which he could not have been convicted on the former trial, the Court shall direct that he shall not be convicted on that count of any offence of which he might have been convicted on the former trial, but that he shall plead over as to any other offence charged.

359 Second accusation–

(1) Where an indictment charges substantially the same offence as that with which the accused was formerly charged, but adds a statement of intention or circumstances of aggravation tending if proved to increase the

punishment, the previous acquittal or conviction shall be a bar to the indictment.

(2) A previous conviction or acquittal on an indictment for murder or manslaughter or infanticide shall be a bar to a second indictment for the same homicide charging it as any one of those crimes.

(3) If on the trial of an issue on a plea of previous acquittal or conviction to an indictment for murder or manslaughter or infanticide it appears that the former trial was for an offence against the person alleged to have been now killed, and that the death of that person is now alleged to have been caused by the offence previously charged, but that the death happened after the trial on which the accused was acquitted or convicted, as the case may be, then, if it appears that on the former trial the accused might if convicted have been sentenced to imprisonment for 3 years or upwards, the Court shall direct that the accused be discharged from the indictment before it. If it does not so appear the Court shall direct that he plead over.

APPENDIX B

Statute of the International Criminal Court: Article 20

Ne bis in idem

1. Except as provided in this Statute, no person shall be tried before the Court with respect to conduct which formed the basis of crimes for which the person has been convicted or acquitted by the Court.

2. No person shall be tried by another court for a crime referred to in article 5 for which that person has already been convicted or acquitted by the Court.

3. No person who has been tried by another court for conduct also proscribed under article 6, 7 and 8 shall be tried by the Court with respect to the same conduct unless the proceedings in the other court:

   (a) Were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court; or

   (b) Otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.

APPENDIX C

Crimes Act 1961: Sections relating to crimes against the administration of justice

101 Bribery of judicial officer, etc–

(1) Every one is liable to imprisonment for a term not exceeding 7 years who corruptly gives or offers or agrees to give any bribe to any person with intent to influence any judicial officer in respect of any act or omission by him in his judicial capacity.

(2) Every one is liable to imprisonment for a term not exceeding 5 years who corruptly gives or offers or agrees to give any bribe to any person with intent to influence any judicial officer or any Registrar or Deputy Registrar of any Court in respect of any act or omission by him in his official capacity, not being an act or omission to which subsection (1) of this section applies.

104 Corruption and bribery of law enforcement officer–

(1) Every law enforcement officer is liable to imprisonment for a term not exceeding 7 years who corruptly accepts or obtains, or agrees or offers to accept or attempts to obtain, any bribe for himself or any other person in respect of any act done or omitted, or to be done or omitted, by him in his official capacity.

(2) Every one is liable to imprisonment for a term not exceeding 3 years who corruptly gives or offers or agrees to give any bribe to any person with intent to influence any law enforcement officer in respect of any act or omission by him in his official capacity.

108 Perjury defined–

(1) Perjury is an assertion as to a matter of fact, opinion, belief, or knowledge made by a witness in a judicial proceeding as part of his evidence on oath, whether the evidence is given in open Court or by affidavit or otherwise, that assertion being known to the witness to be false and being intended by him to mislead the tribunal holding the proceeding.

(2) In this section the term "oath" includes an affirmation, and also includes a declaration made under section 13 of the Oaths and Declarations Act 1957.

(3) Every person is a witness within the meaning of this section who actually gives evidence, whether he is competent to be a witness or not, and whether his evidence is admissible or not.

(4) Every proceeding is judicial within the meaning of this section if it is held before any of the following tribunals, namely:

(a) Any Court of justice:

(b) The House of Representatives or any Committee of that House:

(c) Any arbitrator or umpire, or any person or body of persons authorised by law to make an inquiry and take evidence therein upon oath:

(d) Any legal tribunal by which any legal right or liability can be established:

(e) Any person acting as a Court or tribunal having power to hold a judicial proceeding:

[(f) Any court-martial held under the Armed Forces Discipline Act 1971.]

(5) Every such proceeding is judicial within the meaning of this section whether the tribunal was duly constituted or appointed or not, and whether the proceeding was duly instituted or not, and whether the proceeding was invalid or not.

109 Punishment of perjury–

(1) Except as provided in subsection (2) of this section, every one is liable to imprisonment for a term not exceeding 7 years who commits perjury.

(2) If perjury is committed in order to procure the conviction of a person for any offence for which the maximum punishment is not less than 3 years imprisonment, the punishment may be imprisonment for a term not exceeding 14 years.

112 Evidence of perjury, false oath, or false statement–

No one shall be convicted of perjury, or of any offence against section 110 or section 111 of this Act, on the evidence of one witness only, unless the evidence of that witness is corroborated in some material particular by evidence implicating the accused.

113 Fabricating evidence–

Every one is liable to imprisonment for a term not exceeding 7 years who, with intent to mislead any tribunal holding any judicial proceeding to which section 108 applies, fabricates evidence by any means other than perjury.

116 Conspiring to defeat justice–

Every one is liable to imprisonment for a term not exceeding 7 years who conspires to obstruct, prevent, pervert, or defeat the course of justice.

117 Corrupting juries and witnesses–

Every one is liable to imprisonment for a term not exceeding 7 years who –

(a) Dissuades or attempts to dissuade any person, by threats, bribes, or other corrupt means, from giving evidence in any cause or matter, civil or criminal; or

(b) Influences or attempts to influence, by threats or bribes or other corrupt means, any juryman in his conduct as such, whether the juryman has been sworn as a juryman or not; or

(c) Accepts any bribe or other corrupt consideration to abstain from giving evidence, or on account of his conduct as a juryman; or

(d) Wilfully attempts in any other way to obstruct, prevent, pervert, or defeat the course of justice.

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